

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term 2005

5 (Argued: April 20, 2006 Decided: September 13, 2006)

6 Docket Nos. 05-4026-cr(L); 05-4238-cr(XAP)

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8
9 UNITED STATES OF AMERICA,

10
11 Appellant-Cross-Appellee,

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13 -- v. --

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15 DUSTIN L. McCARGO,

16
17 Defendant-Appellee-Cross-Appellant.

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21 B e f o r e : WALKER, Chief Judge, JACOBS and WALLACE,* Circuit
22 Judges.

23 Appeal and cross-appeal of the judgment of the United States
24 District Court for the Western District of New York, excluding
25 evidence found during a pat-down of the defendant pursuant to a police
26 policy that required pat-downs of all persons placed in patrol cars.

27 REVERSED AND REMANDED.

28 JAMES P. KENNEDY, JR., Assistant
29 United States Attorney (Kathleen M.
30 Mehlretter, Acting United States
31 Attorney for the Western District
32 of New York, on the brief),
33 Buffalo, New York, for Appellant-

* The Honorable J. Clifford Wallace, United States Court of Appeals for the Ninth Circuit, sitting by designation.

1 Cross-Appellee.

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31 Districts of New York, the District
32 of Connecticut, and the District of
33 Vermont as amici curiae in support
34 of Appellant-Cross-Appellee.

35
36 Darrell B. Fields, Federal
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47 the Second Circuit as amici curiae

3 JOHN M. WALKER, JR., Chief Judge:

4 Defendant-appellee-cross-appellant Dustin L. McCargo ("defendant"
5 or "McCargo") was stopped by the Buffalo Police on July 28, 2003,
6 blocks from a reported attempted burglary. The officers decided to
7 take McCargo back to the scene of the alleged crime to see if the
8 victim could identify him. Because the officers planned to transport
9 him in the back of their patrol car, they frisked him for weapons in
10 accordance with a departmental policy. During the frisk, the officers
11 discovered a handgun. McCargo was arrested and later charged in
12 federal court with possession of a firearm by a convicted felon. See
13 18 U.S.C. §§ 922(g)(1), 924(a)(2).

14 McCargo moved to suppress the gun. He argued that the frisk of
15 his person, without a reasonable suspicion that he was armed, violated
16 his Fourth Amendment rights. The district court agreed and suppressed
17 the gun. It held that the initial stop and detention of McCargo was
18 constitutional but that the officers were not permitted to frisk him
19 unless they had a reasonable suspicion that he was armed. The
20 government appealed, and McCargo, claiming error in the district
21 court's holding that the initial stop was constitutional, cross-
22 appealed.

23 **BACKGROUND**

24 At 12:53 a.m. on July 28, 2003, the 911 operator for the Buffalo
25 Police Department was told by a caller from 501 Berkshire Avenue that

1 someone was attempting to break into his residence. The only
2 additional details the caller provided were that more than one person
3 was trying to enter the house and that some of the perpetrators had
4 gone around to the back of the house. Based on this 911 call, a
5 Buffalo Police dispatcher transmitted a radio message to patrol cars
6 in the area of 501 Berkshire Avenue.

7 Buffalo Police officers Sterlace and White were in a patrol car
8 less than two blocks from 501 Berkshire when they received the radio
9 transmission. They then proceeded eastbound on Berkshire. As they
10 came to the intersection of Berkshire and Suffolk Street, the officers
11 saw McCargo crossing Berkshire and continuing to walk north on the
12 east side of Suffolk. The residence at 501 Berkshire is located on
13 the south side of Berkshire, approximately 200 feet to the east of the
14 intersection. The officers testified that as McCargo was walking
15 north he was staring intently to his right at another patrol car that
16 had already arrived at 501 Berkshire, so intently in fact that he did
17 not notice Sterlace and White's car as the officers approached him.

18 The officers turned left onto Suffolk, drew along side the
19 defendant, and told him to stop and approach the car. Sterlace
20 testified that he wanted to detain McCargo to take him back to 501
21 Berkshire for possible identification by the victim. Both officers
22 then left their car, and Sterlace patted down the defendant. White
23 testified that it was departmental policy to pat down all persons
24 before placing them in the back of a police car to protect the

1 officers' safety.

2 While patting down McCargo, Sterlace felt a gun in McCargo's
3 waistband. McCargo jumped away from Sterlace, and the gun became
4 lodged in McCargo's sweatshirt and eventually fell to the ground.
5 McCargo was placed under arrest and taken to police headquarters. A
6 total of two minutes and thirty-eight seconds elapsed between the time
7 the officers advised dispatch that they were proceeding to the scene
8 and the time of the arrest. Because the officers responded to the
9 dispatch call at most three minutes after the initial 911 call, less
10 than six minutes elapsed between the time the 911 call was placed and
11 the time of McCargo's arrest.

12 A federal grand jury indicted McCargo for the possession of a
13 firearm by a convicted felon. See 18 U.S.C. §§ 922(g) (1), 924(a) (2).
14 After McCargo moved to suppress the gun as the product of an
15 unconstitutional search, the motion was referred to a magistrate judge
16 (H. Kenneth Schroeder, Jr., Magistrate Judge), who found that the
17 police had reasonable suspicion to stop McCargo, based on his location
18 near the scene of the crime in a high-crime area very soon after the
19 911 call. The magistrate judge determined, however, that the pat-down
20 was unconstitutional because the officers had no suspicion that
21 McCargo was armed and recommended that the gun be suppressed. The
22 district court (John T. Elfvin, Judge) adopted the magistrate judge's
23 recommendations. The government appealed pursuant to 18 U.S.C. §
24 3731, and McCargo filed a cross-appeal.

1 (2d Cir. 2005); see United States v. Moran Vargas, 376 F.3d 112, 114
2 (2d Cir. 2004). For the weapon to be admissible against McCargo, each
3 question must be answered in the affirmative.

4 **II. The Initial Terry Stop**

5 The district court held that the officers had reasonable
6 suspicion to stop and briefly detain McCargo, short of patting him
7 down, because of his close physical and temporal proximity to the
8 crime scene in a high-crime area. See Brown v. Texas, 443 U.S. 47, 51
9 (1979) (police may detain a suspect for further investigation upon
10 reasonable suspicion of criminal wrongdoing). McCargo argues that the
11 officers point to no aspect of McCargo's behavior that itself
12 indicated criminal wrongdoing: he did not act nervous or evasive; he
13 did not match a description of the perpetrator (in fact none existed);
14 and, because he was crossing Berkshire with 501 Berkshire to his
15 right, he was not walking away from the crime scene when the officers
16 approached him.

17 We agree with the district court. Terry requires that a police
18 officer have only "reasonable suspicion," United States v. Scopo, 19
19 F.3d 777, 781 (2d Cir. 1994), that "criminal activity may be afoot" to
20 justify an investigatory stop, Terry, 392 U.S. at 30. Reasonable
21 suspicion requires considerably less of a showing than probable cause.

1 See United States v. Arvizu, 534 U.S. 266, 273 (2002). Here, based on
2 the totality of the circumstances, the officers had a reasonable
3 suspicion that McCargo had been involved in a crime. Responding to a
4 911 call at close to 1:00 a.m., the officers spotted McCargo walking
5 alone in a high-crime area where no other pedestrians were about. Cf.
6 Illinois v. Wardwell, 528 U.S. 119, 124 (2000) (a high-crime area is a
7 relevant factor in evaluating whether police have reasonable
8 suspicion). McCargo was 200 feet west of the crime scene, just a few
9 minutes after the reported burglary attempt, and he was staring so
10 intently at the police cruiser at the scene of the crime that he did
11 not notice the officers' cruiser as it approached him.

12 Finally, the officers knew, based on the computer system in their
13 car, that one of the suspects had gone to the rear of 501 Berkshire
14 during the burglary attempt. If such a suspect had been heading
15 north, going away from the scene of the crime, one route would have
16 been north along Suffolk Street, the direction McCargo was walking.
17 Thus, we believe McCargo's location supports the officers' claim of
18 reasonable suspicion and does not detract from it, as McCargo argues.

19 Considering these facts in the aggregate and not in isolation,
20 see United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]he
21 assessment must be based upon all the circumstances . . . and
22 weighed not in terms of library analysis by scholars, but as

1 understood by those versed in the field of law enforcement.”), we
2 conclude that Sterlace and White had a reasonable suspicion that
3 McCargo was involved in criminal activity and, therefore, the initial
4 Terry stop was constitutional.

5 **III. Transportation to the Scene of the Crime**

6 Because the officers patted down McCargo only because they
7 intended to transport him to the crime scene, the lawfulness of
8 transporting a suspect to the crime scene as part of a Terry stop is
9 placed in issue. Such a transportation is also subject to the
10 reasonableness requirement of the Fourth Amendment, which governs not
11 just the fact of the Terry stop but its scope. “The reasonableness of
12 a seizure under the Fourth Amendment is determined ‘by balancing its
13 intrusion on the individual’s Fourth Amendment interests against its
14 promotion of legitimate government interests.’” Hiibel v. Sixth
15 Judicial Dist. Ct., 542 U.S. 177, 187-88 (2004) (quoting Delaware v.
16 Prouse, 440 U.S. 648, 654 (1979)); see also United States v. Knights,
17 534 U.S. 112, 118 (2001) (“The touchstone of the Fourth Amendment is
18 reasonableness”). The scope of a Terry stop must therefore be
19 reasonable, but the methods police used need not be the least
20 intrusive available. “The question is not simply whether some other
21 alternative was available, but whether the police acted unreasonably
22 in failing to recognize or to pursue it.” United States v. Sharpe,

1 470 U.S. 675, 686-87 (1985); see United States v. Martinez-Fuerte, 428
2 U.S. 543, 557 n.12 (1976) (rejecting least-restrictive-means
3 analysis).

4 We have little trouble concluding that, in some circumstances,
5 police may transport a suspect short distances in aid of a Terry stop.
6 The Supreme Court has upheld such transportations, see United States
7 v. Place, 462 U.S. 696, 706 (1983); Pennsylvania v. Mimms, 434 U.S.
8 106, 109-119 (1977) (per curiam), and we have held that "it is well
9 established that officers may ask (or force) a suspect to move as part
10 of a lawful Terry stop," United States v. Gori, 230 F.3d 44, 56 (2d
11 Cir. 2000); see also United States v. Tehrani, 49 F.3d 54, 61 (2d Cir.
12 1995) (suspect taken to office to verify immigration status).

13 Because we have already held that the police may require a person
14 temporarily detained under Terry to move to another place, the
15 question is whether this transportation was reasonable. On the
16 government's side of the scale is the strong interest in crime
17 prevention and detection. Cf. Place, 462 U.S. at 704. It was
18 reasonable for the officers to believe that the victim might be able
19 to identify the perpetrator. Taking McCargo to the crime scene could
20 have immediately confirmed or dispelled whether he was a suspect. The
21 fact that the victim had not seen any of the perpetrators was unknown
22 to the officers. Having located a suspect and having good reason to

1 think that he might have something to do with the crime, we think it
2 reasonable for the police to decide to extend the Terry stop briefly
3 to transport McCargo to the crime scene to see whether he could be
4 identified by the victim. The inconvenience of doing so to McCargo,
5 for the short time it would have taken, would present only a limited
6 Fourth Amendment intrusion on McCargo's rights. See Michigan v.
7 Summers, 452 U.S. 692, 700 (1981) ("[A Terry stop,] justified by
8 special law enforcement interests[,] is not confined to the momentary,
9 on-the-street detention").

10 It is true that alternative means of confirming or dispelling the
11 suspicion surrounding McCargo might have existed. Assuming there was
12 a witness who could identify the perpetrators, the police might have
13 walked McCargo to the crime scene or even brought the witness to
14 McCargo. However, we do not think the officers' plan to take McCargo
15 to the crime scene in their patrol car was unreasonable. The officers
16 could not know whether the victim was free to move either because of a
17 physical incapacity or the exigencies of the continuing investigation.
18 Moving the victim to McCargo likely would have taken more time and
19 required the use of more scarce officer resources, because one or two
20 officers would have had to remain with McCargo while others
21 transported the victim. Alternatively, walking McCargo to the crime
22 scene might have meant leaving the car unattended in a high-crime

1 area. In short, taking McCargo to the crime scene by car was
2 reasonable under the circumstances, both by way of resolving the
3 suspicion surrounding McCargo and impinging as little as possible on
4 his Fourth Amendment rights.

5 Our view that transportation to or from the crime scene under
6 circumstances like these would have been reasonable is consistent with
7 the views of three of our sister courts of appeals and several state
8 supreme courts in holding that the police may transport a suspect for
9 identification purposes as part of a Terry stop. See United States v.
10 McCarthy, 77 F.3d 522, 531 (1st Cir. 1996) (officers detained suspect
11 in a police car and brought a witness to the suspect in an attempt to
12 identify him); United States v. Dickson, 58 F.3d 1258, 1263-64 (8th
13 Cir. 1995) (same); United States v. Short, 570 F.2d 1051, 1054 (D.C.
14 Cir. 1978) (suspect transported to bank for show-up before witnesses);
15 People v. Hicks, 500 N.E.2d 861, 866 (N.Y. 1986); People v. Bloyd, 331
16 N.W.2d 447, 453-54 (Mich. 1982); People v. Harris, 540 P.2d 632, 636
17 (Cal. 1975).

18 Therefore, where the police have a reasonable suspicion that a
19 person was involved in a crime, they do not violate the Fourth
20 Amendment rights of a suspect if they stop the suspect and transport
21 him a short distance to the scene of the crime in furtherance of a
22 legitimate law-enforcement purpose. We also believe that the police
23 may reasonably choose to transport the suspect in a police car where,

1 as here, that decision would shorten the length of the Fourth
2 Amendment intrusion.

3 **IV. The Frisk**

4 The officers patted down McCargo preparatory to placing him in
5 the police car to transport him to the crime scene and, in so doing,
6 found the handgun that formed the basis for the charges against him
7 and that McCargo wants suppressed. Terry itself specifically
8 authorized a pat-down where, following a stop, the officers believed
9 that the person detained was armed, Terry, 392 U.S. at 27. The pat-
10 down here, however, was pursuant to a policy of the Buffalo Police
11 Department that required pat-downs before transporting any person in a
12 police car to ensure officer safety. Thus, the question we must
13 answer is whether a suspect may be frisked in certain circumstances as
14 part of a Terry stop without officers' relying on a reasonable
15 suspicion that he is armed.¹ The answer requires an examination of
16 Terry and its progeny as well as those cases in which the Fourth
17 Amendment permits suspicionless searches or seizures. The fundamental
18 command of the Fourth Amendment is that governmental intrusions on
19 persons be reasonable, and, as Terry explained, the "limitations [on

¹ In an amicus brief filed by the other United States Attorneys in this circuit, the government argues that the officers had a reasonable suspicion that McCargo was armed. Because we resolve this case on other grounds, we decline to address this argument.

1 protective searches and seizures] will have to be developed in the
2 concrete factual circumstances of individual cases.” Id. at 29.

3 The touchstone of our analysis is still Terry. While in Terry
4 the suspect patted down was suspected of being armed and thus Terry
5 does not control this case on its facts, the reasoning of Terry leads
6 us to the conclusion that the pat-down of McCargo did not violate his
7 Fourth Amendment rights. In Terry, the Court held that police may
8 frisk a person if they have a reasonable belief that the person is
9 armed and dangerous. Id. Paramount in the Court’s reasoning was that
10 the Fourth Amendment should not require the police to investigate
11 crime with their safety unduly at risk. “Certainly it would be
12 unreasonable to require that police officers take unnecessary risks in
13 the performance of their duties. . . . We cannot blind ourselves to
14 the need for law enforcement officers to protect themselves and other
15 prospective victims of violence in situations where they may lack
16 probable cause for an arrest.” Id. at 23-24. Weighing this important
17 interest in police and public safety against the “brief, though far
18 from inconsiderable,” intrusion on an individual’s privacy, id. at 26,
19 the Court concluded that a frisk for weapons was permissible.

20 A interest in officer safety has been the justification for
21 Terry stops from their inception. Our examination of Terry’s progeny
22 reaffirms this conclusion. See, e.g., Michigan v. Long, 463 U.S.

1 1032, 1049 (1983) (“[P]rotection of the police and others can justify
2 protective searches when police have a reasonable belief that the
3 suspect poses a danger”); Ybarra v. Illinois, 444 U.S. 85, 93
4 (1979) (“[A] law enforcement officer, for his own protection and
5 safety, may conduct a patdown to find weapons”); Mimms, 434
6 U.S. at 110 (“We think it too plain for argument that the State’s
7 proffered justification – the safety of the officer – is both
8 legitimate and weighty.”). The lesson we take from these cases is
9 that the strictures of the Fourth Amendment must not be so burdensome
10 as to impose unreasonable and avoidable risks on police officers
11 during their investigations.

12 In the typical Terry stop, we have no doubt that the powers the
13 police possess over the suspect, including the power to order the
14 suspect to move to a more convenient or safer location, see Place, 462
15 U.S. at 706; Mimms, 434 U.S. at 110-11, adequately protect the
16 important state interest in the safety of police officers and others.
17 There are important differences, however, between the typical Terry
18 stop where the suspect is detained on the street and this case where
19 the suspect is to be transported in the back of a patrol car. In the
20 typical case on the street, the officers have the ability to terminate
21 the stop or arrest the suspect at any moment and to control the
22 location of the stop to minimize the danger the suspect poses to the

1 police and others.

2 The transportation of the suspect in the back of a police car as
3 part of the Terry stop is markedly different. The officers are less
4 able to protect themselves from the possibility of violence. The
5 officers cannot depart or remove themselves temporarily from the
6 situation and call in additional officers as backup. The suspect and
7 the officers are in close proximity to each other for the duration of
8 the transportation; the suspect sits behind them, a few feet away in
9 the rear of the car, frequently separated by only a wire grate. And
10 the suspect is not subject to the officers' immediate physical control
11 or restraint: if the suspect turns out to be armed, the police are at
12 his mercy.

13 In sum, we think the dangers posed to police officers in
14 situations where a suspect, who may be armed, is placed in the rear of
15 a police car are substantially different and greater than those posed
16 in the typical Terry stop. The increased threat to police safety
17 informs the balance to be struck between the safety interests of the
18 police and the privacy interests of individuals. See Camara v. Mun.
19 Ct., 387 U.S. 523, 534-35 (1967); see also Terry, 392 U.S. at 9 ("Of
20 course, the specific content and incidents of [Fourth Amendment
21 rights] must be shaped by the context in which [they are] asserted.
22 For 'what the Constitution forbids is not all searches and seizures,

1 but unreasonable searches and seizures.'" (quoting Elkins v. United
2 States, 364 U.S. 206, 222 (1960)).

3 Permitting a limited frisk for weapons before placing a suspect
4 in a police car, pursuant to an established policy, reflects an
5 appropriate balancing of the interests at stake. Because the suspect
6 is placed in the rear of the car – a location where, were he armed, he
7 would expose the officers to peril – we think the most reasonable, and
8 least intrusive, solution is to permit a pat-down for weapons. The
9 possibility of danger to the officers can be eliminated simply by
10 ensuring that the suspect does not have a weapon that can be used
11 against them.

12 The justification for the pat-down is not that the suspect is
13 reasonably suspected of being armed; it is rather a matter of sound
14 police administration: police officers should be certain before
15 transporting members of the public, whom they do not know, that none
16 of them is armed. The administrative nature of the search is
17 evidenced by the existence of the Buffalo Police's department-wide
18 policy that requires the pat-down whenever a person is transported in
19 a police car. The fact that the policy is administrative and
20 universally applied to all who are transported eliminates any
21 selective-use concern. See Brown, 443 U.S. at 51.

22 Courts have long upheld suspicionless searches conducted under an

1 official policy as not violative of the Fourth Amendment. Although
2 the reasonableness balance differs following an arrest, permitting
3 greater intrusion, post-arrest administrative searches are justified,
4 not by probable cause or suspicion, but by the same safety rationale
5 applicable in this case. See Colorado v. Bertine, 479 U.S. 367, 373-
6 74 & n.6 (1987).

7 Arrested persons have also been known to injure themselves -
8 or others - with belts, knives, drugs or other dangerous
9 items on their person while being detained. Dangerous
10 instrumentalities - such as razor blades, bombs, or weapons
11 - can be concealed in innocent-looking articles taken from
12 the arrestee's possession. The bare recital of these
13 mundane realities justifies reasonable measures by police to
14 limit these risks

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16 Illinois v. Lafayette, 462 U.S. 640, 646 (1983). Similarly, non-
17 discretionary inventory searches of vehicles are constitutional,
18 without any quantum of suspicion, in order to protect the police from
19 the potential danger posed by items left behind. South Dakota v.
20 Opperman, 428 U.S. 364, 369, 374-75 (1976).

21 Suspicionless searches are permissible in other instances, as
22 well, where special governmental interests outweigh the individual's
23 liberty interest. See, e.g., Mich. Dep't of State Police v. Sitz, 496
24 U.S. 444 (1990) (drunk-driving checkpoint); United States v. Martinez-
25 Fuerte, 428 U.S. 543 (1976) (immigration checkpoint); United States v.
26 Biswell, 406 U.S. 311 (1972) (closely regulated businesses); Camara,

1 387 U.S. 523 (administrative searches); Nicholas v. Goord, 430 F.3d
2 652 (2d Cir. 2005) (DNA extraction from inmates).

3 Our holding in this case is a narrow one. We are not holding
4 that the police are entitled to pat down a person, absent reasonable
5 suspicion that he is armed, simply because they have stopped that
6 person pursuant to a lawful Terry stop. However, in cases where the
7 police may lawfully transport a suspect to the scene of the crime in
8 the rear of a police car, the police may carry out a departmental
9 policy, imposed for reasons of officer safety, by patting down that
10 person. Because the police must have a legitimate law-enforcement
11 reason to transport a suspect, we see little danger that policies such
12 as these might be used as a pretext for a suspicionless frisk.

13 Applying these rules to this case is now straightforward. We
14 have already said that McCargo was lawfully stopped and that the
15 police were entitled to transport McCargo to the scene of the crime.
16 The officers testified, and the district court found, that the
17 officers frisked McCargo pursuant to a generally applicable police
18 policy that required all persons placed in patrol cars to be frisked.
19 There are no allegations, much less proof, of bad faith or pretext on
20 the part of the police. Therefore, the frisk of McCargo was
21 constitutional, and the judgment of the district court should be
22 reversed.

CONCLUSION

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For the reasons set forth above, the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.