APPENDIX

APPENDIX A: *United States v. Mykel Lee McMillion*, 4:22-cr-174, (S.D. Iowa) (criminal proceedings) Order on Motion to Suppress entered June 30, 2023. 1

APPENDIX B: *United States v. Mykel Lee McMillion*, 23-2720, (8th Cir.) (interlocutory criminal appeal), Judgment entered May 13, 2024. 12

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, Plaintiff, vs. MYKEL LEE MCMILLION, Defendant.	4:22-cr-00174-SHL-HCA **ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS**

As a result of new legislation enacted effective July 1, 2021, the open carry of firearms is allowed in Iowa in public places without a permit. On September 25, 2022, law enforcement officers received a report that someone (later identified as Defendant Mykel McMillion) was openly carrying a firearm in a public place. One of the officers responded by stopping McMillion and others to investigate. The Court concludes, in light of the recent change to Iowa gun laws, that the officer did not have reasonable suspicion for the stop and thus violated McMillion's Fourth Amendment rights. The Court therefore GRANTS McMillion's Motion to Suppress.

I. PROCEDURAL HISTORY.

On November 15, 2022, the grand jury returned a one-count Indictment charging McMillion with felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(8). (ECF 2.) On May 17, 2023, McMillion filed a Motion to Suppress. (ECF 26.) The Government resists. (ECF 31.) The Court held a hearing on June 6, 2023, during which three witnesses testified and seven exhibits were admitted, including police videos of the circumstances giving rise to McMillion's arrest. (ECF 33.)

II. FINDINGS OF FACT.

In the early morning hours of September 25, 2022, a security officer at Oakridge Apartments in Des Moines, Iowa, called police to make the following report: "My name is [inaudible], I'm with Oakridge Public Safety. An individual is in a white Buick by our maintenance shop. He had a gun on him, a handgun. And the car's still [inaudible] if you can get here, like, really quick." (Def. Ex. A, 00:00–00:26.) The dispatch operator asked, "is he, like, threatening to use it, or . . .? People are allowed to have guns." (Id., 00:26–00:32.) The caller said she was not sure. (Id., 00:32–00:34.) In response to follow-up questions, the caller said the person with the gun

was still in the vehicle, described his appearance and clothing, and explained the area of the apartment complex where he could be found. (Id., 00:42–2:36.) The dispatch operator said she would send someone. (Id., 2:36–2:40.)

The Oakridge Apartments had recurring issues with violence in the months leading up to September 25, 2022, prompting the complex to restrict access to certain parking lots and increase their security presence. (Tr. 5–8.) Mason Bantz was one of the security guards on duty during the early morning hours of September 25, 2022, although he was not the person who called police. (Tr. 8.) According to Bantz, the white Buick was in a parking lot near the complex's maintenance building. (Tr. 9.) It was not necessary to go through a barricade to reach that lot. (Tr. 13.) There are signs posted in or near the maintenance building stating that parking is for maintenance vehicles only and non-permitted vehicles will be towed at the owner's expense. (Tr. 10.) However, there is no evidence that the Oakridge security guards (or anyone else) expressed concerns to police that the Buick was illegally parked. Moreover, the Buick moved to a different parking space before police arrived. (Tr. 11.)

Two Des Moines police officers, Grant Purcell and Ernesto Escobar, arrived on the scene in separate vehicles around 4:40 a.m. (Tr. 21; Def. Ex. B; Def. Ex. D.) Officer Escobar appears to have arrived first, pulling his police cruiser into the same section of the parking lot as the white Buick. (Tr. 21, 41; Def. Ex. B, 0:50–1:05.) Escobar was familiar with the Oakridge Apartments because he had been called to respond to problems there before, including shootings, disputes, and complaints about trespass. (Tr. 49–50.) This time, however, Escobar's dash camera video did not show any sort of commotion or disturbance when he arrived; in fact, other than the headlights of one vehicle, there was no movement in the area at all except an Oakridge security guard. (Def. Ex. B, 0:50–1:20.) As Escobar pulled into the parking lot, he encountered that security guard, who directed Escobar's attention to the white Buick in the corner of the parking lot and said, "one of the male individuals had a gun in his hand and was swinging it around; we saw him on camera." (Id., 1:21–1:26.) Just then, the Buick began backing out of its parking spot. (Id., 1:27–1:34.) Escobar responded by quickly driving his vehicle further into the lot to intercept the Buick before it could head for the exit. (Id., 1:34–1:45.) The Buick stopped in its tracks as Escobar's vehicle approached, undoubtedly in response to Escobar's presence. (Id.) As Escobar's vehicle came within approximately twenty feet of the Buick, he switched from his normal headlights to either

his bright lights or "takedown" lights,[1] causing them to shine directly on the Buick. (Id., 1:46–1:48.) Escobar continued moving his vehicle closer to the Buick, finally stopping approximately ten feet away. (Id., 1:56; Gov't Ex. 1.) The Buick remained running but motionless. (Id.) Escobar stepped out of his vehicle and walked toward the Buick. (Def. Ex. B, 1:57–2:10.)

Officer Purcell arrived on foot approximately twenty-five seconds later, having parked his cruiser just outside the parking lot. (Id., 2:33.) Like Escobar, Purcell was familiar with the Oakridge Apartments. (Tr. 20.) He said police had been called to the complex more than 300 times in the six months preceding September 25, 2022, for reports of trespass, domestic disputes, shots fired, fights, public intoxication, robberies, and burglaries. (Id.) When Purcell arrived, he spoke "very briefly" with the complex's security guards to obtain a description of the person with the firearm and his vehicle and location. (Tr. 22.) He was told the person was an African American male wearing a white T-shirt and jeans. (Tr. 23.)

Purcell did not issue any verbal commands as he approached the Buick, nor did he have his weapon drawn. (Tr. 32–33.) As Purcell reached the Buick, he believed he recognized someone in the front passenger seat from police bulletins about possible unlawful activity. (Tr. 23–24.) In the backseat, Purcell saw McMillion, who fit the description provided by security officers of the person displaying the firearm—i.e., an African American male wearing a white T-shirt and jeans. (Tr. 24.) As Purcell looked through the rear window, he saw McMillion "quickly place his shirt over his waist" and engage in other furtive movements that appeared to be designed to conceal something from Purcell's view. (Tr. 24–25.) Purcell knocked on the window and told the passengers to quit moving and keep their hands where he could see them, but McMillion did not stop moving. (Id.) Purcell then directed the driver to roll down the window, which the driver did. (Tr. 25.) Upon Purcell's request, McMillion provided his name "kind of under his breath" but loud enough for Purcell to hear. (Id.) Purcell "immediately recognized" McMillion's name from police bulletins regarding gang-related and firearm activity. (Tr. 25–26.) Purcell knew McMillion had been involved in "felony-related crimes" but did not know with certainty if McMillion was a convicted felon. (Tr. 26.) Purcell ultimately used force to remove McMillion from the vehicle and

[1] Escobar's police vehicle had both traditional "bright" lights (like those available in most vehicles) and "takedown" lights that are apparently specialized lights for law enforcement vehicles. (Tr. 42–43.) Takedown lights can make it harder for the person on whom the lights are shining to be able to see, although this was not necessarily Escobar's intention when he turned the bright lights on. (Tr. 43.)

place him into handcuffs. (Def. Ex. B, 4:00–4:40.) At some point during or immediately after this interaction, officers located a firearm on McMillion's person. (ECF 26-1, p. 4; ECF 31, p. 4.)

At the suppression hearing, some of the testimony focused on whether Officers Purcell or Escobar believed the Buick was free to leave once Escobar drove up and turned on his bright lights. The subjective views of the police officers on this issue are not determinative, but the Court nonetheless will summarize their testimony for context. Purcell said the white Buick could have maneuvered around Escobar's vehicle if it wanted to do so. (Tr. 28.) However, when asked if he would have allowed the Buick to leave, Purcell said: "I can't answer that." (Id.) Escobar, for his part, said he did not consider the Buick free to leave once he approached because he "wanted to investigate what was going on." (Tr. 46.)

III. LEGAL ANALYSIS.

A. Legal Standards and Background.

The Fourth Amendment protects against unreasonable searches and seizures. "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Lillich*, 6 F.4th 869, 875 (8th Cir. 2021) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "[A] seizure occurs when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 434 (1991)) (cleaned up). "A traffic stop constitutes a seizure under the Fourth Amendment." *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008). "A traffic stop generally must be supported by at least a reasonable, articulable suspicion that criminal activity has occurred or is occurring . . . ." *United States v. Forjan*, 66 F.4th 739, 746 (8th Cir. 2023) (quoting *United States v. Cox*, 992 F.3d 706, 709 (8th Cir. 2021)) (cleaned up).

"To establish reasonable suspicion, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' further investigation.'" *United States v. Woods*, 829 F.3d 675, 679 (8th Cir. 2016) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). "The concept of reasonable suspicion is 'not readily, or even usefully, reduced to a neat set of legal rules.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). "[W]hen determining whether reasonable suspicion exists, we consider the totality of the circumstances." *Id.* "The collective knowledge of law enforcement officers conducting an investigation is sufficient to provide reasonable suspicion, and the collective

knowledge can be imputed to the individual officer who initiated the traffic stop when there is some communication between the officers." *United States v. Rederick*, 65 F.4th 961, 966 (8th Cir. 2023) (quoting *United States v. Thompson*, 533 F.3d 964, 969 (8th Cir. 2008)).

B. Recent Changes in Iowa Gun Laws.

Prior to July 1, 2021, Iowa Code § 724.4(1) stated: "Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor." *Id.* (effective July 1, 2018). The statute contained many exceptions, one of which was for people with valid permits. *Id.* at § 724.4(4)(i) (effective July 1, 2018). Because a valid permit was an affirmative defense, however, the Eighth Circuit held that a law enforcement officer in Iowa was entitled to presume that a person carrying a concealed weapon was doing so unlawfully "until the suspect demonstrates otherwise." *United States v. Sykes*, 914 F.3d 615, 617 (8th Cir. 2019) (citing *United States v. Pope*, 910 F.3d 413, 415–16 (8th Cir. 2018)). In other words, "an officer in Iowa may briefly detain someone whom the officer reasonably believes is possessing a concealed weapon." *Id.*

Effective July 1, 2021, the Iowa Legislature amended section 724.4. *See* 2021 Iowa Legis. Serv. Ch. 35 (H.F. 756) (West). The statute now states: "A person who goes armed with a dangerous weapon on or about the person, **and who uses the dangerous weapon in the commission of a crime**, commits an aggravated misdemeanor, except as provided in section 708.8." Iowa Code § 724.4 (emphasis added). This is very different than the prior version of the statute, which started from the premise that a person could not lawfully carry a firearm without a permit. The premise is now flipped: a person possessing a firearm is presumptively doing so legally regardless of permit status. The conduct becomes illegal only if the person possesses the firearm *and* "uses [it] in the commission of a crime." *Id.* Possession alone is not enough.

McMillion argues that the amendment to section 724.4 renders Eighth Circuit cases like *United States v. Sykes* and *United States v. Pope* obsolete. The Court agrees. *Pope* itself recognized a dichotomy between states where carrying a firearm is illegal in the absence of a permit or other exception and those where open or concealed carry is legal without a permit. *See* 910 F.3d at 415–16. When Iowa was in the former category, law enforcement officers could briefly detain someone based solely on information that the person possessed a firearm. *See id.*; *see also Sykes*, 914 F.3d

at 617. Now that Iowa is an open-carry state, *Sykes* and *Pope* are no longer good law. The governing Eighth Circuit precedent for Iowa is instead *Duffie v. City of Lincoln*, which holds that, in an open-carry state, "the mere report of a person with a handgun is insufficient to create reasonable suspicion." 834 F.3d 877, 883 (8th Cir. 2016).

C. Officer Escobar "Seized" the White Buick When He Pulled into the Parking Lot and Effectively Blocked it from Leaving.

Before addressing the issue of reasonable suspicion in greater detail, the Court must answer a threshold question: did Officer Escobar "seize" McMillion and the other occupants of the Buick for Fourth Amendment purposes when Escobar moved his police cruiser into the Buick's path as the Buick was preparing to leave the parking lot. If so, Escobar needed reasonable suspicion at that moment; any information he or Purcell acquired when they reached the Buick on foot a short time later is irrelevant. *See Fla. v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.").

The Court finds as a matter of fact that Escobar "seized" the Buick when he intercepted it with his police cruiser as the Buick was starting to leave the parking lot. Escobar drove his cruiser toward the Buick just as it was starting to back out of the parking space, and precisely for that reason. Escobar's goal, according to his own testimony, was to prevent the Buick from leaving so he could "investigate what was going on." Escobar achieved his goal by driving within approximately ten feet of the Buick, stopping at a perpendicular angle that essentially blocked the Buick from exiting the parking lot, and shining his bright lights directly onto the Buick and its passengers. The still-shot captures the situation:

(Gov't Ex. 1.)

A reasonable person in the driver's position would not have believed the Buick was free to leave the parking lot after Escobar's sudden and purposeful approach. Indeed, the Buick was literally trying to leave when Escobar's cruiser quickly pulled up and blocked the path to the only exit, thus making it clear that Escobar was not allowing the car to go. Moreover, there was no way for the Buick to maneuver around Escobar's cruiser other than, perhaps, engaging in a complicated multi-point turn and trying to squeeze through the narrow gap between the cruiser and parked cars. The Court cannot imagine a reasonable driver believing this would be permissible, nor, according to his own testimony, did Escobar have any intention of allowing it to happen. It follows that Escobar "seized" the Buick and its passengers for Fourth Amendment purposes. *See, e.g.*, *United States v. Tuley*, 161 F.3d 513, 515 (8th Cir. 1998) ("We conclude that blocking [the defendant's] truck with the squad car resulted in a Fourth Amendment seizure."); *United States v. See*, 574 F.3d 309, 313 (6th Cir. 2009) (holding that seizure occurred when officer used his patrol car to block defendant's vehicle); *United States v. Dunn*, No. CR 19-268 (MJD/BRT), 2020 WL 2527178, at *6 (D. Minn. Feb. 28, 2020) (holding that seizure occurred when officer parked his squad car perpendicular to the suspect's car and within a few feet of it, "and within the lane of traffic one would need to use to exit the parking lot"), *report and recommendation adopted*, No. CR 19-268 (MJD/BRT), 2020 WL 2526464 (D. Minn. May 18, 2020).

There are, to be clear, Eighth Circuit cases recognizing that the mere act of shining a bright police light on a vehicle is not enough to constitute a "seizure." *See United States v. Wright*, 844 F.3d 759, 762–63 (8th Cir. 2016). Blocking an exit is not automatically a seizure, either, particularly if it was incidental to the officer's purpose. *See United States v. Steffens*, 418 F. Supp. 3d 337, 355 (N.D. Iowa 2019) ("[I]t is true that law enforcement officers blocking an entrance or exit is a factor that weighs in favor of finding that a person has been seized . . . However, it is not dispositive in every case."), *aff'd sub nom. Lillich*, 6 F.4th 869. Here, however, Escobar blocked the exit precisely because the Buick was preparing to leave and for the specific purpose of preventing that from happening. This is a seizure. *See Tuley*, 161 F.3d at 515 (concluding seizure occurred because officer blocked suspect's car); *Wright*, 844 F.3d at 762 (no seizure because officer did not block suspect's car); *United States v. Griffith*, 533 F.3d 979, 983 (8th Cir. 2008) (no seizure because "officers did not block the parking lot exit or impede [the driver's] ability to drive away").

D. Officer Escobar Did Not Have Reasonable Suspicion to Stop the Buick.

Prior to July 1, 2021, Officer Escobar clearly would have had reasonable suspicion to stop the Buick because of the reliable eyewitness report that one of the passengers (later determined to be McMillion) had a firearm. *See Sykes*, 914 F.3d at 617; *Pope*, 910 F.3d at 415–16. The legal landscape changed, however, when the Iowa Legislature amended Iowa Code § 724.4 and turned Iowa into an "open carry" state. From that point forward, "the mere report of a person with a handgun is insufficient to create reasonable suspicion." *Duffie*, 834 F.3d at 883. Something more is required. The question turns, then, to whether something more is present here, with the Government focusing primarily on three facts: (i) the Oakridge Apartments are a high-crime area; (2) the time of night; and (3) the report that McMillion was "swinging [the gun] around."[2]

Given the recent changes to Iowa gun laws, the first two facts contribute little, if anything, to the reasonable suspicion analysis in this factual context. The Iowa Legislature did not exclude "high-crime neighborhoods" from the new gun laws or restrict open-carry rights to particular times of day; instead, the right to carry applies across the board. *See United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (concluding that reasonable suspicion did not exist even though suspect possessed firearm "in a high crime area at night"). Indeed, one common justification for open-carry laws is that people have a particularly strong need for firearms for self defense in high-crime areas. *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 751 (2010) ("Otis McDonald, who is in his late seventies, lives in a high-crime neighborhood. He is a community activist involved with alternative policing strategies, and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers."). It would undermine the Legislature's judgment that open carry

[2] In its Brief, the Government also attached significance to the fact that McMillion and others were "loitering" on the Oakridge property. (ECF 31, p. 8.) The evidence failed to establish, however, that the security guards or police officers discussed or were in any way concerned about the so-called "loitering." The Oakridge security guards did not mention anything about loitering to the responding officers, nor did Officers Escobar or Purcell suggest in their testimony that possible loitering played a role in their decision to approach the Buick. The Oakridge Apartments are, in any event, residential, and thus people "loiter" there because they *live* there. *Contra, e.g.*, *United States v. Trogdon*, 789 F.3d 907, 910 (8th Cir. 2015) (finding reasonable suspicion where suspect was loitering in a "commercial parking lot" that had a "no-trespassing sign"). This is not illegal.

The Government's Brief also argued that reasonable suspicion existed for the crime of trespass. The Government admitted at the suppression hearing, however, that officers did not learn that McMillion and his friends did not reside at the Oakridge Apartments until after McMillion had been arrested. (Tr. 3.) Moreover, the Oakridge security guards did not mention trespass to the responding officers as a basis for concern about McMillion's group. Trespass is therefore not a viable basis for the Government to argue reasonable suspicion.

should be legal to allow law enforcement officers to detain people for mere gun possession in high-crime neighborhoods. *See Black*, 707 F.3d at 540; *United States v. Ubiles*, 224 F.3d 213, 218 (3d Cir. 2000) (concluding officers did not have reasonable suspicion to detain person merely for possessing firearm in crowded area). "To allow stops in this setting 'would effectively eliminate Fourth Amendment protections for lawfully armed persons.'" *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1132 (6th Cir. 2015) (quoting *United States v. King*, 990 F.2d 1552, 1559 (10th Cir. 1993)).

The Court understands the "awkward situation" this creates for law enforcement officers like Officers Escobar and Purcell. *Id.* at 1133. When they responded to the Oakridge Apartments, Officers Escobar and Purcell were unquestionably and sincerely motivated by the desire to address a potentially dangerous situation. They were trying to keep the community safe. There is, however, a difference between what is "dangerous" and what is "unlawful." The Iowa Legislature has decided that the dangerousness of allowing guns to be possessed more easily is outweighed by the benefits of expanded gun possession for the ability of people to defend themselves. The Court must respect that policy judgment even when it means a potentially dangerous person will go free. The simple reality in Iowa is that mere possession of a firearm in a high-crime neighborhood is no longer enough to give law enforcement officers reasonable suspicion for an investigative stop—and, in fact, is arguably not even *relevant* to reasonable suspicion in the absence of information that the gun is being used as part of a crime. *See Duffie*, 834 F.3d at 883; *Ubiles*, 224 F.3d at 218 (concluding that officers could not detain someone for possessing a gun any more than they could do so for possessing a wallet). Stated differently: if the Iowa Legislature wants to pass laws making it easier for people to possess guns, those laws must be given equal effect in high-crime neighborhoods as anywhere else. *See United States v. Richmond*, 924 F.3d 404, 419 (7th Cir. 2019) (Wood, C.J., dissenting) ("True, the neighborhood in which Richmond was walking was known to be a high-crime area, but that simply underscores why a person might, for self-defense, want to have a gun with him.").

This conclusion means the reasonable suspicion analysis boils down to one fact: the security guard's report to Escobar that McMillion was "swinging [the gun] around" in the parking lot. The Government argues that this creates reasonable suspicion that McMillion violated Iowa Code § 708.1(2)(c), which makes it a criminal offense for someone to "[i]ntentionally point[] any firearm toward another, or display[] in a threatening manner any dangerous weapon toward

another." (Tr. 56.) The factual record does not, however, establish reasonable suspicion that McMillion committed this crime. The security guard did not report to Escobar that McMillion pointed the gun at anyone or otherwise threatened anyone when he was "swinging it around," nor did the original caller suggest the same even when asked directly. To the contrary, the caller said she did not know if McMillion threatened anyone with the gun. In fact, there was no discussion in the call to police dispatch of anyone else even being present on the scene, nor did Escobar see any sort of commotion, disturbance, or other activity when he arrived at the property. It was serene other than the Buick backing out of its parking spot. The Court is therefore left to conclude, as a matter of fact, that law enforcement officers merely had reason to believe McMillion *displayed* the firearm in the parking lot. *See Duffie*, 834 F.3d at 884. This is legal given the Iowa Legislature's amendments to section 724.4.

Duffie is almost squarely on point. There, the suspect displayed a firearm in the parking lot of a convenience store at night after behaving "strangely" inside the store. *Id*. His actions included sitting in his car with the gun and "acting as though he was blowing smoke from the barrel" just as a convenience store employee left the store to take out the trash. *Id.* The City argued there was reasonable suspicion the suspect committed assault under Nebraska law. *Id.* The Eighth Circuit disagreed because there was no evidence the suspect "display[ed] hostile or menacing conduct toward the clerks in the store," nor that he was trying to threaten the store employee while holding the gun in the parking lot. *Id.* "The officers' reports reflect that they were responding to the display of a weapon, not a threat against the clerk." *Id.*

The same conclusion is appropriate here. At most, Officer Escobar had reason to believe that someone in the white Buick displayed a firearm in a public place. The Iowa Legislature has decided this should be legal, and it is not the Court's prerogative to second-guess that judgment. In the absence of any reason to believe McMillion displayed hostile or menacing conduct toward anyone, there was not reasonable suspicion to detain him based on the report that he was "swinging" the firearm around. *See id*. It follows that evidence acquired by Officers Escobar and Purcell after they approached the Buick—including, importantly, the discovery and seizure of the firearm on McMillion's person—must be suppressed. *See Black*, 707 F.3d at 542; *Ubiles*, 224 F.3d at 218.

IV. CONCLUSION.

The Court GRANTS McMillion's Motion to Suppress and holds that evidence discovered by police after the seizure of the white Buick—including, especially, the discovery of a firearm on McMillion's person—is inadmissible at trial.

IT IS SO ORDERED.

Dated: June 30, 2023

STEPHEN H. LOCHER
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2720

United States of America

Plaintiff - Appellant

v.

Mykel Lee McMillion

Defendant - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cr-00174-SHL-1)

JUDGMENT

Before GRUENDER, SHEPHERD, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the order of the district court denying the motion to suppress in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

May 13, 2024

Order Entered in Accordance with Opinion:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Stephanie N. O'Banion

United States Court of Appeals
For the Eighth Circuit

No. 23-2720

United States of America

Plaintiff - Appellant

v.

Mykel Lee McMillion

Defendant - Appellee

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: March 13, 2024
Filed: May 13, 2024

Before GRUENDER, SHEPHERD, and GRASZ, Circuit Judges.

GRUENDER, Circuit Judge.

A federal grand jury charged Mykel Lee McMillion with knowingly possessing a firearm after having been convicted of a crime punishable by imprisonment for more than one year. *See* 18 U.S.C. §§ 922(g)(1), 924(a)(8). He moved to suppress the admission into evidence of the firearm he was alleged to have possessed, arguing that Des Moines Police Department Officers Ernesto Escobar and Grant Purcell did not have reasonable suspicion to stop the white Buick in which

McMillion was a passenger. The district court granted the motion. The Government appeals, and we reverse.

I.

At 4:40 a.m. on September 25, 2022, a security guard at the Oakridge Neighborhoods apartment complex called the Des Moines Police Department to report that a white Buick was parked in a restricted area near Oakridge's maintenance shop and that one of the occupants of the Buick had a gun. Oakridge had recently added security guards as part of a suite of measures designed to alleviate the significant amount of violent crime at the complex, which had been the scene of over three hundred calls to the police in the six months preceding September 25.

Officers were dispatched to the complex. By the time they arrived, the white Buick had moved from the maintenance shop to a tenant parking spot. Officer Escobar was the first on the scene and met one of the Oakridge security guards in the parking lot near the Buick. The security guard informed Officer Escobar that "one of the male individuals" in the Buick "had a gun in his hand and was swinging it around." While Officer Escobar was speaking to the Oakridge security guard, the Buick turned on its lights and began to back out, at which point Officer Escobar drove closer and turned on his bright "takedown" lights. The car stopped, and Officer Escobar, along with the just-arrived Officer Purcell, walked up to it. As they approached, they noticed a man in the back seat who matched the previous description of the man who had been swinging a gun around. They also noticed the man's "furtive movements that appeared to be designed to conceal something from . . . view." The man identified himself as Mykel McMillion, a name Officer Purcell recognized from an officer-safety bulletin concerning gang- and firearm-related activity. Officer Purcell and two Oakridge security guards then removed McMillion from the white Buick, handcuffed him, patted him down, and located a handgun concealed in McMillion's pants.

The district court determined that these circumstances were insufficient to create reasonable suspicion and granted McMillion's motion to suppress. In particular, the district court reasoned that the time—the middle of the night—and the location—a notoriously high-crime area—were irrelevant to the reasonable-suspicion analysis, as was the report that an individual was swinging a gun around. According to the district court, these factors were irrelevant because permitless open carry is legal in Iowa and "[t]he Iowa Legislature did not exclude 'high-crime neighborhoods' from the new gun laws or restrict open-carry rights to particular times of day." In short, the district court concluded that "[t]here is . . . a difference between what is 'dangerous,' and what is 'unlawful.'" The Government appeals, arguing that reasonable suspicion existed at the time Officer Escobar stopped the white Buick.

II.

"When reviewing a district court's grant of a motion to suppress, we review its factual findings for clear error and its application of law de novo." *United States v. Thabit*, 56 F.4th 1145, 1149 (8th Cir. 2023). "The existence of reasonable suspicion is a mixed question of law and fact that appellate courts review de novo." *Id.*

"A police officer may conduct an investigative stop," a so-called *Terry* stop, "if [he] has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *United States v. Roberts*, 787 F.3d 1204, 1209 (8th Cir. 2015) (internal quotation marks omitted); *see generally Terry v. Ohio*, 392 U.S. 1 (1968). "To establish that a *Terry* stop was supported by reasonable suspicion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *United States v. Quinn*, 812 F.3d 694, 697 (8th Cir. 2016) (internal quotation marks omitted). "The concept of reasonable suspicion is not readily, or even usefully, reduced to a neat set of legal rules." *Id.* (internal quotation marks omitted). "Instead, in evaluating the validity of a *Terry* stop, we must consider the totality of the

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circumstances." *Id.* "Reasonable suspicion must be supported by more than a mere hunch, but the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying the preponderance of the evidence standard." *Roberts*, 787 F.3d at 1209 (internal quotation marks omitted). "This analysis requires us to consider that officers may draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them." *Id.* (internal quotation marks omitted). "[W]e view the officers' observations as a whole, rather than as discrete and disconnected occurrences." *United States v. Hightower*, 716 F.3d 1117, 1121 (8th Cir. 2013) (internal quotation marks omitted).

"After a suspect is lawfully stopped, an officer may in some circumstances conduct a pat-down search for weapons." *United States v. Trogdon*, 789 F.3d 907, 910 (8th Cir. 2015). "To justify the search, the officer must have reasonable, articulable suspicion that the suspect is armed and dangerous." *Id.* "The officer need not know for certain that the suspect is armed; instead, a search is permitted if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* (internal quotation marks omitted).

"Factors that may reasonably lead an experienced officer to investigate include time of day or night, location of the suspect parties, and the parties' behavior when they become aware of the officer's presence." *Quinn*, 812 F.3d at 697-98. Additional factors include whether the suspect parties are "located in a high-crime area" or an area where crimes have recently been committed. *Trogdon*, 789 F.3d at 910. That someone has "previously observed a pistol in [defendant's] hand further indicate[s] that the officers [have] a reasonable suspicion of criminal activity . . . ." *United States v. Houston*, 920 F.3d 1168, 1172 (8th Cir. 2019). "[U]nprovoked flight at the sight of an officer can contribute to reasonable, articulable suspicion." *United States v. Horton*, 611 F.3d 936, 940 (8th Cir. 2010). Importantly, even if "[a]ll of [defendant's] conduct was by itself lawful," reasonable suspicion may still exist—if conduct is "ambiguous and susceptible of an innocent explanation" as well as a criminal one, "officers [can] detain the individuals to resolve the ambiguity."

Illinois v. Wardlow, 528 U.S. 119, 125 (2000); *see United States v. Stewart*, 631 F.3d 453, 457 (8th Cir. 2011) ("[F]actors that individually may be consistent with innocent behavior, when taken together, can give rise to reasonable suspicion . . . .").

Here, Officers Escobar and Purcell responded to a 4:40 a.m. call from the security guards at a notoriously high-crime apartment complex. They learned that an unknown car was moving about the complex, including in areas where personal cars were not allowed, and that one of the occupants of the car had a gun and was swinging it around. When the officers got close to the car, it attempted to leave the area. McMillion argues that this was merely the behavior of an individual exercising his right to openly carry a gun in a dangerous neighborhood. Perhaps. But while the mere presence of a firearm in an open carry jurisdiction does not itself create reasonable suspicion of criminal activity, the presence of a firearm taken together with the "high-crime area," the "time of . . . night," the report that Oakridge security had "previously observed a pistol in [McMillion's] hand," the "location of the suspect parties," and their "behavior when they [became] aware of the officer[s'] presence" may be indicative of criminal activity such as trespass, assault, or burglary. *See Trogdon*, 789 F.3d at 910-14 (holding that officers had reasonable suspicion to stop defendant when he "was loitering late at night in a commercial parking lot with a small group of people . . . in a high-crime area where violence and gang and narcotics activity was commonplace," and where "the group took evasive action after sighting the officers"). Officers Escobar and Purcell were allowed to "detain [McMillion] to resolve the ambiguity." *Wardlow*, 528 U.S. at 125. And given that Officers Escobar and Purcell were told that one of the car's occupants was armed, they were justified in "conduct[ing] a pat-down search for weapons," *Trogdon*, 789 F.3d at 910, on the man in the backseat of the Buick who matched the previous description of the man who had been swinging a gun around and who appeared to be trying to conceal something from view.

Evaluating the officers' observations as a whole, we find that articulable facts support the existence of reasonable suspicion sufficient for a *Terry* stop. Thus, the district court erred in granting the motion to suppress.

III.

For the aforementioned reasons, we reverse the district court's order granting the motion to suppress and remand the case for further proceedings.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2720

United States of America

Appellant

v.

Mykel Lee McMillion

Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:22-cr-00174-SHL-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 14, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Maureen W. Gornik