06-4832-cr

To Be Argued By:
EDWARD T. KANG

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4832-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

BRANDON MILES,
Defendant-Appellant.

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

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

EDWARD T. KANG
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

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 THE ISSUES PRESENTED

I. Did the district court commit clear error in denying the defendant's motion to suppress evidence on grounds that the evidence was obtained pursuant to a valid consent search and that the arresting officer did not exceed the scope of consent provided?

II. In the alternative, was the evidence seized from the defendant validly obtained pursuant to the "plain feel" doctrine while the arresting officer conducted a permissible *Terry* search for weapons?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4832-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

BRANDON MILES,
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 addresses the issues of a defendant's consent to search and of the permissible scope of a search pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). These issues came into play on the evening of February 1, 2005, when police officers in Norwalk, Connecticut, were patrolling the Colonial Village Housing Complex, known by them to be a high-crime area with frequent reports of narcotics trafficking and gun fire.

During their patrol, officers encountered an illegally parked vehicle impeding the free flow of traffic within the complex. From their squad car, the officers twice shined an alley light in the direction of the illegally parked vehicle, signaling that the driver needed to move along. The driver failed to move. One of the officers got out of the squad car and approached the driver's side of the parked car to conduct a vehicle stop. As the officer approached, he saw the defendant-appellant Brandon Miles in the driver's seat. From prior encounters with the defendant, the officer knew that the defendant was associated with the Westsiders, a neighborhood gang known to be associated with narcotics trafficking and several shootings. The officer also knew that the defendant had been convicted of assault and that the defendant was a narcotics trafficker. The officer also saw the defendant's brother, Christopher Miles, seated in the passenger seat, whom the officer knew was also a narcotics trafficker.

The officer asked the defendant questions. During that encounter, the officer noticed that the defendant's feet were tucked in an unusual position towards the left of the brake pedal. The officer asked the defendant to move his feet. The defendant did not respond and did not make eye contact with the officer. The officer became concerned that the defendant was concealing a weapon underneath his feet and asked the defendant to step out of the car. The defendant got out and the officer checked the driver's side area for weapons. Finding none, the officer asked the defendant if he had any weapons on his person. The

defendant responded: "No, you can check me," and raised his hands in the air.

The defendant was wearing a bulky sweatshirt with pockets. Concerned that the defendant could be concealing a weapon, the officer squeezed the front pocket of the defendant's sweatshirt and felt a hard, rock-like substance which he immediately recognized to be crack cocaine. The officer reached into the pocket and removed the item, which later tested positive as crack cocaine. The defendant was arrested and handcuffed. The officer then reached back into the same pocket and removed another piece of crack cocaine. In total, the officer retrieved 12.9 grams of crack cocaine from the defendant. These events gave rise to the defendant's present conviction for possessing with intent to distribute five grams or more of cocaine base.

In this appeal, the defendant contends that the government has failed to meet its burden of proving that the officer's search did not exceed the scope of consent given by the defendant and, in the alternative, that the officer's search of the defendant exceeded the constitutionally mandated limits of a pat down search as set forth in *Terry*. This Court should reject both claims, as did the district court (Ellen Bree Burns, J.). The district court correctly concluded that the defendant voluntarily consented to the search and that the search did not exceed the scope of consent. Moreover, assuming *arguendo* that the search was not a valid consent search, the crack cocaine was validly seized pursuant to the "plain feel" doctrine during a lawful *Terry* search for weapons.

Accordingly, the Court should affirm the district court's judgment.

STATEMENT OF THE CASE

On August 18, 2005, a federal grand jury in Connecticut returned an indictment charging the defendant with knowingly and intentionally possessing with intent to distribute 5 grams or more of a mixture and substance containing a detectable amount of cocaine base ("crack"), in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B). *See* Joint Appendix ("JA") 3, 10. On November 29, 2005, the defendant filed a motion to suppress evidence. JA 4, 11-14. The defendant filed a pre-hearing brief in support of his motion to suppress on November 28, 2005. JA 21-28. The Government filed its pre-hearing memorandum opposing the motion to suppress on February 21, 2006. JA 29-44.

On March 23, 2006, Senior United States District Judge Ellen Bree Burns held a hearing on the defendant's motion to suppress, at which the Government offered testimony from two of the arresting officers. JA 45-126. The defendant filed a post-hearing memorandum on March 29, 2006. JA 127-43. The Government filed its post-hearing memorandum on March 30, 2006. JA 144-52. On May 18, 2006, the district court issued a written ruling denying the defendant's motion to suppress. JA 153-68.

On May 24, 2006, the defendant entered a conditional plea of guilty to the indictment. JA 7, 169-76.

On October 17, 2006, the district court sentenced the defendant principally to a term of 60 months of imprisonment, to be followed by a four-year term of supervised release. JA 8. The district court entered judgment on October 18, 2006. JA 177-79.

On October 18, 2006, the defendant filed a timely notice of appeal. JA 8, 180-81. The defendant is serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

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 of March 23, 2006, the Government called as witnesses two officers in the Special Services Division of the Norwalk Police Department ("NPD"): Detective Mark Lepore and Sergeant Ronald Pine. The defendant did not present any evidence.

At the time of the hearing, Detective Lepore was a 10-year veteran of the NPD, with seven years of experience in the Special Services Division, which specialized in enforcing narcotics laws. JA 49-50. On February 1, 2005, at approximately 6:30 p.m., Detective Lepore, along with four other officers from NPD, were patrolling in a housing

complex called Colonial Village, in Norwalk, Connecticut. JA 54, 59-60, 101. Detective Lepore and one other officer were patrolling in a marked police car. JA 59. The remaining three officers were following in an unmarked car. JA 59-60. Colonial Village is a high-crime area associated with fighting, shootings, and heavy street-level narcotics trafficking. JA 54, 99-100. That area is also associated with a gang called the Westsiders, which trafficked in crack cocaine and engaged in acts of violence, including shootings. JA 56, 99-100, 102-03.

During the patrol, the officers observed a memorial erected within the housing complex, dedicated to a member of the Westsiders who had been shot and killed one week earlier. JA 57, 60, 101-02. It was dark. JA 60, 101. Several members of the Westsiders were in the area of the shrine. JA 60, 102-03.

In the vicinity of the shrine, Detective Lepore saw a double-parked, dark-colored Honda. JA 61, 103. The road running through Colonial Village is a one-way, residential street. JA 62, 104. The Honda was obstructing the free flow of traffic on the street, in violation of Connecticut motor vehicle statutes. JA 65. Detective Lepore noticed that the engine of the car was running and that a person was seated in the vehicle. JA 68. Detective Lepore shined his patrol car's alley light in the direction of the Honda, indicating to the driver that he needed to move. JA 68-69. The driver did not move the car. JA 69. Detective Lepore then saw an individual named Christopher Miles approach the passenger side of the Honda. JA 69. Christopher Miles was a known narcotics

trafficker and member of the Westsiders. JA 59. Detective Lepore saw Christopher Miles talking with the driver of the Honda, at which point the detective shined his alley light a second time in the direction of the car. JA 69-70. The driver of the vehicle did not move the car. JA 70. Believing that the Honda would not move from the illegally parked position, Detective Lepore activated his overhead lights and stepped out of his patrol car to effect a vehicle stop.[1] JA 70-71. As the detective stepped out, Christopher Miles got into the Honda, and the driver of the vehicle began moving the car away slowly. JA 72. Detective Lepore tapped on the back of the vehicle and the driver stopped the car. *Id.*

Based upon prior contacts, Detective Lepore recognized the driver to be the defendant. JA 72-73. The detective was aware that the defendant was a member of the Westsiders, that he was a narcotics trafficker, and that he had been convicted of assault in the past. JA 73-74, 104. As the detective asked the defendant for his license, registration, and registration card, the detective noticed that the defendant had his feet in an unusual posture — tucked together towards the left of the brake pedal. JA 74-76. Detective Lepore asked the defendant to move his feet. JA 74-75. The defendant did not respond; he stared straight ahead and did not look at the detective. JA 75-76. Detective Lepore became concerned that the defendant

---

[1] The defendant, by way of his post-hearing memorandum, conceded that the traffic violation gave Detective Lepore the constitutional basis to effect a *Terry* stop. JA 129-30, 153, 159.

was concealing a weapon and asked the defendant to step out of the vehicle. JA 76-77, 105. The defendant complied and the detective checked the driver's side area for weapons. JA 77. Detective Lepore did not find any weapons. *Id.* He then turned to the defendant and asked, "Do you have any weapons on you?" JA 77-78. The defendant said, "No, you can check me," and then raised his hands straight up in the air. JA 78. The defendant was wearing a sweatshirt with pockets. JA 77. Detective Lepore, facing the defendant, squeezed the right front pocket of the sweatshirt and felt a hard rock-like substance, packaged in a plastic bag. JA 78-79. The detective was searching for weapons and chose to squeeze the defendant's sweatshirt for fear that an open-hand pat down of the defendant's baggy clothing would miss uncovering a weapon such as a razor blade or a small knife. JA 79, 90, 94.

Based on his prior dealings with crack cocaine during his ten years as a police officer, Detective Lepore immediately recognized the object in the defendant's pocket to be crack. JA 78-79, 94. Once feeling that object, Detective Lepore did not slide or manipulate that object any further; he reached in and pulled out the plastic bag containing the crack. JA 79, 94. Detective Lepore handcuffed the defendant and reached back in the same pocket and pulled out another piece of crack. JA 79-80. The detective then searched the defendant all the way down to his feet and did not find any other contraband or weapons. JA 80.

B. The District Court's Ruling

On May 18, 2006, the district court issued a written ruling denying the motion to suppress. JA 153-68. The court held that Detective Lepore's search of the defendant's person was conducted with the defendant's voluntary consent. JA 163-68. Although not decisive to the ruling, the court also indicated that Detective Lepore's squeeze of the defendant's sweatshirt did not run afoul of the constitutionally mandated limits set forth in *Terry*. JA 161-63.

The district court set forth the following factual findings at the outset of its ruling:

- that on February 1, 2005, at approximately 6:30 p.m., Detective Lepore and four other officers were patrolling the area in the Colonial Village housing complex;

- that the area is known for street-level narcotics trafficking and gun-related violence;

- that the area is associated with the activity of the Westsiders, a gang trafficking in crack cocaine and associated with several shootings;

- that while on patrol, the officers observed five to ten people gathered near a shrine that had been erected in remembrance of a Westsiders member who had been shot and killed;

- that Detective Lepore recognized some of those gathered at the shrine to be members of the Westsiders;

- that the road leading through the housing complex is a one-way street;

- that Detective Lepore observed a dark green Honda double-parked on the right side of the street, obstructing the free passage of traffic;

- that Detective Lepore observed the engine of the Honda running and at least one person in the vehicle;

- that Detective Lepore twice shined his patrol car's alley light in the direction of the Honda to give the driver a hint to move along;

- that the Honda did not move along even after Detective Lepore's actions;

- that the detective activated his overhead lights to effect a vehicle stop, approached the vehicle, and recognized the driver to be the defendant;

- that Detective Lepore had had several dealings with the defendant and knew that the defendant was associated with the Westsiders, that confidential informants had made controlled purchases of narcotics from him, and that he had been convicted of assault;

- that Detective Lepore observed the defendant's brother, Christopher Miles, a known narcotics trafficker, in the passenger seat;

- that as the detective asked the defendant for his driver's license, registration, and insurance card, he noticed that the defendant had his feet together to the left of the brake pedal in an unusual posture;

- that the detective asked the defendant to move his feet, but the defendant did not respond, stared straight ahead, and did not look at the officer;

- that Detective Lepore became concerned that the defendant was concealing a weapon underneath his feet and the floor mat and asked the defendant to step out of the vehicle;

- that after the defendant emerged from the vehicle, the detective leaned into the driver's side area, lifted the floor mat, looked under the seat, but found no weapon;

- that Detective Lepore then turned to the defendant and said, "Do you have any weapons on you?";

- that the defendant responded, "No, you can check me," and raised his hands straight up in the air;

- that the detective understood this exchange to mean that the defendant had no weapons on him and was allowing the detective to search him;

- that the defendant was wearing a bulky sweat-shirt top with pockets;

- that Detective Lepore testified that his search was primarily for weapons, and the first thing he did was squeeze the right, front pocket on the sweat-shirt;

- that the detective testified that using an open-handed pat could cause an officer to miss small weapons, such as a razor blade or a small knife;

- that Detective Lepore testified that he usually squeezes pockets when conducting a search because his safety is his primary focus;

- that upon squeezing the defendant's pocket, the detective felt a hard, rock-like substance which, based upon his training and experience, he immediately recognized to be crack cocaine;

- that Detective Lepore then reached into the pocket and removed the item, which later tested positive as being crack cocaine;

- that the detective then placed the defendant under arrest and handcuffed him;

- that Detective Lepore then reached back into the same pocket and pulled out another piece of crack cocaine; and

- that the detective continued his search down to the defendant's feet and found no weapons on the defendant.

JA 154-58.

The court noted that the defendant, by way of his post-hearing memorandum, was conceding that the traffic violation gave Detective Lepore the constitutional basis to effect a *Terry* stop. JA 159. The court thus focused its attention on the issues that are raised in this appeal: (1) whether Detective Lepore's "pat down" search exceeded the scope of a permissible *Terry* search and (2) whether the detective's search exceeded the scope of consent, if any, given by the defendant. JA 159-60.

As to the initial question, the court reviewed relevant precedent and indicated that Detective Lepore did not exceed the scope of a permissible *Terry* search. In reaching that conclusion, the court noted:

> Defendant argues that, although the traffic violation gave Officer Lepore a constitutional basis for the "pat down," *Terry* and its progeny created a narrow scope, allowing for a search of weapons to protect the safety of police officers, but not allowing for a broadening of a search into a "general warrant to rummage and seize at will." Defendant further argues that Lepore's statement that he was checking Defendant "primarily for weapons" suggests that the officer was also

searching the Defendant for other reasons, namely to discover contraband. . . .

As an initial matter, the subjective intent of an officer making a *Terry* stop is of no moment where the officer has an objectively reasonable basis for the stop. Defendant has conceded that, due to the traffic violation, reasonable suspicion existed at the time Officer Lepore effected the vehicle stop. Whether or not Lepore's knowledge of narcotics sales in the area, gun violence or any other reason precipitated the stop or the decision to search Defendant, because he had an objective reason for the stop of Defendant, subjective intent is immaterial. Furthermore, Lepore found the positioning of Miles's feet in the car rather unusual and, coupled with his knowledge that Defendant had sold narcotics to informants and was affiliated with the Westsiders, Lepore reasonably could have concluded that a weapon was being concealed. . . . And, counter to Defendant's assertions concerning the credibility of Lepore's testimony, Lepore did not end his search upon discovering the crack cocaine in Defendant's sweat-shirt pocket. He testified that, after he placed Defendant under arrest, he pulled another piece of crack cocaine out of Defendant's pocket and then proceeded to search Defendant down to his feet, finding neither weapons nor additional contraband. . . .

. . . .

> . . . While Lepore's "squeeze-down" method may be unconventional under *Terry*, he testified that this method is the only way to ensure that a search for weapons in bulky clothing does not miss something small such as a knife or razor blade. Thus, his search was more akin to an "initial limited exploration for arms," and not to an attempt "to rummage and seize at will." The search for weapons was an intrusion "reasonably designed" to discover what might be concealed in the pocket of a bulky sweat-shirt top. There was no invasion of the pocket prior to the time it was "immediately apparent" to Lepore that the item he squeezed through the outside surface of Defendant's clothing was contraband.

JA 160-61, 163 (citations omitted).

Turning to the issue of whether the defendant consented to Detective Lepore's search and whether that search exceeded the scope of consent given, the district court again reviewed relevant precedent discussing searches pursuant to valid consent. The court then rejected the defendant's argument, and held as follows:

> Here, the Government contends, and this Court agrees, that the totality of the circumstances suggests that Defendant's consent to the search of his person was voluntary. When asked if he had any weapons, Defendant responded "No, and you can check me" and raised up his arms. Defendant was not handcuffed or otherwise physically

restrained during the initial search, and understood and responded to Lepore's inquiries. Furthermore, having had a previous conviction for assault and having been stopped and searched by the police "with no justification" previously, Defendant would have been aware of his right to refuse consent. This was not a situation where Defendant merely acquiesced to a show of authority.

Defendant argues that, even if this Court finds the consent was voluntary, the search went beyond Defendant's consent to check him for weapons. Testimony at the hearing established that Lepore constrained himself to an exploration of the outer surfaces of Defendant's clothing even after receiving consent. The expressed object of the search was weapons, and Lepore did not reach into Defendant's pocket until he was immediately alerted to the presence of contraband.

A reasonable person would have understood the exchange between Lepore and Defendant to encompass Defendant's consent to a search of his person. Defendant could have limited the breadth of the consent he gave, or given no consent at all, but he voluntarily raised his hands and offered Lepore the opportunity to "check" him. (And, under *Terry*, because Lepore had reasonable suspicion, he did not need Defendant's consent to a search for weapons).

> Where, as here, the "incriminating character" of the crack cocaine in Defendant's sweat-shirt pocket was "immediately apparent" to Officer Lepore upon squeezing Defendant's pocket, the seizure is valid under the plain-view doctrine. Furthermore, "[i]f the frisk for a weapon is conducted in compliance with proper standards and results in recognition of the likely presence of narcotics, it is immaterial that what was discovered is not the article for which the police officers were originally and specifically looking."
>
> Additionally, "a suspect's failure to object (or to withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator" that the search was within the scope of the initial consent. The Court is mindful of the Supreme Court's admonition against "stealthy encroachments" upon the rights of citizens, but here, where Defendant consented voluntarily to a search of his person, such concerns are not founded.

JA 165-67 (citations omitted). Accordingly, the district court found no Fourth Amendment violation and denied the motion to suppress.

SUMMARY OF ARGUMENT

The district court did not commit clear error in determining that the defendant consented to a search of his person. When asked if he had any weapons, the defendant freely and voluntarily responded "No, you can check me," and raised up his arms. That response was not a mere acquiescence to a show of authority. The defendant was not handcuffed or otherwise physically restrained during the initial stop. The defendant understood and responded to the detective's inquiries. The defendant was aware of his right not to volunteer consent.

Nor did the district court commit clear error in rejecting the defendant's argument that the search went beyond the scope of his consent. A reasonable person would interpret the defendant's words and gestures as demonstrating consent to a full search of his person. The defendant's failure to expressly limit the scope of the search or to object or withdraw his consent during the search further demonstrates that the search was within the scope of the defendant's consent.

Finally, even assuming *arguendo* that the defendant did not consent, the search did not violate any of the constitutionally mandated limits of a *Terry* search. Detective Lepore constrained himself to an exploration of the outer surfaces of the defendant's clothing. The detective's express aim was to search for weapons, and the detective did not reach into the defendant's pocket until he felt an object that he immediately recognized to be crack cocaine. The detective's method of squeezing the

defendant's pocket was reasonable in this case, where the defendant was dressed in a baggy sweatshirt. Squeezing the defendant's pocket was necessary for Detective Lepore to ensure that the defendant had not concealed a small weapon such as a razor blade or a knife in his bulky clothing. Thus, as the district court properly concluded, the detective's search was more akin to an "initial limited exploration for arms," and not an attempt to "rummage and seize at will."

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN RULING THAT THE DEFENDANT VOLUNTARILY CONSENTED TO THE SEARCH AND THAT THE SEARCH WAS WITHIN THE SCOPE OF HIS CONSENT

A. Governing Law and Standard of Review

Subject to several delineated exceptions, the Fourth Amendment requires law enforcement officers to obtain a judicial warrant before conducting a search and seizure. *See United States v. Davis*, 326 F.3d 361, 365 (2d Cir. 2003). It is well settled that a search conducted pursuant to a voluntary consent is one of the specifically established exceptions to the warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). To determine whether consent to a search is voluntarily given, a court must examine "the totality of all the circumstances" to ascertain whether the consent "was a product of that individual's free and unconstrained choice, rather than a

mere acquiescence in a show of authority." *United States v. Garcia*, 56 F.3d 418, 422 (2d Cir. 1995) (citations and internal quotation marks omitted); *accord Schneckloth*, 412 U.S. at 226-27. "So long as the police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search." *Garcia*, 56 F.3d at 422 (citing *Schneckloth*, 412 U.S. at 228).

Whether an individual has voluntarily given consent is a fact-based inquiry. *United States v. Peterson*, 100 F.3d 7, 11 (2d Cir. 1996); *United States v. Gandia*, 424 F.3d 255, 265 (2d Cir. 2005) ("The scope of the suspect's consent under the Fourth Amendment is a question of fact, and the government has the burden of proving, by a preponderance of the evidence, that a consent to search was voluntary") (internal quotation marks omitted). "The district court's finding that consent was given voluntarily will not be overturned unless it is clearly erroneous." *Id.* (citing *United States v. Hernandez*, 5 F.3d 628, 632 (2d Cir. 1993)). In reviewing a district court's denial of a motion to suppress, this Court reviews the evidence in the light most favorable to the Government. *See United States v. Bayless*, 201 F.3d 116, 132 (2d Cir. 2000); *see also United States v. Crespo*, 834 F.2d 267, 272 (2d Cir. 1987).

Factors taken into consideration when assessing whether a defendant's "will was overborne" to render consent invalid include, *inter alia*, the age, intelligence, and education level of the defendant; whether the defendant is aware of his right to refuse consent; the length of the detention and the prolonged nature of any questioning; whether the defendant was threatened by any

further action if he denied consent; whether law enforcement officers displayed a weapon; whether the defendant was under any physical restraint; and whether any physical punishment or deprivation occurred. *Schneckloth*, 412 U.S. at 226; *Hernandez*, 5 F.3d at 633 (fact that defendant was not threatened by any further law enforcement action if he denied consent supported finding that consent had been provided voluntarily); *United States v. Marin*, 669 F.2d 73, 83 (2d Cir. 1982) (fact that law enforcement officers did not display weapon to defendant supported finding that consent was voluntary). No single factor is dispositive. *Schneckloth*, 412 U.S. at 226-27. "[I]t is well settled that consent may be inferred from an individual's words, gestures, or conduct." *United States v. Buettner-Janusch*, 646 F.2d 759, 764 (2d Cir. 1981). Consent can be voluntarily given even if a defendant is under arrest. *See Crespo*, 834 F.2d at 271.

Once it has been established that the consent to search was voluntary, the court must ascertain the scope of the consent given. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *accord United States v. Snow*, 44 F.3d 133, 134-35 (2d Cir. 1995). The scope of a search is generally defined by its expressed object, and a suspect can limit the breadth of the consent given. *Jimeno*, 500 U.S. at 251-52. "[A] suspect's failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator that the

search was within the proper bounds of the consent search." *United States v. Jones*, 356 F.3d 529, 534 (4th Cir. 2004); *see United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir. 2003); *United States v. Gordon*, 173 F.3d 761, 766 (10th Cir. 1999); *United States v. Torres*, 32 F.2d 225, 231 (7th Cir. 1994); *United States v. Martel-Martines*, 988 F.2d 855, 858 (8th Cir. 1993).

"Whether the search remained within the boundaries of the consent is a question of fact to be determined from the totality of all the circumstances." *United States v. Espinosa*, 782 F.2d 888, 892 (10th Cir. 1986) (citing *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir. 1978)); *see also United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989); *United States v. Hardin*, 710 F.2d 1231, 1236 (7th Cir. 1983). The trial court's determination on whether the search comported with the scope of consent will be upheld unless it is clearly erroneous. *Espinosa*, 782 F.2d at 892; *Blake*, 888 F.2d at 798.

B. Discussion

The district court did not commit clear error in concluding that the defendant voluntarily consented to the search that led to Detective Lepore's discovery of crack cocaine. A number of factors present here demonstrate that the district court properly concluded that the defendant's consent was a product of the defendant's "free and unconstrained choice, rather than a mere acquiescence in a show of authority." *Garcia*, 56 F.3d at 422 (internal quotation marks omitted).

First, the defendant was 25 years old and speaks and understands the English language fluently. He was of sufficient age and intelligence to understand the situation and to consent to the search. *See United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (consent held to be voluntary because, *inter alia*, "respondent, who was 22 years old and had an 11th-grade education, was plainly capable of a knowing consent").

Second, the record is devoid of any facts suggesting that the defendant had been coerced into providing consent. The officers had only briefly detained the defendant at the time he gave consent. *See Schneckloth*, 412 U.S. at 226. There is no evidence that the officers subjected the defendant to repeated or prolonged questioning, *see Schenckloth*, 412 U.S. at 226, or that the defendant was threatened by further law enforcement action if he refused consent, *see Hernandez*, 5 F.3d at 633. There is no evidence that the officers had physically restrained the defendant, had displayed a weapon to the defendant, or had spoken in anything but a conversational tone with the defendant at the time of consent. *Marin*, 669 F.2d at 83.

Third, the defendant invited the search, raising his arms up in the air and telling Detective Lepore to "check him." JA 78. That invitation further demonstrates that consent was voluntary. *See United States v. Glover*, 957 F.2d 1004, 1007, 1013 (2d Cir. 1992) (consent found to be voluntary where defendant threw bag on desk and told officers to search it); *United States v. Brown*, 102 F.3d 1390, 1397 (5th Cir. 1996) (consent found voluntary

where motorist stepped out of his van and told officers to "go ahead" and search the van), *overruled on other grounds*, 161 F.3d 256 (5th Cir. 1998).

Fourth, the evidence demonstrates that the defendant was aware of his right to refuse consent. *See Schneckloth*, 412 U.S. at 227. The defendant had been convicted previously of assault and had been stopped and searched by the police on prior occasions. JA 165. The defendant's prior criminal record and his past experiences with law enforcement search procedures support the district court's proper conclusion that the defendant was aware of his right to refuse consent. *See United States v. Calvente*, 722 F.2d 1019, 1023 (2d Cir. 1983) (conclusion that consent was voluntary was supported by the fact that the defendant had been convicted on two previous occasions and is thus not a "'newcomer to the law'") (quoting *United States v. Watson*, 423 U.S. 411, 424-25 (1976)); *United States v. Gonzales*, 79 F.3d 413, 421 (5th Cir. 1996) (consent to search held to be voluntary even though defendant was not informed of right to refuse where, *inter alia*, the defendant had prior criminal record and experience with the law).

The confluence of all the aforementioned factors demonstrates that the district court did not commit clear error in concluding that the defendant voluntarily consented to the search of his person.[2]

---

[2] The defendant cites *People v. Springer*, 460 N.Y.S. 2d 86 (N.Y. App. Div. 1983), but that case is neither binding on this Court nor persuasive authority. In *Springer*, a New York (continued...)

[2] (...continued)
state appellate court case decided over a strong dissent, there was arguably some degree of law enforcement coercion unlike the present case. There, the court found that the defendant's consent was not voluntary because, *inter alia*, (1) there were as many as "five or six patrol cars containing up to seven or eight officers" and the defendant's "automobile was blocked on both sides by patrol cars;" (2) the defendant verbally protested the officers' initial pat down before acquiescing to the search; (3) the defendant "testified that the officer told him to open the door of his car so that he could search it and that he acquiesced to the search on account of fear, as he was alone and surrounded by many police officers;" (4) the defendant was not a native of the United States with only a seventh-grade education; and (5) there was no indication "that defendant ever had any prior experience with law enforcement officers." 460 N.Y.S. 2d at 88-91. Those factors were not present in this case. There was only one marked patrol car in the vicinity, only Detective Lepore was questioning the defendant, and at most three additional officers were present when the defendant consented to the search. *See Schneckloth*, 412 U.S. at 220 (valid consent to search where one officer questioned the defendant and two additional officers arrived thereafter). Nothing in the record suggests that the defendant's vehicle was blocked in by patrol cars. The defendant was not alone; his brother was present and several additional members of the Westsiders gang were nearby. The record is devoid of any indication that the defendant protested Detective Lepore's pat down or that the defendant acquiesced to the search on account of fear; rather, he invited the search by raising his arms and telling Detective Lepore to "check him." Moreover, the defendant was a native of the United States and had prior
(continued...)

The district court also did not commit clear error in concluding that Detective Lepore's search was within the scope of the defendant's consent. JA 164-67. A reasonable person would have understood that the defendant consented to a search beyond a *Terry* pat down. *Jimeno*, 500 U.S. at 251.

The defendant's words and physical gestures demonstrate that he was consenting to a full search of his person. After requesting the defendant to step out of his vehicle, Lepore searched the driver's side area for weapons and found none. JA 77, 157. Lepore then turned to the defendant and asked, "Do you have any weapons on you?" JA 77-78, 157. The defendant responded, "No, you can check me," and voluntarily raised his arms in the air. JA 78, 157.

The word "check" carries a common meaning to the reasonable person. The dictionary definitions include: "to test, measure, verify, or control by investigation, comparison, or examination;" "to investigate in order to determine the condition, validity, etc. of something;" "to prove to be accurate, in sound condition, etc. upon examination." Webster's New World Dictionary 238 (3d ed. 1994). Under the dictionary definition, the term "check" implies something more than a superficial examination. It entails testing, measuring, verifying,

---

[2] (...continued)
experiences with law enforcement officers. For all these reasons, *Springer* is inapposite to the facts presented here.

investigating, and proving the validity of something, which, in this case, is the validity of the defendant's statement that he did not have any weapons on him. A reasonable person would thus understand the defendant's use of the word "check," coupled with his gesture of raising his arms, as inviting Detective Lepore to do whatever was necessary to investigate and verify the accuracy of the defendant's statement. Based on the foregoing, the reasonable interpretation of the defendant's words and actions is that he consented to a full search of his person. Detective Lepore testified, and the district court correctly found, that he was looking for weapons when he felt an object that he immediately recognized to be crack cocaine. JA 79, 157. Thus, Lepore's search was well within the scope of the defendant's consent when he discovered the crack cocaine under the "plain feel" doctrine. *See Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993).

Moreover, the defendant did not place any explicit limitation on the scope of the search. *See Jimeno*, 500 U.S. at 252. The defendant did not tell Detective Lepore, "you can pat me down," or "frisk me." The defendant has acknowledged his experience with the criminal system. *See* Def. Br. 26 ("It is simply not reasonable to presume that the defendant, in light of his experience with the criminal system, would have consented to a search which he recognized exceeded the bounds of a traditional patdown."). Given his self-professed knowledge of the difference between a traditional pat down and a full search, the defendant, had he intended for the scope of his

consent to encompass merely a pat down, could have expressed that limitation to Lepore.

Lastly, the defendant did not object to the scope of Detective Lepore's search. "[A] suspect's failure to object (or withdraw his consent) when an officer exceeds limits allegedly set by the suspect is a strong indicator that the search was within the proper bounds of the consent search." *Jones*, 356 F.3d at 534. Had the defendant truly intended to limit his consent to a traditional pat down, he would have objected when, as he now alleges, Detective Lepore's search went beyond that limitation. The defendant's failure to object or withdraw his consent demonstrates that the district court correctly concluded that Lepore's search was within the scope of consent.

United States v. Lemons, 153 F. Supp. 2d 948 (E.D. Wis. 2001), to which the defendant cites, is inapposite. In *Lemons*, the district court found that the scope of consent was limited to a pat down on grounds, *inter alia*, that the arresting officer specifically requested a pat down search of the defendant. *Id.* at 963 (officer "clearly asked only for a pat-down search"). In contrast, Detective Lepore made no comment that limited the scope of his search to a pat down.[3] In that regard, the facts of this case are

---

[3] The defendant's conclusory argument that the phrase "check for weapons" is indistinguishable from the phrase "pat down," *see* Def. Br. 25, should be rejected. As discussed earlier, the objectively reasonable interpretation of the phrase "you can check me" is that the defendant consented to the (continued...)

analogous to another case which the defendant cites, *United States v. Jahkur*, 409 F. Supp. 2d 28 (D. Mass. 2005). There, the district court found that the defendant consented to a search of his person when he raised both arms and answered "no" to the officer's question of whether the defendant had any weapons on him. *Id.* at 30, 32 ("Because the Court concludes that the search of Jahkur was justified by his consent, it need not address whether the search was also reasonable under *Terry*").[4]

---

[3] (...continued)
officer taking the steps necessary to verify the accuracy of the defendant's statement — that he did not have weapons — by means of a full search of his person.

[4] Neither *United States v. Jackson*, 151 F.3d 1031, 1998 WL 386119 (4th Cir. June 19, 1998) (unpublished per curiam opinion) nor *United States v. Wilson*, 895 F.2d 168 (4th Cir. 1990) (per curiam), *see* Def. Br. 24, stand for proposition cited by the defendant. In *Jackson*, the Fourth Circuit, in an unpublished decision, did not address the issue of the defendant's scope of consent, much less hold that the defendant's actions limited the scope of consent to a pat down. Rather, the officer in *Jackson* asked the defendant if he could "search" the defendant, obtained the defendant's consent, and then chose to conduct a pat down of the defendant's person. 1998 WL 386119, at *1. The decision did not suggest that the officer was precluded from other techniques beyond a pat down. Similarly, in *Wilson*, the Fourth Circuit did not hold that the defendant's scope of consent was limited to a pat down. Rather, it simply held that the defendant validly consented to the pat down search that an agent actually performed when, in response to the agent's request to "pat him down, [the
(continued...)

II. THE SEARCH DID NOT OFFEND THE PROVISIONS OF *TERRY v. OHIO*

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 detain an individual briefly for questioning if the officer had 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, 145 (1972). "On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an immediate response." *Id.* "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146. 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*

---

[4] (...continued)
defendant] responded by shrugging his shoulders and raising his arms." 895 F.2d at 172.

generally United States v. Arvizu, 534 U.S. 266 (2002) (discussing *Terry*).

"Under *Terry* a police officer is free to approach a person in public and ask questions while taking objectively reasonable steps to protect himself and others in view of the dangers that the officer's judgment and experience indicate might exist." *United States v. Zabala*, 52 F. Supp. 2d 377, 381 (S.D.N.Y. 1999). Accordingly, "a reasonable search for weapons for the protection of the police officer [is permissible], where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Terry*, 392 U.S. at 27. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*

In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court, while extending *Terry* to apply to a protective area search of a vehicle to uncover weapons, reasoned that police investigations at close range, such as those involved during car stops, leave officers particularly vulnerable "because a full custodial arrest has not been effected, and the officer must make a 'quick decision as to how to protect himself and others from possible danger . . . .'" *Long*, 463 U.S. at 1052 (emphasis deleted) (quoting *Terry*, 392 U.S. at 28). Accordingly, a protective pat down of an individual for weapons during an investigative stop is permitted for officer safety. That pat down "must be limited to that which is necessary for the

discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26.

A *Terry* search is not limited to pat downs. *See United States v. Casado*, 303 F.3d 440, 449 n.5 (2d Cir. 2005) ("[W]e agree with the general principle that a patdown is not the only type of search authorized by *Terry*, and that there are circumstances in which a patdown is not required."). "[C]ourts in other situations have allowed weapons searches that take forms other than a patdown, particularly where a weapon might be hidden somewhere close by, but not on the suspect's person . . . or where a patdown is unlikely to be effective . . . ." *Id.* at 449 n.4. "The assessment of the reasonableness of each search was made on 'the facts of the case before' each court." *Id.* (quoting *Terry*, 392 U.S. at 15); *see also United States v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996) ("[T]he district court erroneously concluded that a patdown frisk was the only permissible method of conducting a *Terry* search. This reasoning is incorrect because the reasonableness of a protective search depends on the factual circumstances of each case. . . . [A] patdown frisk is but one example of how a reasonable protective search may be conducted."); *United States v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979) (". . . *Terry* does not limit a weapons search to a pat-down.").

While officers are prohibited from "continued exploration of [a suspect's] pocket after having concluded that it contained no weapon," *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993), they are permitted to squeeze an item "*to determine in the first instance* whether an item is

a weapon." *Lemons*, 153 F. Supp. 2d at 955 (emphasis in original). "[S]uch a precautionary squeeze is well within the scope of *Terry*." *United States v. Mattarolo*, 209 F.3d 1153, 1158 (9th Cir. 2000).

As long as an officer stays within the scope of *Terry*, the officer may seize, without warrant, weapons and any detected contraband. *See Long*, 463 U.S. at 1050. During a *Terry* pat down, detection of contraband may validly occur under the "plain feel" extension of the plain view doctrine. *See Dickerson*, 508 U.S. at 375-76; *United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991); *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981). Therefore, "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons." *Dickerson*, 508 U.S. at 375.

In reviewing the defendant's challenge that Detective Lepore's search exceeded the limits of a *Terry* pat down, this Court construes the evidence in the light most favorable to the Government, reviews the district court's factual findings for clear error and its legal conclusions *de novo*. *United States v. Garcia*, 339 F.3d 116, 118-19 (2d Cir. 2003) (per curiam).

B. Discussion

A review of the circumstances surrounding the stop of the defendant demonstrates that Detective Lepore's precautionary squeeze of the defendant's pocket was reasonable and did not exceed the parameters of *Terry*.

First, Lepore had a well-founded concern that the defendant was carrying a weapon. The defendant was a known member of the Westsiders, a gang associated with violence and shootings. JA 56, 154. The defendant had been convicted of assault. JA 73, 156. It was dark, and several other members of the Westsiders were nearby, including the defendant's brother, who was seated in the passenger seat of the defendant's vehicle. JA 60-61, 69-72, 74, 155-56. The defendant behaved in a suspicious manner: not responding to questions, refusing to look directly at Lepore, and tucking his feet together in an unusual posture towards the left of the brake pedal. JA 74-77, 156-57. *See Holeman v. City of New London*, 425 F.3d 184, 192 (2d Cir. 2005) (holding that officers had reasonable suspicion to search passenger for weapons where "[i]n the middle of the night, the police were in a high crime area with a convicted narcotics felon who was acting suspiciously").

Second, Lepore's primary purpose in searching the defendant was to ensure officer safety and to locate weapons. JA 79, 89, 157, 163. The defendant was wearing a bulky sweatshirt. JA 79, 157, 163. The district court concluded that in this situation an open-hand pat down could miss the possibility that the defendant was

carrying a small weapon, such as a razor blade or knife. *Id.* Under these circumstances, Lepore's precautionary squeeze to determine whether the defendant was concealing a small weapon in his bulky sweatshirt was reasonable and well within the confines of a *Terry* search. *See Casado*, 303 F.3d at 449 n.5 ("a patdown is not the only type of search authorized by *Terry*, and that there are circumstances in which a patdown is not required"); *Lemons*, 153 F. Supp. 2d at 955 (officers are permitted to squeeze an item "*to determine in the first instance* whether an item is a weapon") (emphasis in original); *Mattarolo*, 209 F.3d at 1158 ("a precautionary squeeze is well within the scope of *Terry*"). Lepore did not reach into the defendant's pockets or otherwise use the stop as a basis to "rummage and seize at will." *Dickerson*, 508 U.S. at 378 (internal quotation marks omitted). Rather, he constrained himself to an exploration of the outer surfaces of the defendant's clothing as an "initial limited exploration for arms." *Casado*, 303 F.3d at 447. The search was an intrusion "reasonably designed" to discover what weapons, if any, might be concealed in the pocket of the defendant's bulky sweatshirt. *Casado*, 303 F.3d at 444 (internal quotation marks omitted).

Third, Lepore did not improperly slide or manipulate the defendant's pocket after determining that it contained no weapon. JA 94; *see Dickerson*, 508 U.S. at 378. Rather, while he was performing a precautionary squeeze on the defendant's sweatshirt to locate weapons, he felt an object in the defendant's pocket that he immediately recognized as crack cocaine. JA 78-79, 94, 157, 163. Given that the nature of the contraband was "immediately

apparent," Lepore was permitted to seize the crack cocaine under the "plain feel" extension of the plain view doctrine. *Dickerson*, 508 U.S. at 375-76; *see Salazar*, 945 F.2d at 51; *Ocampo*, 650 F.2d at 429.

The defendant's attempt to draw a bright-line distinction between open-hand pat down and a precautionary squeeze, *see* Def. Br. 13-17, ignores both the realities of the facts in this case and this Court's prior conclusion that "there are circumstances in which a patdown is not required." *Casado*, 303 F.3d at 449 n.5. A *Terry* search is not, as the defendant asserts, "axiomatically about an open-handed patdown of the suspect's outer clothing." Def. Br. 15. Nor is there a requirement that "officers conducting a *Terry* search must begin with an open-handed search." Def. Br. 16. Rather, the case law is clear that the hallmark of a *Terry* search, as with all Fourth Amendment analysis, is reasonableness. *Terry*, 392 U.S. at 9; *see also United States v. McCargo*, 464 F.3d 192, 198 (2d Cir. 2006) ("The scope of a *Terry* stop must therefore be reasonable, but the methods police used need not be the least intrusive available") (citing, *inter alia*, *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976) as "rejecting least-restrictive-means analysis"). The overarching inquiry is whether the search in question was a reasonable and limited exploration for weapons. *See id.*; *Casado*, 303 F.3d at 447, 449 n.4; *see, e.g., Baker*, 78 F.3d at 138 ("[T]he reasonableness of a protective search depends on the factual circumstances of each case. . . . [A] patdown frisk is but one example of how a reasonable protective search may be conducted"); *Thompson*, 597 F.2d at 191 (". . . *Terry* does not limit a

weapons search to a pat-down"). That inquiry must consider the "'facts of the case before' each court." *Casado*, 303 F.3d at 449 n.4 (quoting *Terry*, 392 U.S. at 15). As detailed above, Lepore's decision to conduct a precautionary squeeze of the defendant's outer clothing was reasonable to assist the detective in discovering any small weapons that the defendant could be concealing in his bulky sweatshirt.

Furthermore, the defendant misses the mark in asserting that Lepore "habitually engages in . . . constitutionally deficient searches," Def. Br. at 16, and that Lepore had "motivations for conducting his search" other than searching for weapons, *id.* at 18. Detective Lepore's subjective intentions are irrelevant for purposes of *Terry* analysis. *See United States v. Vargas*, 369 F.3d 98, 101 (2d Cir. 2004) ("the officers' subjective intent does not calculate into the [Fourth Amendment] analysis"); *Bayless*, 201 F.3d at 133 ("the subjective intentions or motives of the officer making the stop are irrelevant"). Rather, Fourth Amendment analysis requires only that officers' actions be objectively reasonable. *See Whren v. United States*, 517 U.S. 806, 811-12 (1996); *United States v. Miller*, 430 F.3d 93, 98 (2d Cir. 2005) ("At the core of *Terry*, *Long*, and *Buie* is the common understanding that the Fourth Amendment's reasonableness requirement is sufficiently flexible to allow officers who have an objectively credible fear of danger to take basic precautions to protect themselves"). For all the reasons discussed earlier, Detective Lepore's precautionary squeeze of the defendant's bulky sweatshirt was an objectively reasonable, limited exploration for

small weapons that an open-hand pat down would not otherwise detect.

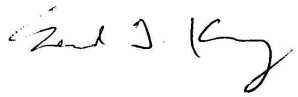
CONCLUSION

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

Dated: February 7, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

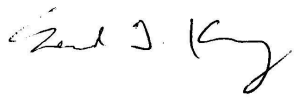


EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,013 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



EDWARD T. KANG
ASSISTANT U.S. ATTORNEY