UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

- against -

JULIAN ODEN,

Defendant.
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MEMORANDUM AND ORDER

16 CR 472 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Defendant Julian Oden ("Oden") was charged in a one-count indictment with possession of a firearm at a place he knew or had reasonable cause to believe was a school zone in violation of 18 U.S.C. § 922(q)(2)(A). Oden was arrested on April 27, 2016, after a woman called 911 to report that a man possessed a gun near the intersection of West 165th Street and Anderson Avenue in the Bronx. Three officers from the New York City Police Department (the three "Officers" and the "NYPD") responded to a radio message from a police dispatcher alerting them to a possible firearm crime. Identifying Oden near the aforementioned intersection as the individual described in the call, the Officers approached him and performed a stop and frisk, recovering an inoperable gun from Oden's backpack. Oden now moves to suppress the firearm and statements he made during and after the investigative stop. For the reasons stated herein, we grant the motion to suppress the firearm. The

remainder of the motion has been mooted by the Government's decision to forego the use during its case in chief of any of the challenged statements made by Oden.

BACKGROUND[1]

On August 4, 2016, Oden filed this motion to suppress. "[A]n evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." United States v. Watson, 404 F.3d 163, 167 (2d Cir. 2005) (internal quotation marks omitted). Both sides agree that there are no disputed material facts with respect to the legality of the investigative stop that resulted in seizure of the firearm. Neither side seeks an evidentiary hearing on the motion to suppress physical evidence of the firearm. The Court independently sees no reason to hold a hearing. Accordingly, we decide the issue based on the uncontested facts set forth in the parties' submissions.[2]

[1] In this Memorandum and Order, citations to "GX-___" are citations to exhibits attached to the Government's Opposition to the Defendant's Motion to Suppress ("G. Opp."); citations to "D. Aff." are citations to Oden's Affidavit dated July 29, 2016, submitted in support of the motion to suppress; and citations to "Complaint" or "Compl." are citations to the Sealed Complaint filed June 23, 2016.

[2] Oden initially sought an evidentiary hearing to the extent that there were factual disputes as to the circumstances surrounding the investigative stop and any statements he subsequently made. The government responded that there was no basis for a hearing because Oden did not dispute any material facts. The government also explained that it was not seeking to admit at trial any un-Mirandized statements made by Oden during the stop.

I. The 911 Call

At approximately 5:23 p.m. on Wednesday, April 27, 2016, an unknown female (the "911 Caller") placed a call to 911 (the "911 Call") to report a "guy near Anderson and 165th. He has on a bright orange sweatshirt and an army bookbag. He has a gun and he's threatening to [inaudible]. Please stop him." GX-A (Audio of 911 Call); see GX-C (Sprint Report). In response to a series of questions from the 911 operator, the 911 Caller described the individual in question as a Hispanic, light-skinned male wearing a "bright orange sweatshirt, and army pants, and an army bookbag." GX-A. She confirmed the location as "165th and Anderson," "near the Yankee Stadium," and stated that the man was "walking around." Id. The man, whom she said she did not know, was "short" and "skinny," with hair that looked "all crazy right now." Id. When asked how old he appeared to be, she answered: "I don't know, a teenager." Id.

The operator asked her what the man had said, and the 911 Caller responded that "he's going to shoot people. He's talking about shooting somebody over here." Id. Near the conclusion of the call, the 911 Caller confirmed that she had not actually

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Oden now agrees that there are no disputed material facts with respect to the legality of the stop. At the same time, he contends that such disputes remain with respect to statements he made at the police precinct following his arrest. Specifically, the parties dispute whether Oden waived his Miranda rights at the police precinct. The government, however, has now advised that it no longer seeks to introduce during its case in chief any post-Miranda statements made by Oden at the precinct. Accordingly, so much of the motion as seeks to suppress Oden's statements is moot.

seen a firearm, but indicated that it was possibly in the man's bookbag. When asked the phone number she was calling from, she answered "I don't even know"; after the operator again tried to confirm the intersection, the call was disconnected. Id.

II. The Radio Run

Police dispatchers attempted to contact patrol units via radio to respond to the 911 Call (the "Radio Run"). The NYPD radio dispatcher reported a "10-10 with a firearm, Anderson and West 165. It's a male Hispanic, light skin, wearing orange sweatshirt, an army bookbag." GX-B (Audio of Radio Run). It is undisputed that "10-10" is NYPD radio code for a "possible crime." After repeating the initial description, the dispatcher added: "teenager, possibly, thinks he's by Yankee Stadium, short, skinny." Id. The dispatcher was asked if the individual was "by Yankee Stadium or 165 and Anderson," to which she responded: "West 165 to Anderson, . . . it says the perp was walking around and around that location." Id. Someone again sought to clarify the address, and the dispatcher noted that "the location came up Anderson Avenue to West 165, it says he's walking by Yankee Stadium as well." Id.

III. The Stop

The three Officers were driving in an unmarked car on University Avenue in the Bronx when they received the Radio Run. Compl. ¶¶ 3(a), (b). The Officers, who were in uniform, began

to drive southbound on Anderson Avenue towards 165th Street. One of them observed a male, later identified as Oden, standing near 165th street at 1050 Anderson Avenue ("1050 Anderson") and wearing an orange sweatshirt and an army-fatigue bag on his back. Id. ¶¶ 3(a), (c). Two of the Officers got out of the car and approached him. According to the Complaint, the two Officers observed that Oden had blood-stained bandages on his hands. Id. ¶ 3(d).[3] As they approached Oden, the Officers indicated that they were going to conduct a frisk of his person and walked him towards a wall in the courtyard of 1050 Anderson. Id. ¶ (3)(e).

During the frisk, Oden repeatedly removed his hands from the wall and attempted to turn around. He was warned that he would be handcuffed if he did not cooperate. As an Officer frisked the outside of Oden's backpack, Oden tensed and attempted to turn around and position himself between the Officer and the backpack. Id. ¶ 3(f). He was handcuffed, and the Officer subsequently opened the backpack and recovered the firearm, later discovered to be inoperable. Id. ¶¶ 3(g), 4.

There is no suggestion that Oden ran or attempted to run from the Officers, or that he appeared evasive or nervous prior to his being stopped. See Oden Aff. ¶ 6.

[3] Oden disputes that the Officers observed bandages before approaching him. As discussed below, this dispute is immaterial to our conclusion.

DISCUSSION

Because the police stopped Oden and searched his bag without a warrant, the government bears the burden of establishing that the Officers' conduct fell within an exception to the warrant requirement. See, e.g., Arkansas v. Sanders, 442 U.S. 753, 759-60 (1979); United States v. Echevarria, 692 F. Supp. 2d 322, 332 (S.D.N.Y. 2010). The parties' dispute centers on whether the Officers had reasonable suspicion to stop Oden.

I. Reasonable Suspicion Standard

Under the rule of Terry v. Ohio, 392 U.S. 1 (1968), police officers may briefly detain an individual for questioning if, at the time the stop is made, they have a reasonable suspicion that criminal activity is afoot, and may frisk the individual if they reasonably believe he is armed and dangerous. United States v. Elmore, 482 F.3d 172, 179 (2d Cir. 2007). To sustain a stop, police "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion [on a citizen's liberty interest]." Terry, 392 U.S. at 21. Moreover, the stop must be "justified at its inception," id. at 20, and thus events occurring after a stop is effectuated, such as Oden's non-cooperation during the frisk, cannot contribute to the reasonable-suspicion analysis.

When evaluating reasonable suspicion, courts must consider the "totality of the circumstances," Alabama v. White, 496 U.S. 325, 330 (1990) (internal quotation marks omitted), to "see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing," United States v. Arvizu, 534 U.S. 266, 273 (2002) (internal quotation marks omitted). This assessment must be conducted "'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.'" United States v. Colon, 250 F.3d 130, 134 (2d Cir. 2001) (quoting United States v. Bayless, 201 F.3d 116, 133 (2d Cir. 2000)).

Finally, under the "collective knowledge" doctrine, courts may impute the knowledge of a law enforcement officer initiating or involved with the investigation to officers actually conducting the stop or search. Colon, 250 F.3d at 135. However, the Second Circuit has held that the doctrine does not extend to a civilian 911 operator lacking the training, responsibility, and authority to make a determination of reasonable suspicion. Id. at 137.[4] Accordingly, the knowledge of 911 operators and dispatchers may be imputed to investigating officers in the field only where the operator or dispatcher is a

[4] After this motion was fully briefed, the Second Circuit again declined to extend the collective knowledge doctrine in the Terry stop context, this time to situations where there was no evidence that an officer working closely at the scene with the officer who conducted the search communicated his or her suspicions to the searching officer. See United States v. Cunningham, --- F.3d ----, No. 14-4425, 2016 WL 4536516, at *7 & n.8 (2d Cir. Aug. 31, 2016).

law enforcement officer or has received appropriate training to evaluate information for reasonable suspicion. See United States v. Peterson, No. 12 CR 409 (PAE), 2012 WL 4473298, at *8 & n.7 (S.D.N.Y. Sept. 28, 2012), aff'd, 559 F. App'x 92 (2d Cir. 2014); Hickey v. City of New York, No. 01 Civ. 6506 (GEL), 2004 WL 2724079, at *8 (S.D.N.Y. Nov. 29, 2004), aff'd, 173 F. App'x 893 (2d Cir. 2006).

Nothing in the record reflects whether either the 911 operator or the police dispatcher in this case was a law enforcement officer or had the relevant training. Notably, the 911 Call contained certain details that the Radio Run lacked, most significantly the 911 Caller's assertion that the subject of the call had said he was going to "shoot people."

The government, which has the burden of proving reasonable suspicion, does not appear to argue that information conveyed to the 911 operator may be imputed to the Officers. Although it repeatedly refers to the 911 Caller's statement that Oden had said he was going to shoot people, the government does not mention that reported threat in listing the undisputed factors supporting the Officers' decision to act "reasonably in conducting a limited investigative stop." See G. Opp. at 12-13. We thus proceed on the basis that the evaluation of reasonable suspicion depends solely on the information relayed to the

Officers through the Radio Run and the Officers' observations prior to the stop.[5]

II. Reliability of the Anonymous Tip

"Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." White, 496 U.S. at 330. It can thus arise from "information supplied by another person" as long as that information has sufficient "indicia of reliability." Adams v. Williams, 407 U.S. 143, 147 (1972).

The parties agree that this motion is governed by the Supreme Court's framework for evaluating the reliability of anonymous tips. "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity.'" Florida v. J.L., 529 U.S. 266, 270 (2000) (citation omitted) (quoting White, 496 U.S. at 329). "[H]owever, there

[5] The government has also included a "Sprint Report" associated with the 911 Call and the Radio Run. GX-C. The Sprint Report states that an individual was "WALKING AROUND --- SAYING HE IS GOING TO SHOOT PEOPEL [sic]," and "GUN IS POSSIBLY IN THE ARMY BOOK BAG." Id. However, the government has not provided us with any indication of who inputted the information in the Sprint Report or when it was reviewed and by whom, nor are those facts apparent from the face of the document. There is nothing in the record to suggest that either the police dispatcher--even assuming her knowledge could be imputed to the Officers--or any of the Officers reviewed the information contained in the Sprint Report prior to stopping Oden. Indeed, given that a tipper's statements that a suspect has said he intends to shoot people would likely be significant to officers tasked with calibrating an appropriate police response and ensuring the safety of themselves and any bystanders, we presume that dispatchers are incentivized to convey such statements to responding officers if made aware of them.

are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." J.L., 529 U.S. at 270. As recognized by the Second Circuit, "it is useful to think of known reliability and corroboration as a sliding scale," Elmore, 482 F.3d at 181, and thus certain circumstances evincing a higher degree of reliability "require[] a lesser showing of corroboration," United States v. Simmons, 560 F.3d 98, 105 (2d Cir. 2009).

For instance, in White, an anonymous caller to the police accurately foretold the defendant's future transportation of drugs during a particular timeframe, to a certain place, in a certain type of vehicle. See 496 U.S. at 327, 332. The officers' corroboration of the innocent details predicted by the tip made it sufficiently reliable. Because the tip accurately predicted future behavior, it demonstrated "a special familiarity with [the defendant's] affairs," thereby suggesting that the tipper may have had "access to reliable information about that individual's illegal activities." Id. at 332.

White may be contrasted with J.L., where an anonymous caller reported that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. See J.L., 529 U.S. at 268. The content of the tip "neither explained how [the caller] knew about the gun nor supplied any

basis for believing he had inside information about J.L." Id. at 271. The Supreme Court rejected the argument that the tip was reliable because it accurately described the suspect's visible attributes and location: although corroboration of such readily observable details would "help the police correctly identify the person whom the tipster means to accuse," it would "not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." Id. at 271-72.

Most recently, in Navarette v. California, the Court held that an anonymous 911 call reporting that a "Silver Ford 150 pickup" with a "Plate of 8-David-94925" had run the caller off the highway "bore adequate indicia of reliability for the officer to credit the caller's account," and made it reasonable for the officer to execute a stop on suspicion of drunk driving. 134 S. Ct. 1683, 1686, 1688, 1692 (2014). Acknowledging that it was a "close case," the Court emphasized that (1) the tip's content meant that the caller "necessarily claimed eyewitness knowledge of the alleged dangerous driving"; (2) the timeline of events suggested that the tip was made "contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event"; and (3) the caller used

the 911 system, which "provide[s] some safeguards against making false reports with immunity." Id. at 1689-90, 1692.

In light of the above authority, we believe that the 911 Call did not justify the stop of Oden. The tip as conveyed to the Officers "neither explained how [the 911 Caller] knew about the gun nor supplied any basis for believing [she] had inside information about [Oden]." J.L., 529 U.S. at 271.[6] The description of Oden included his approximate location and relatively distinctive apparel and thus provided the Officers with an increased likelihood of stopping the subject of the tip. Nevertheless, "[i]dentifying 'a determinate person,' a task made easier by [Oden likely] being the only individual matching the description, does not bolster the tip's reliability 'in its assertion of illegality.'" United States v. Freeman, 735 F.3d 92, 100 (2d Cir. 2013) (quoting J.L., 529 U.S. at 272). Courts in this Circuit have frequently concluded that anonymous 911 calls reporting that an individual of a particular race wearing certain clothing at a particular location possessed a gun lacked sufficient indicia of reliability where the only aspects of the tip corroborated by officers' personal observations were the subject's description and whereabouts. See Freeman, 735 F.3d at 94-95, 99-100 (tip described black male wearing white doo-rag,

[6] In fact, the 911 Caller reported that she had not seen the gun, although she indicated that she thought it was possibly in Oden's backpack.

black hat, and white t-shirt standing on particular corner); United States v. Muhammad, 463 F.3d 115, 118-19, 122-23 (2d Cir. 2006) (tip described black male in white sweat suit riding bicycle west on particular street; nevertheless, Terry stop supported because of additional factor of officers' observation of suspect's attempt to flee); Colon, 250 F.3d at 132 (tip as relayed to police described Hispanic male wearing red hat with red leather jacket at night club); United States v. Gonzalez, 111 F. Supp. 3d 416, 428-31 (S.D.N.Y. 2015) (tip described heavyset Hispanic man with American flag t-shirt near certain intersection; nevertheless, Terry stop supported by additional factor of officers' observation of bulge in sweatpants pocket causing pants to sag).

Relying on Navarette, the government stresses that the tip in this case reported that the suspect was "walking around" 165th and Anderson and described his clothes and hair. Further, the Officers stopped Oden near that location approximately nine minutes after the 911 Call was made. As a result, the government argues, the Officers could reasonably believe that the 911 Caller was reporting events as she was perceiving them.

However, in emphasizing "eyewitness knowledge," contemporaneity, and excited reactions to startling events as factors enhancing the reliability of an anonymous tip, the Navarette Court was assessing a tip where the informant claimed

to be an actual witness to recently observed wrongdoing. See 134 S. Ct. at 1689 ("By reporting that she had been run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving." (emphasis added)); id. (distinguishing J.L. and White because the timeline surrounding the driver's tip suggested that it was "contemporaneous with the observation of criminal activity"); see also Illinois v. Gates, 462 U.S. 213, 234 (1983) (informant's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case"). A tip must be "reliable in its assertion of illegality," J.L., 529 U.S. at 272, and under Navarette, it is the observation and contemporaneous reporting of possible unlawful activity that "lends significant support to the tip's reliability," 134 S. Ct. at 1689. Indeed, the Court in Navarette highlighted this point of contrast with J.L., where the tip "provided no basis for concluding that the tipster had actually seen the gun." Id.

Although the Officers were informed that someone had claimed that the suspect "was walking around" 165th and Anderson and was wearing certain clothes and their stop corroborated those details, the Officers received no information to establish the tipper's basis of knowledge with respect to Oden's

possession of a gun. Upon locating Oden, they did not observe him carrying a gun. Thus, while the Officers could reasonably assume that the tipper had recently seen Oden, we do not think that such an assumption would meaningfully distinguish this case from J.L., where police were able to corroborate the claim that the suspect was wearing a plaid shirt and standing at a particular bus stop. See also White, 496 U.S. at 332 (distinguishing between "'details relating . . . to easily obtained facts and conditions existing at the time of the tip'" and "'future actions of third parties ordinarily not easily predicted'" (quoting Gates, 462 U.S. at 245)); Freeman, 735 F.3d at 100 (rejecting conclusion that caller's description of individual as "walking east on Burke Avenue" imbued tip with greater reliability).

As the government argues, the 911 Caller's use of the 911 system, which permitted her call to be recorded and the number from which she called to be traced, is an "indicator of veracity," Navarette, 134 S. Ct. at 1689. Even so, the Navarette Court stated that it did not intend to "suggest that tips in 911 calls are per se reliable." Id. at 1690. Only when taken together with other evidence of the reliability of the driver's tip--evidence which, as discussed above, is not present here--did use of 911 justify the officer's reliance on the information conveyed in the tip. Id. Other than a logged phone

number, the Officers here did not have any information about the source of the tip such that they could conclude that the tipper had enabled them "to identify her and track her down later to hold her accountable if her tip proved false," Elmore, 482 F.3d at 182.[7] For instance, the Officers were not provided with a location where the tipper could be found in the future. We do not think that the use of the 911 system alone suffices to make the tip in this case reliable.

In addition to defending the reliability of the tip, the government presents two additional factors it argues justified the stop. First, it contends that the necessary level of corroboration of an anonymous 911 call is lowered when the caller reports an ongoing emergency. In J.L., the Supreme Court declined to adopt a "firearm exception" to its established reasonable-suspicion analysis. 529 U.S. at 272-73. The Second Circuit has held, however, that an "anonymous 911 call reporting an ongoing emergency is entitled to a higher degree of

[7] There is some reason to believe that the 911 Caller did not wish to be identified. During the Radio Run, the dispatcher made multiple attempts to reach her at the number logged by the 911 system, but there was no answer. The recording of the Radio Run features, prior to someone announcing "one male stop" at "1050 Anderson," two dialing attempts that resulted in the dispatcher reporting "no answer on your callback." GX-B. The recording is unclear as to whether these calls were to the 911 Caller. After the announcement of the stop, two additional dialing attempts are audible; both attempts were also unsuccessful, but after these calls the dispatcher reported that there was no answer on the callback "in regards to the 10-10 with a firearm." Id. In addition, although not relayed to the Officers, the 911 Caller stated "I don't even know" when asked for the number she was calling from, after which the 911 Call was disconnected. GX-A. We do not consider these facts in the reasonable-suspicion analysis as it is unclear if any of these facts were known to the Officers prior to the stop.

reliability and requires a lesser showing of corroboration than a tip that alleges general criminality." Simmons, 560 F.3d at 105. In Simmons, the police received a dispatch relaying information from an anonymous 911 caller about a possible assault with a weapon in progress. Given that context, the "officers' corroboration of information identifying the suspect . . . [wa]s entitled to more weighty consideration." Id. at 108. Combined with additional factors present in that case, such corroboration was sufficient to support a stop. Id.

Here, however, assuming that the 911 Caller's description of a man who possibly had a gun in his bag threatening to shoot people constitutes the kind of emergency call contemplated by Simmons, the reported threat was not transmitted to the Officers. Accordingly, this case does not fall within Simmons's "narrow exception" to the rule in J.L.; indeed, the Second Circuit has expressly declined to expand the reach of that exception to a radio dispatch reporting similar occurrences. See Freeman, 735 F.3d at 100-01 (emergency exception did not apply to tip reporting that possibly armed individual was arguing with a female and was mobile).[8]

[8] To the extent that the government suggests that the Officers had reason to believe that an emergency was in progress because Oden was near a school, there is nothing in the record to indicate that the Officers were aware of that fact at the time of the stop. Nor does the record indicate that Oden, who was not stopped in front of the school, was positioned or was behaving in such a manner as would lead a reasonable officer to suspect that the school was his destination.

Second, the government argues that the Officers' observation of blood-stained bandages on Oden's hands was an additional fact supporting the stop. Oden disputes that the Officers observed any bandages before stopping him.[9] For purposes of this motion, we assume the Officers had observed them. The government still does not articulate how the bandages, which were consistent with the innocent act of Oden treating lacerations on his hands, suggested that Oden was engaged in unlawful activity. Of course, investigating officers may rely on factors that on their own are "susceptible of innocent explanation" but taken together form a particularized and objective basis for a stop. Arvizu, 534 U.S. at 277–78. Yet there is no explanation of how, in light of the Officers' experience and specialized training, the fact of observing the bandages reinforced the anonymous tip that Oden had a gun. Nor can we easily theorize such an explanation. We thus attribute this additional factor minimal weight in considering the totality of the circumstances known to the Officers at the time of the stop.

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[9] The government has submitted a post-arrest photo of Oden, although it is unclear how long after his arrest it was taken. In the photo, he is wearing an orange sweatshirt with army-fatigue pants, and there is a Band-Aid visible on his left thumb and some sort of dressing encircling the base of his right thumb. GX-D. The admittedly blurry picture does not appear to show any blood stains. Id. It should be noted that, to the extent that the picture depicts the appearance of Oden's hands at the time of the stop, the bandages are rather unremarkable.

In sum, on the undisputed facts before the Court, we conclude that the Officers did not have a permissible basis to perform a Terry stop of Oden.

CONCLUSION

For the foregoing reasons, we grant defendant's motion to suppress the physical evidence of the firearm. The Clerk of the Court is directed to terminate the motion pending at ECF No. 17. The Court is aware that there is a pending motion to dismiss the indictment, but also recognizes that such a motion would be rendered moot if the government decides not to proceed with this case. Accordingly, within a week of the entry of this Memorandum and Order, the government should inform the Court as to how it wishes to proceed.

SO ORDERED.

Dated: New York, New York
September 12, 2016

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE