

05-4034-cr

To Be Argued By:
THOMAS V. DAILY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4034-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

NEVILLE THOMAS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED

Whether the district court correctly determined that the investigatory stop of defendant and pat-down for weapons was supported by reasonable suspicion.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4034-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

NEVILLE THOMAS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This criminal appeal concerns the Fourth Amendment's requirements of reasonable suspicion to support an investigatory pat-down for weapons. These requirements came into play on June 13, 2004, when police officers in Hartford, Connecticut responded to a noise complaint at 2:45 a.m. in one of the top three "hot spots" for drug dealing and violent crime in the North End of the city. Police discovered loud music coming from a blue van with tinted windows, its motor running, and parked on the wrong side of the street. A computer check

established that the van was rented – a common practice of area drug dealers. In the van were two men, including the defendant Thomas in the front passenger seat, both of whom reacted nervously and suspiciously. The defendant was rubbing his legs, moving his hands nervously, looking about as if for escape and otherwise “acting strangely.” The driver claimed they were waiting for his girlfriend, but they were parked over 250 feet away from her house, on the opposite side of the street, despite the absence of other cars on the street. The officers removed the defendant from the van and conducted a pat-down for weapons. The officers located a .380 caliber semi-automatic pistol in the defendant’s waistband, and then placed him under arrest. These events gave rise to the defendant’s present conviction for being a felon in possession of a firearm.

On appeal, the defendant contends that the police did not possess “articulable facts” specifically relating to the defendant that would under the “totality of the circumstances” permit them to reasonably fear that he was “armed and presently dangerous.” This Court should reject this claim, as did the district court (Mark R. Kravitz, J.). The officers had reasonable suspicion sufficient to justify an investigatory stop and frisk of the defendant. The officers had reasonable suspicion on the basis of their observations of the defendant, in a rental van with tinted windows, in one of the highest crime areas in Hartford, notorious for drug trafficking and violence, making furtive and suspicious movements, where his companion gave an suspicious explanation for their presence. Accordingly, the Court should affirm the district court’s denial of his motion to suppress the seized gun.

STATEMENT OF THE CASE

On September 14, 2004, a federal grand jury in Connecticut returned an indictment charging the defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). *See* Joint Appendix of Defendant-Appellant Neville Thomas at A-2 (docket entry), A-6 (indictment). On November 30, 2004, the defendant filed a motion to suppress evidence.

On January 10, 2005, United States District Judge Mark R. Kravitz held a hearing on the defendant's motion to suppress, at which the government offered testimony from the two arresting officers. A-8 (transcript of hearing). The defendant filed a post-hearing memorandum on January 28, 2005. A-4 (docket entry). The Government filed its post-hearing memorandum on February 10, 2005. A-4. On March 7, 2005, the district court issued a written memorandum of decision denying the defendant's motion to suppress. A-98 (district court ruling). The ruling was published at 363 F. Supp.2d 84 (D. Conn. 2005).

On April 13, 2005, the defendant entered a conditional plea of guilty to the indictment. A-4 (docket entry).

On July 18, 2005, the district court sentenced the defendant principally to a term of 77 months of imprisonment, to be followed by a three-year term of supervised release. A-5 (docket entry), A-114 (judgment).

The judgment was filed on July 21, 2005 and entered on July 22, 2005. A-5 (docket entry), A-114 (judgment).

On July 20, 2005, the defendant filed a timely notice of appeal. A-5 (docket entry), A-117 (notice of appeal). The defendant is serving his sentence.

STATEMENT OF FACTS

Part A below describes the evidence presented at the hearing on the defendant's motion to suppress. Part B summarizes the district court's ruling denying the defendant's motion.

A. The Suppression Hearing

At the suppression hearing on January 10, 2005, the government called two Hartford police officers as witnesses: Dominic Agostino and John Zweibelson. The defendant did not present any evidence.

On June 13, 2004, at approximately 2:45 a.m., very early on a Sunday morning, the Hartford Police Department received a citizen complaint reporting loud music coming from a blue van parked on Edgewood Street in the North End of Hartford. A-12-13. Officer Dominic Agostino, who was working the shift from midnight to 8:00 a.m., was sent by the Hartford dispatcher to respond to the complaint. Officer Agostino was familiar with Edgewood Street and knew it be a high drug trafficking area, as well as an area known for violent crimes such as robberies, stabbings and shootings. A-14-15. He explained that "usually around that time, anywhere between midnight and 4:00 o'clock in the morning in that area, crack sales are very high and when crack sales are very high, there's a lot of street robberies. When there's

a lot of street robberies, a lot of people use firearms involved in the street robberies.” A-50. His understanding of the high crime nature of the area was based upon his own experience as well as discussions with other members of the Hartford Police Department. A-14-15.

When Officer Agostino arrived at the location in full uniform and in a marked cruiser, he saw a blue van parked on the street at 46 Edgewood Street. A-15-16. The blue van was parked on the wrong side of the street, facing traffic. A-20-21. He ran the blue van’s license plate in his cruiser computer, and the registration came back to a rental car company, PV Holding Corp. A-16. That heightened Officer Agostino’s suspicion because he had learned through his experience that people often use rental vehicles in other people’s names to conduct criminal activity, *id.*, particularly drug trafficking, which often involves weapons, A-50.

Shortly after Officer Agostino arrived at 46 Edgewood Street, Officer Zweibelson, in uniform and in a marked police cruiser, also arrived. A-16, 55. Officer Zweibelson also knew this to be a high crime area, reputed for drug trafficking and violent crime. A-56-57. He had responded to a “vast number of calls” in that area. A-85. Officer Zweibelson explained that Edgewood Street was “one of the top three hot spots” in terms of criminal activity in the North End of Hartford. A-64-65.

Officer Agostino heard loud music coming from the blue van as he approached it on the passenger side. A-17. Officer Zweibelson also approached the van on the passenger side. A-55-56. As Officer Agostino got closer,

he saw two males in the van with their seats in the reclined position. A-17-18. According to Officer Agostino, “it looked like they were just waiting for people to purchase” drugs. A-44. He asked the person in the driver’s seat what he was doing. The driver responded that he was visiting his girlfriend who lives at 83 Edgewood Street. A-19-20. Officer Agostino asked him for his driver’s license which he provided. The license identified the driver as Larry Anderson. As he answered, Anderson “began to stutter, stutter questions, why are you asking me these questions?” A-18. Anderson’s nervous and defensive reaction increased Officer Agostino’s suspicions, particularly because he had approached the situation as a “routine call, a noise complaint,” and “tried to lighten the atmosphere” with his initial inquiries of the two men. A-19, A-40.

Officer Agostino also observed an individual in the front passenger seat whom he identified as the defendant, Neville Thomas. A-18-19. He observed that Thomas was acting very nervously and suspiciously, looking around, staring, as if he were looking for an escape. A-19, A-51. He saw that Thomas was rubbing his legs, licking his lips, and his eyes became wider and wider. A-19. Officer Agostino interpreted this activity as suspicious. A-19, A-42. Officer Agostino indicated that Anderson was also acting nervously, but not to the extent of the defendant, Thomas. A-19.

Anderson, when asked why he was at 46 Edgewood Street, had indicated that he had just left the house of his girlfriend Latoya Newman, at 83 Edgewood Street. That address was at least 250 to 300 feet from where the blue van was parked, yet there were no other vehicles parked on

Edgewood Street at that time. A-20. Based upon all of his observations, and his training and experience, Officer Agostino felt that “things weren’t making sense” and that Anderson and the defendant, Thomas, were up to some type of criminal activity. A-19-21.

Officer Agostino, then fearing for his safety and the safety of Officer Zweibelson, asked the driver, Anderson, to step out of the van so that he could conduct a cursory check for weapons. He asked Anderson to place his hands on the van and then patted down outside of his clothing, looking for weapons. A-21-22. He did not find anything during the pat-down. *Id.* He advised Anderson that he was not under arrest, but he asked him to have a seat in his cruiser for safety. He indicated that Anderson was compliant and said that that was fine.

Officer Zweibelson, as he approached the van on the passenger side, saw the defendant in the passenger seat in the fully reclined position. A-58. He shone his flashlight in the van to ascertain that no other people were inside, A-58, but did not see whether there were firearms in the back of the van due to the tinted windows. A-72. He saw Thomas making furtive movements, looking around nervously, licking his lips and moving his hands up and down his thighs. A-59. He asked defendant to keep his hands in front of him, which he did, although he kept moving them about nervously. A-59-60.

Officer Zweibelson, after seeing Officer Agostino put Anderson in the back of his police cruiser, asked Thomas to get out of the van. A-62. He asked him to turn and put his hands on top of the van so that he could conduct a pat-

down for any weapons. *Id.* As Officer Agostino came back to the van, Officer Zweibelson commenced his pat-down, *Id.* moving up Thomas's legs. In front of Thomas's waist, Officer Zweibelson felt a large hard object which he could tell was some type of firearm. A-63. He grabbed the firearm to secure it and then handed the firearm to Officer Agostino. *Id.*

Officer Zweibelson described defendant Thomas as wearing a very baggy shirt and baggy pants. The shirt was on the outside of his pants and covering his waistband such that he could not see whether or not there was a firearm or any other weapon while Thomas was sitting in the vehicle. A-62-63.

B. The District Court's Ruling

On March 7, 2005, the district court issued a written memorandum of decision denying the motion to suppress. The court concluded in pertinent part that the officers possessed reasonable suspicion sufficient to justify an investigatory stop and frisk of the defendant.

At the outset of its ruling, after noting that facts relevant to the motion to suppress were not in dispute, the district court set forth detailed factual findings from the suppression hearing which included the following:

- In the early morning hours of Sunday, June 13, 2004, at about 2:45 a.m., an unidentified citizen called and reported loud music coming from a blue van parked on Edgewood Street in the north end of Hartford. Officers Dominic Agostino and John

Zweibelson were on patrol in the North End at the time and were dispatched to respond to the complaint. A-99.

- The officers knew the Edgewood Street area to be a high drug trafficking area known for violent crimes such as robbery, stabbings and shootings, including one of the top three “hot spots” in the North End in terms of criminal activity. A-99-100.
- When the officers arrived on Edgewood Street, they observed a blue van parked on the wrong side of the street with no vehicles parked in the immediate vicinity of it and no one on the street or sidewalks. A-100.
- Officer Agostino ran the blue van’s license plate on his cruiser computer and the registration came back to P.V. Holding Corp., which Officer Agostino took to mean that the van was a rental. This heightened his concern because in his experience, people often use rental vehicles and others’ names to conduct criminal activity. A-100-101.
- As the officers approached the van, they observed that the engine was running, the passenger side windows were rolled down, and because the windows were tinted, the officers could not see in the back seat. A-101.
- Officer Agostino asked the driver who he was and what he was doing at that location. The driver responded in a stutter that he was visiting his

girlfriend at 83 Edgewood Street and was waiting for her. This caused Officer Agostino some suspicion because that address was 250 to 300 feet from the location where the van was parked in front of 46 Edgewood Street. A-101.

- Both Officer Agostino and Officer Zweibelson described the defendant, who was sitting in the passenger seat of the van, as acting “very nervously, suspicious,” looking around staring, appearing to be looking for an escape, rubbing his legs, licking his lips and widening his eyes, and moving his hands up and down his thighs. A-102.
- Officer Agostino asked the driver of the van to get out of the car. Because of his suspicion and concern for officers’ safety, Officer Agostino conducted a pat-down search for weapons. He did not feel anything unusual, and then asked the driver to get in the back of his police cruiser. The driver complied. A-103.
- Officer Zweibelson then conducted a similar pat-down of the defendant, checking for weapons by touching the exterior of his clothing while the defendant had his hands on the top of the van. He described the defendant as wearing a very baggy untucked shirt which covered the waistband of baggy pants. In patting down the defendant, Officer Zweibelson felt a large hard object in the defendant’s waistband. He handcuffed the defendant and then grabbed the object which was the loaded .380 caliber semi-automatic pistol that

forms the basis of the federal felon in possession charge. A-103.

- The defendant was placed under arrest for carrying a pistol without a permit and for carrying a weapon in a motor vehicle. A-103.

The district court then reviewed relevant case law discussing the concept of “reasonable suspicion” as it relates to investigatory stops. The court acknowledged there was no dispute that the police were justified in making inquiries of Anderson and the defendant based on the noise complaint, and that the officers were lawfully permitted to ask both occupants to get out of the car for brief questioning. A-106. Because the defendant did not dispute the limited scope of the pat-down, the only question was whether the frisk for weapons was justified. The court found that it was, and held as follows:

Applying the foregoing principles to the facts of this case, the Court concludes that Officer Zweibelson was justified in patting down Mr. Thomas upon his exiting of the van and before initiating any questioning of Mr. Thomas. The Court reaches this conclusion because it believes that under the facts of this case, Officers Agostino and Zweibelson reasonably believed that their safety was in danger and that in those circumstances, ensuring the Officers’ safety – through a brief patdown of Mr. Thomas’s outer clothing – before continuing with the questioning of Mr. Thomas did not violate his Fourth Amendment rights. . . .

Here, a number of factors convince the Court that the Officers[] had a reasonable concern for their safety. First, it was the middle of the night, and the blue van, about which police had received a citizen complaint, was parked in an area known to the Officers as a location of violent crime, shootings and frequent drug trafficking. Edgewood Street was not even an ordinary high crime area. Instead, it was, as Officer Zweibelson testified without contradiction, one of the top three “hot spots” for crime and violence in the City. . . .

Of course, mere presence in a high crime area standing alone, even late at night, would not justify a warrantless police search. But that is not the only factor present in this case. The van had tinted windows, obscuring the Officers’ ability to see the interior of the vehicle. Vans with tinted windows pose a special danger to officers conducting a brief investigatory stop. . . . And the van was rented. . . . Officer Agostino testified that in his experience rented vehicles are often used in drug trafficking and Officer Zweibelson similarly testified that he found the presence of the rental vehicle suspicious.

Again, these facts standing alone would not justify the police in searching the occupants of every window-tinted van or every rented car. However, when police find a rented window-tinted van parked by itself in the middle of the night with its engine running in a “hot area for drug trafficking,” it is not unreasonable for police to suspect that a crime, particularly a drug crime,

might be afoot. And, it is well recognized that firearms are “regularly found on narcotics traffickers.”

Importantly as well, both occupants of the van acted nervously and suspiciously, with Mr. Thomas, in particular, rubbing his legs, moving his hands about nervously, looking about as if for a means of escape, looking behind him, and “acting strangely.” Moreover, while Officer Zweibelson did not hear what Officer Agostino and Mr. Anderson were discussing, Officer Agostino was suspicious of Mr. Anderson’s explanation that he had been visiting his girlfriend at 83 Edgewood Street, since the van was parked so far from where she lived and on the opposite side of the street.

A-108-110 (citations omitted). The Court then concluded:

Viewed with a modicum of common sense and through the lens of a trained police officer, the facts presented justified the Officers’ concern that Mr. Thomas might be armed and dangerous and that a brief safety patdown of Mr. Thomas’s outer clothing was justified before the Officers questioned him further.

A-111. Accordingly, the district court found no Fourth Amendment violation and denied the suppression motion.

SUMMARY OF ARGUMENT

The district court did not err in determining that the investigatory stop and frisk of the defendant was sufficiently supported by reasonable suspicion. The police officers, while responding to a citizen complaint, observed the defendant in the early morning hours, in one of the highest crime areas of the city, while he sat in a rented van, with tinted windows, parked on the wrong side of the street with the engine running. The van was parked about 250 to 300 feet away (and on the wrong side of the street) from the house from which he was supposedly waiting for the driver's girlfriend to emerge, despite the fact that the street was otherwise deserted. The officers described the nervous actions and furtive hand movements of the defendant while they spoke to him. Under the totality of the circumstances, the officers were justified in conducting a brief pat-down for weapons to ensure the officers' safety before they continued the investigation.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE INVESTIGATORY STOP AND FRISK OF THE DEFENDANT WAS SUPPORTED BY REASONABLE SUSPICION

A. Governing Law and Standard of Review

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court construed the Fourth Amendment's prohibition against unreasonable searches and seizures to permit a law

enforcement officer to briefly detain an individual for questioning if the officer has a reasonable, articulable suspicion that the individual is involved in criminal activity. The “*Terry* stop” rule recognizes that “[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.” *Adams v. Williams*, 407 U.S. 143, 144 (1972).

Accordingly, “an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry*, 392 U.S. at 30). See generally *United States v. Arvizu*, 534 U.S. 266 (2002) (discussing *Terry*).

In connection with such a stop, an officer may “tak[e] 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.” *Terry*, 392 U.S. at 23. Under *Terry*, an officer may take such measures “[w]hen [the] 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.” *Id.* at 24. “A law enforcement agent, faced with the possibility of danger, has a right to take reasonable steps to protect himself and an obligation to ensure the safety of innocent bystanders, regardless of whether probable cause to arrest exists.” *United States v. Alexander*, 907 F.2d 269, 272 (2d Cir. 1990); see also *Adams*, 407 U.S. at 146; *United States v.*

Jackson, 652 F.2d 244, 249-50 (2d Cir. 1981). “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.” *Terry*, 392 U.S. at 27. Because the purpose of such a search is “to allow the officer to pursue his investigation without fear of violence” rather than to look for evidence of crime, a frisk for weapons may be necessary regardless of whether the suspected gun possession is illegal under state law. *Adams*, 407 U.S. at 146 (affirming investigatory stop in Bridgeport, Connecticut, where tipster reported that defendant was sitting in car with narcotics and gun, and officer reached through car window and retrieved gun from defendant’s waistband).

“Reasonable suspicion is not a high threshold” *United States v. Lawes*, 292 F.3d 123, 127 (2d Cir. 2002). Although the concept of “reasonable suspicion” is not precisely articulable, *see Ornelas v. United States*, 517 U.S. 690, 695-96 (1996), it requires “some minimal level of objective justification” for making a stop, but “considerably less proof ” than a preponderance of the evidence, and the standard is “obviously less demanding” than probable cause. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *see also Arvizu*, 534 U.S. at 274 (same).

In evaluating the lawfulness of a *Terry* stop, a reviewing court “must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing.” *Arvizu*, 534 U.S. at 273 (internal quotation marks omitted). The validity of a brief

investigatory stop is to be “judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?” *Terry*, 392 U.S. at 21-22 (internal quotation marks omitted).

“The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause.” *Ornelas*, 517 U.S. at 696. As this Court has emphasized, “the court must evaluate those circumstances ‘through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.’” *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000) (quoting *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977)).

The collective knowledge of several law enforcement officers jointly involved in an investigation may be considered in determining the existence of reasonable suspicion to support a *Terry* stop. See *United States v. Colon*, 250 F.3d 130, 135 (2d Cir. 2001); cf. *United States v. Cruz*, 834 F.2d 47, 51 (2d Cir. 1987) (probable cause to arrest can be based on the collective knowledge of all officers involved in a surveillance where the various officers were in communication with each other).

On appeal, this Court reviews for clear error the district court’s findings of fact and reviews *de novo* the district

court's determination that the facts as found gave rise to "reasonable suspicion" to conduct an investigatory stop. *See Ornelas*, 517 U.S. at 699; *Lawes*, 292 F.3d at 127. In reviewing a district court's denial of a motion to suppress, this Court views the evidence in the light most favorable to the Government. *See Bayless*, 201 F.3d at 132.

B. Discussion

The district court did not clearly err with respect to any finding of fact or commit any legal error in its determination that the weapons frisk of the defendant was supported by reasonable suspicion. A number of factors present here combined to justify the police officers' concern that a patdown was warranted to ensure their safety.

First, the district court properly noted that the defendant's presence in a high-crime area of Hartford contributed to the officers' reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (high crime area is a relevant factor); *United States v. Peterson*, 100 F.3d 7, 11 (2d Cir. 1996) (high crime area and evasive movements when defendant saw police supported investigatory stop). The pat-down occurred on Edgewood Street in the North End of Hartford, an area known to both officers for its high crime rate. The area was so bad that, in the words of Officer Zweibelson, it was "one of the top three hot spots," with a "very high" rate of drug sales, due in part to the number of abandoned buildings, open spaces, and abandoned vehicles in the area. A-57. The area is known for shootings, A-56-57, as well as "[d]omestic violence calls, active domestic violence calls, gun calls as

shots fired in the area.” A-56-57, 84-85. Moreover, Officer Agostino explained from experience that “between midnight and 4:00 o’clock in the morning in that area, crack sales are very high and when crack sales are very high, there’s a lot of street robberies. When there’s a lot of street robberies, a lot of people use firearms involved in the street robberies.” A-50; *see also* A-14-15. The nature of the crime under investigation is a factor that may justify pat-down searches, and officer suspicions that the case involves drugs or violence will justify such a frisk. *See, e.g., United States v. Reyes*, 353 F.3d 148, 154 (2d Cir. 2003) (recognizing that firearms are “tools of the trade” for drug dealers and are “regularly found on narcotics traffickers”); *United States v. Salazar*, 945 F.3d 47, 51 (2d Cir. 1991) (*Terry* pat-down justified where officers were “sufficiently experienced to know that narcotics dealers frequently carry weapons,” and saw that the defendant “had become visibly nervous at learning that they were law enforcement officers”).¹

Second, the fact that the officers encountered the defendant in this high-crime area at night – specifically, at about 2:45 a.m. – also permissibly raised their suspicions.

¹ As noted above, the Officers testified that Edgewood Street was notorious for both drug dealing and violent crime, such as robberies, involving firearms – particularly in the wee hours of the morning. In light of this specific (and uncontested) testimony linking drugs and guns in this particular street at this particular time of night, there is no need for this Court to consider whether, absent such specific and detailed testimony, reasonable suspicion that a person is involved in drug dealing is enough to justify a pat-down for weapons.

The record reflects that it was dark out, hindering the officers' vision and necessitating the use of flashlights. Darkness (which impedes an officer's vision) and time of day (which is relevant to patterns of criminal activity and relative danger) are both factors that justify a pat-down for weapons – particularly when the stop occurs in a “high crime area.” *See, e.g., United States v. Murphy*, 261 F.3d 741, 743 (8th Cir. 2001) (fact it was 2:45 a.m. was a factor supporting frisk); *United States v. Brown*, 273 F.3d 747, 748 (7th Cir. 2001) (“A nighttime traffic stop, especially in an area where crime is not a stranger is more fraught with potential danger”); *United States v. Menard*, 95 F.3d 9, 11 (8th Cir. 1996) (fact that officer was outnumbered is relevant factor, especially at two in the morning). *See generally United States v. Reid*, 997 F.2d 1576, 1581 (D.C. Cir. 1993) (Wald, J., dissenting) (“Factors that may justify an investigative stop, a search for weapons, or the escalated use of force include the time of day, the ‘high-crime’ nature of the area, an informant’s tips that person might be armed, furtive hand movements, flight or attempted flight by the person sought to be detained, and a pressing need for immediate action.”).

Third, the fact that the van had tinted windows provided further cause for the officers to suspect that the defendant and his companion were involved in drug dealing, and thus possibly armed. Tinted windows hindered the officers' ability to see in the van. Officer Zweibelson testified that he was able to ascertain with his flashlight only that there were no other people in the back seat of the van; he could not tell whether there were any weapons in the back. A-55-58, A-72; *see also* A-37 (Officer Agostino). This made the van less safe to

approach. Vans with tinted windows pose a special danger to officers conducting a brief investigatory stop. *See United States v. Starfield*, 109 F.3d 976, 981 (4th Cir. 1997) (having to approach a vehicle with tinted windows during “already dangerous” traffic stop “increases exponentially” the “potential harm to which the officers are exposed”); *see also United States v. Bold*, 19 F.3d 99, 103 (2d Cir. 1994) (*Terry* stop justified partially by “inability of the officers to see in the darkly tinted car windows”).

Fourth, a reasonable officer’s suspicions would be increased by the fact that this van, parked in the middle of the night on a deserted street known for drug dealing, was a rental. Indeed, Officer Agostino keyed on the fact that the van was a rental, and understood from his own experience in this neighborhood that this was an indicator of possible criminal activity, including drug dealing *and weapon possession*. As Officer Agostino testified, the fact the van was a rental “definitely heightened my awareness because in my past dealings with that time frame at night and the fact it was a rental vehicle, my experience is that people use rental vehicles . . . [for] criminal activity.” A-16. He explained that “a lot of the narcotic sellers use rental car vehicles in other people’s names and it didn’t come back to Mr. Anderson or Mr. Thomas or even Miss Newman; just came back to a PV Corp., and a lot of people, what they’ll do is use that vehicle and they’ll use it to sell narcotics out of and if they get chased by police, they just ditch it and run, *and a lot of those people carry weapons.*” A-50 (emphasis added). *See*

Murphy, 261 F.3d at 743 (fact vehicle was not registered to the driver was a factor justifying search).²

Fifth, additional factors reinforced the officers' suspicion that these two men – sitting in a rental van in the middle of the night in an area reputed for crack sales – “were just waiting for people to purchase [drugs].” A-50-51. Approaching the van, the officers saw the two men sitting in reclined seats. A-17, 58. A reasonably trained officer could conclude this was a possible sign of criminal activity in that the seats were reclined to obscure the occupants of the van from view. Moreover, the van's engine was running, A-37, enabling a potentially quick getaway. (It also meant that a reasonable officer would have to consider the potential danger of being run over.)

Sixth, the officers also considered the actions of the defendant and the driver of the van. Officer Agostino spoke to the driver, who was defensive despite the

² The defendant correctly points out that the concern raised in *Murphy* was that the driver's identity was uncertain in light of, *inter alia*, the fact that he was driving a car registered under a woman's name. App. Br. at 13. While it is true that the concern in the present case was not that the police were in fact unable to identify the driver, they were still dealing with a concern relating to identification. Specifically, they were concerned that the driver might be using a rental to evade identification if pursued. This was premised on the officers' knowledge that drug dealers in Hartford often do their business out of rental vehicles which are registered in other people's names. That way, they can ditch the cars if pursued and not be traced. This raised the suspicion that the occupants of this rental van were, in fact, drug dealers.

officer's attempts to put him at ease, and stuttered "Why are you asking me these questions?" A-18. *See, e.g., Peterson*, 100 F.3d at 9 (defendant stuttered answers about his home to police officers). Both the driver of the van and the defendant were "acting suspiciously, looking around, staring, almost looking for an escape . . ." A-19. Furthermore, both men were gesturing, but more so the defendant Thomas, who was "rubbing his legs, licking his lips," and his eyes became "wider and wider" as he was asked questions by the officer. *Id.* Particularly worrisome for Officer Agostino was the fact defendant Thomas kept glancing towards the back of the van, which as a trained and experienced officer, Agostino undoubtedly recognized as a danger sign, i.e., a possible glance towards a concealed weapon. A-39. *See Brown*, 273 F.3d at 748 (upholding *Terry* stop partly because defendant "appeared to be nervous, repeatedly glanced backwards, and seemed to be moving his hands around his lap area").

Officer Zweibelson testified that upon approach to the van, its occupants "seemed to be moving around," and both were "acting strangely." A-59. Officer Zweibelson had to tell defendant Thomas to keep his hands in front of him. A-60. Furthermore, defendant Thomas was running his hands up and down his legs, and could have easily reached for a weapon in his waist, ankle, or on the floor of the van. This movement understandably concerned the officers. *Id.* Also, defendant Thomas was wearing baggy clothes making it hard, especially at night, for officers to see the bulge of a weapon on him. A-62-63.

The driver's explanation for their presence at 46 Edgewood also seemed questionable. Upon questioning

by Officer Agostino, Anderson said he had been visiting his girlfriend at 83 Edgewood Street. This seemed to be an odd explanation, given that the van was parked 250 to 300 feet away from that house; on the opposite side of the street; facing the wrong way; when the street was practically empty and there were parking spaces much closer to 83 Edgewood. A-20.

It is just such unusual behavior that has supported the finding of reasonable suspicion validating an investigatory stop and pat-down for weapons. As noted above, numerous cases in the Second Circuit have held that “suspicious conduct” can provide the requisite justification for the police to conduct a *Terry* search. See *United States v. Rogers*, 129 F.3d 76, 78 (2d Cir. 1997) (evasive conduct and subject turning as if to hide left side justified pat-down search); *Peterson*, 100 F.3d at 9-11 (*Terry* stop justified where defendant ducked behind parked car when he saw police; and appeared “nervous, agitated, and evasive” when questioned by police); *United States v. Jaramillo*, 25 F.3d 1146, 1151 (2d Cir. 1994) (“Circumstances giving rise to sufficiently ‘specific and articulable facts’ to warrant the stop and patdown of an individual include instances where that individual has engaged in suspicious behavior . . .”). “[N]ervous evasive behavior is a pertinent factor in determining reasonable suspicion.” *Illinois v. Wardlow*, 528 U.S. at 124; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (“obvious attempts to evade officers can support a reasonable suspicion”); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (per curiam). Erratic behavior may also justify a pat-down. *United States v. Brown*, 232 F.3d 589, 594 (7th Cir. 2000). Specifically, furtive hand movements are

also a justification for a pat-down. *United States v. Paulino*, 850 F.2d 93, 94 (2d Cir. 1988) (automobile search justified where back-seat passenger bent over as if to place something on floor, outside view of officers).

Defendant's arguments center around his claim that there are "no objective facts *specifically relating to Mr. Thomas*, taken alone or in totality of the circumstances, that would have justified Officer's Zwiebelson's belief that Mr. Thomas was "armed and presently dangerous." Brief for Appellant-Defendant ("App. Br.") at 8 (emphasis added). However, while facts supporting an investigatory stop and pat-down for weapons must relate specifically to the defendant, they need not be limited to facts that are exclusive to the defendant. Put another way, the factors which are common to the defendant and his companion – the fact that they were found at 2:45 a.m., in one of the worst high-crime areas of Hartford, on a street reputed for crack sales and violent crime; in a rental van with tinted windows with the engine running; parked the wrong way on the street; 250 to 300 feet away and on the opposite side of the street from the house from which they were supposedly waiting for someone – should not be disregarded as to the defendant simply because they properly raised suspicion as to *both* occupants. Instead, all of the facts set forth above that relate to both the defendant and driver of the van may be considered by the court in finding reasonable suspicion. Moreover, the defendant's claim ignores those facts that are specific and exclusive to the defendant – that is, his nervousness and suspicious movements described by both officers and found to exist by the court in its finding that reasonable suspicion supported the pat-down search.

Nor does the defendant's characterization of Officer Zwiebelson's motivation in conducting the pat-down indicate that anything other than articulable facts specific to Thomas adequately supported the investigatory stop and pat-down. App. Br. at 10-11. As the court noted in its memorandum of decision, the defendant misconstrues Officer Zwiebelson's testimony when he argues that Officer Zwiebelson would have patted Mr. Thomas down in the absence of the factors testified to at the hearing, and that he would have conducted a pat-down at any time he came upon people in the car at night, particularly in a high-crime area. *Id.* The district court rather interpreted Officer Zwiebelson's testimony as "read in context, his testimony merely confirmed that having considered all of the factors enumerated above, it would have been standard practice to pat Mr. Thomas down as a safety precaution before questioning him further." A-14 n.4. This factual finding was not clearly erroneous.

In any event, as a legal matter, the defendant's argument regarding Officer Zwiebelson's motivation is irrelevant. A law enforcement officer's subjective intent has no bearing on the Fourth Amendment reasonableness inquiry. "Objective rather than subjective factors govern the propriety of both stops and arrests." *Jackson*, 652 F.2d at 244-50 (officer's subjective belief that a "stop" had become an "arrest" thus requiring probable cause was irrelevant; objective facts indicated that no arrest had yet occurred); *cf. United States v. Harrell*, 268 F.3d 141, 148 (2d Cir. 2001) (where traffic law prohibited tinted car windows and officers observed that windows were heavily tinted, the officers' stop of the car was justified regardless of their awareness of the traffic law, and their subjective

intent to search the car for guns); *see also Brown*, 232 F.3d at 593 (upholding *Terry* stop even though arresting officer suggested that he would have conducted a pat-down as a routine matter during sobriety test).

The defendant's insular discussion of each of the factors considered by the court in finding reasonable suspicion, is just such the "divide-and-conquer" analysis rejected by the Supreme Court in *Arvizu*, 534 U.S. at 274-75. *See United States v. Singh*, 415 F.3d 288, 295 (2d Cir. 2005). The "evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase Although each of [a] series of acts was "perhaps innocent in itself," we [have] held that, taken together, they "warranted further investigation."" *Id.* (quoting *Arvizu*, 534 U.S. at 274-75) (quoting, in turn, *Terry*, 392 U.S. at 22). Here, while any single fact relied upon by the officers and found by the district court in support of reasonable suspicion might not have independently sufficed for a finding of reasonable suspicion, combined with each other under the "totality of the circumstances," they sufficiently supported a finding of reasonable suspicion.

In short, the district court correctly determined that the investigatory stop of defendant and pat-down for weapons was supported by reasonable suspicion. The Court should therefore affirm the district court's denial of the motion to suppress.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: March 13, 2006

Respectfully submitted,

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A handwritten signature in cursive script, reading "Thomas V. Daily".

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ANTI-VIRUS CERTIFICATION

Case Name: United States v. Thomas

Docket Number: 05-4034-cr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 3/13/2006) and found to be VIRUS FREE.

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