[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEPTEMBER 9, 2010
JOHN LEY
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No. 10-10570
Non-Argument Calendar

D.C. Docket No. 1:09-cr-20736-KMM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH L. BELLAMY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 9, 2010)

Before TJOFLAT, BARKETT and HULL, Circuit Judges.

PER CURIAM:

Joseph Bellamy appeals his conviction for being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1). The sole issue on

appeal is whether the district court erred in denying Bellamy's motion to suppress the firearm and ammunition officers of the Miami-Dade Police Department recovered from a locked tool box lying on the bed of Bellamy's pickup truck. (Bellamy gave the officers the key to the box after they detained him.) The motion to suppress was heard by a magistrate judge. After holding an evidentiary hearing, the magistrate judge issued a report and recommendation ("R & R"), with findings of fact and conclusions of law, recommending that the district court deny the motion. Bellamy did not object to the R & R, and the district court, after conducting a de novo review of the record, adopted the R & R and denied Bellamy's motion.

In his brief to us, Bellamy argues that (1) the testimony of the officers at the evidentiary hearing was contradicted by more credible evidence presented by the defense witness; (2) the officers lacked a lawful basis for stopping him; (3) even if the officers had a lawful basis to stop him, they lacked a legal basis for searching his truck or for patting him down; (4) the officers' use of his identification to conduct further investigation constituted an unlawful seizure under the Fourth and Fourteenth Amendments; and (5) he did not voluntarily consent to the challenged search.

Bellamy's failure to object to the magistrate judge's R & R means that we review the R & R's findings of fact for plain error or manifest injustice. *United States v. Warren*, 687 F.2d 347, 348 (11th Cir. 1982). "We . . . defer to the . . . judge's [credibility] determinations unless [her] understanding of the facts appears to be 'unbelievable.'" *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002). Findings of probable cause and reasonable suspicion are mixed findings of fact and law that we review *de novo* as matters of law. *United States v. Arvizu*, 534 U.S. 266, 275, 122 S.Ct. 744, 751, 151 L.Ed.2d 740 (2002). In this case, the record fully supports the magistrate judge's findings of historical fact; we therefore accept the findings.

The Fourth Amendment protects individuals from "unreasonable searches and seizures" by government officials, "and its protections extend to brief investigatory stops of persons or vehicles." *Arvizu*, 534 U.S. at 273, 122 S.Ct. at 750. However, "the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *California v. Acevedo*, 500 U.S. 565, 580, 111 S.Ct. 1982, 1991, 114 L.Ed.2d 619 (1991). Additionally, an officer is permitted to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is

committing an offense. *United States v. Lyons*, 403 F.3d 1248, 1253 (11th Cir. 2005) (citation and internal quotation marks omitted).

Florida law defines a concealed firearm as any firearm "which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person." Fla. Stat. § 790.001 (2006). Some are licensed to carry a concealed firearm. *See* Fla. Stat. § 790.06. Florida law further provides that it is "unlawful for any person to openly carry on or about" his person "any firearm." Fla. Stat. § 790.053 (2006). "Ordinary sight" means the "casual and ordinary observation of another in the normal associations of life." *Davis v. State*, 761 So. 2d 1154, 1156 (Fla. Dist. Ct. App. 2000). Here, as Bellamy was approaching his pickup truck following what the police suspected was a drug transaction, involving Bellamy's payment of cash to a suspected drug trafficker in a high crime area, an officer saw Bellamy take a firearm from his waistband, place it in a toolbox on the bed of his truck, lock the box, and get into the truck.

Where an officer has a reasonable articulable suspicion that criminal activity is afoot, he is permitted to conduct a brief investigatory stop even in the absence of probable cause. *Terry v. Ohio*, 392 U.S. 1, 26-29, 88 S.Ct. 1868, 1882-84, 20 L.Ed.2d 889 (1968). When the police believe through the course of their investigation that the person may be armed and dangerous, and there is concern for

officer safety, for his protection, the officer is entitled to conduct a limited search of the outer clothing. *Terry*, 392 U.S. at 29-30. The *Terry* investigative stop of persons on foot has been applied to automobiles. *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985). While a "mere hunch" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and falls short of satisfying a preponderance of the evidence standard. *Arivzu*, 534 U.S. at 751.

After hearing the testimony the parties presented at the evidentiary hearing, the magistrate judge found the officers's testimony credible and not materially contradicted by the defense witnesses. The officers reasonably believed that criminal activity was afoot. Given the judge's findings of fact, the officers had probable cause or at least a reasonable suspicion to stop Bellamy.[1]

We find no error in the district court's application of Fourth Amendment precedent in denying Bellamy's motion to suppress. The court's judgment is, accordingly,

AFFIRMED.

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[1] Since we conclude that, at the very least, the officers had reasonable suspicion to stop Bellamy, we need not determine whether his delivery of the key to the tool box was voluntary.