

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA**  
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA

v.

TONY LLOYD JOHNSTON,

*Defendant.*

CRIMINAL No. 3:08CR00042

**MEMORANDUM OPINION**

JUDGE NORMAN K. MOON

This matter is before the Court on Defendant Tony Johnston’s Motion to Suppress Evidence (docket no. 33). Johnston was initially approached by a police officer in the parking lot of a public housing complex located in an area of Charlottesville, Virginia known for its particularly high rates of drug activity and violence. Although the encounter between the officer and Johnston started out as a consensual one, Johnston was detained when the officer discovered that he was trespassing on the property and had two open containers of alcohol in his vehicle. These facts, combined with several other circumstances detailed below, amounted to sufficient objective evidence to demonstrate reasonable suspicion and thus justify the officer’s detainment of Johnston. Accordingly, the Motion to Suppress Evidence will be denied.

**I. BACKGROUND**

**A. FACTUAL BACKGROUND**

On April 30, 2008, at around 6:30 P.M., Officer Lee Gibson of the Charlottesville Police Department (“CPD”) was dispatched to the Hardy Drive area of the City to look for a wanted subject. Hardy Drive is home to Westhaven, a public housing complex, and is considered by police officers to be one of the most dangerous areas in Charlottesville because of relatively high incidences of drug activity, firearms violations, and violence. Although Gibson could not find

the wanted subject he was originally dispatched to locate, he recognized another individual – “Mr. Stanley” – who was also wanted by the CPD. In a previous encounter, CPD officers had recovered a small amount of crack cocaine from Stanley’s vehicle. When Gibson first noticed Stanley on the evening of April 30th, he was standing in a parking lot near a parked vehicle about forty yards away and appeared to be speaking to the two occupants inside. As Gibson approached the parked vehicle on foot, Stanley promptly left the area.

After briefly looking for Stanley, Gibson approached the parked car and asked Johnston, who was sitting in the driver’s side of the parked vehicle, where Stanley was. Johnston repeatedly told Gibson that he did not know who “Mr. Stanley” was. After Gibson explained that Stanley was the person who Johnston was previously speaking with, Johnston continued to state that he did not know who Stanley was. Eventually, Johnston indicated that Stanley had headed in the westbound direction from the parking lot but provided no more information.

During the conversation with Johnston, Gibson noticed what he believed to be (and what in fact were) two large, opened forty ounce containers of alcohol wrapped in brown paper bags in the center console of Johnston’s vehicle. Gibson then informed Johnston that he could not have open containers of alcohol on the property and questioned him about his reason for visiting Westhaven. Even though he was wearing street clothes, rather than athletic attire, Johnston explained that he was waiting to meet his godbrother, “Gator,” so that they could play basketball at the Westhaven courts. Although the Westhaven courts have a directly adjacent parking lot, Johnston was parked several blocks down from the courts. Johnston also revealed that Gator was not a resident of Westhaven and lived in an apartment complex several miles away in Albemarle County. Gibson then informed Johnston that only residents and their bona fide guests were permitted on Westhaven property. Two large “No Trespassing” signs are posted at both

entrances to Hardy Drive.<sup>1</sup> Although Johnson claimed he was not aware of the restriction, it is not possible to enter the Westhaven property in a vehicle without passing at least one of the two signs.

Shortly after Gibson saw the open containers and determined that Johnston was trespassing, Officer Michael Flaherty, also of the CPD, arrived on the scene. Because Gibson was primarily engaged with Johnston, Flaherty began speaking with the passenger of Johnston's vehicle. At some point shortly after he arrived, Flaherty ran the passenger's information through the National Crime Information Center ("NCIC") index and also checked with the local service division of the CPD for any outstanding local warrants, barment notices, gang affiliations, or other alerts. Shortly after checking the passenger's information, Flaherty then ran Johnston's information through the NCIC and the CPD local service division. Although there were no outstanding warrants for Johnston's arrest, his vehicle was registered to a Franklin, Virginia address.<sup>2</sup> Around that time, Gibson had Johnston step out of his vehicle to conduct a pat-down for weapons. Although the pat-down revealed no contraband, Gibson continued to question Johnston about Stanley's whereabouts and called the CPD canine unit to respond to his location.<sup>3</sup> When Johnston asked if he was free to leave, Gibson explained that he still needed to resolve the issue of the open containers in the vehicle and issue Johnston a trespass barment notice. Although Gibson had the information necessary to issue a barment notice at that time, the actual copies of the notices were in Flaherty's police cruiser, which was not immediately adjacent to Johnston's vehicle.

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<sup>1</sup> The signs on Hardy Drive state: "NO TRESPASSING; ACCESS RESTRICTED TO RESIDENTS AND BONA FIDE GUESTS; VIOLATORS MAY BE PROSECUTED."

<sup>2</sup> Franklin is located approximately 150 miles from Charlottesville.

<sup>3</sup> Officer Gibson testified that he often calls the canine unit as a precaution when there are any suspicious circumstances involved in a stop because it can take a while for the unit to arrive on the scene.

Once Johnston learned that he was not free to leave, he called Gator on his cell phone. Shortly after initiating the call, he handed the cell phone to Gibson, apparently so that Gator could confirm that he was intending to meet with Johnston to play basketball at the Westhaven courts. After Johnston got off the phone, Gibson asked him whether there was any contraband inside his vehicle, warned him that the canine unit was on the way, and continued to question him about Stanley's whereabouts.

The canine unit arrived about five to ten minutes after Gibson's initial call. Once the unit arrived, Johnston again got on his cell phone and began pacing and meandering around in circles. The officers then began to notice Johnston slowly stepping away from his vehicle. After Gibson asked Johnston to come back to the car, Johnston took off running towards Holly Drive. While pursuing Johnston on foot, the officers noticed that he threw a small plastic baggie on the ground. Shortly thereafter, Johnston either fell or laid down in a grassy area and submitted to arrest. The CPD later discovered that the small baggie thrown out by Johnston contained crack cocaine. A subsequent search of Johnston's vehicle revealed additional amounts of crack cocaine and a Smith & Wesson .38 caliber revolver.

#### B. PROCEDURAL BACKGROUND

On October 8, 2008, Johnston was charged with: (1) possession with intent to distribute five grams or more of crack cocaine and a quantity of powder cocaine, (2) being a felon in possession of a firearm and ammunition, and (3) using or carrying a firearm during and in relation to a drug trafficking crime. In his Motion to Suppress Evidence, Johnston argues that he was illegally seized, and, as a result, the evidence uncovered from the search of his vehicle should be suppressed as "fruit of the poisonous tree." In response, the Government argues that numerous suspicious factors, combined with the presence of alcohol in Johnston's vehicle and

Johnston's unlawful presence at Westhaven, justified the officers' detainment and brief investigation of Johnston under the circumstances.

## II. DISCUSSION

A police officer may stop and detain an individual for investigative purposes without violating the Fourth Amendment's prohibition against unreasonable searches and seizures when the officer possesses "a reasonable and articulable suspicion," based on specific facts, that criminal activity is afoot. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989); *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968); *United States v. Smith*, 396 F.3d 579, 583 (4th Cir. 2005). Although reasonable suspicion is a less demanding standard than probable cause, "[t]he officer... must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Sokolow*, 490 U.S. at 7. Whether reasonable suspicion exists depends on the totality of the circumstances, including the information known to the officer and any reasonable inferences to be drawn at the time of the stop. *United States v. Arvizu*, 534 U.S. 266, 273, 151 L. Ed. 2d 740, 122 S. Ct. 744 (2002). In making this assessment, "context matters: actions that may appear innocuous at a certain time or in a certain place may very well serve as a harbinger of criminal activity under different circumstances." *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). As a result, judicial analysis of the facts offered to support reasonable suspicion "must be commonsensical, focused on the evidence as a whole, and cognizant of both context and the particular experience of officers charged with the ongoing tasks of law enforcement." *Id.* at 337.

Applying these principles to Johnston's case, I find no constitutional violation. Shortly after approaching Johnston's vehicle, Officer Gibson learned that Johnston was trespassing at Westhaven in violation of Virginia law. *See* Va. Code Ann. § 18.2-119 (2009). As a result,

Gibson was authorized to detain Johnston to issue a trespass barment notice and even had probable cause to arrest him. *See* Va. Code Ann. § 18.2-119; *Bass v. Commonwealth*, 2009 WL 111635 (Va. Ct. App. 2009) (discussing arrest authority under § 18.2-119 and upholding search that resulted from trespassing investigation); *Bandy v. Commonwealth*, 52 Va. App. 510 (Va. Ct. App. 2008) (same).

Gibson also had reasonable suspicion to detain Johnston to investigate and/or prevent the potential violation of city and state open container laws. Gibson spotted two large, open containers of what he reasonably believed to be alcohol covered in brown paper bags in the center console of Johnston's vehicle.<sup>4</sup> Charlottesville City Code § 17-37 makes it a Class 4 misdemeanor for "any person to possess an open or opened container, can, cup, glass, or bottle, containing an alcoholic beverage in any city park or playground or in any public street... in the city." Furthermore, Virginia Code § 18.2-323.1 prohibits any person from consuming an alcoholic beverage while driving a motor vehicle on a public highway in Virginia. Va. Code Ann. § 18.2-323.1 (2009). Even though Johnston's vehicle was parked and not running, Gibson had the authority to issue him a citation for a violation of city code or act to prevent the potential violation of city code and state law under the circumstances.<sup>5</sup>

Several other factors, combined with the trespass and open container violations, contributed to the officers' reasonable suspicion to detain Johnston under the circumstances. Gibson initially noticed Johnston speaking with "Mr. Stanley," a man who was wanted by the

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<sup>4</sup> Johnston admitted at the hearing on this Motion that the containers were indeed forty-ounce bottles of alcohol.

<sup>5</sup> Johnston claims that Gibson lacked reasonable suspicion to detain him for a violation of § 17-37 because he was in a private parking lot, not a public street. Westhaven is a *public* housing complex run by a private entity, and the CPD has been given trespass authority on the property. Whether or not Westhaven's parking lots fall within Charlottesville's definition of "public streets" is inapposite, as Gibson had at least a reasonable basis for issuing Johnston a citation based on a good faith reading of the city code. Furthermore, Gibson had the authority to investigate whether Johnston had been drinking and to ensure that Johnston did not drive away from the premises with an open container in violation of city and state laws.

CPD, in an area of Charlottesville known for its relatively high frequency of drug activity and violence. While Johnston's presence in the high crime area is *alone* insufficient to justify the *Terry* stop, it is "among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 145 L. Ed. 2d 570, 120 S. Ct. 673, 676 (2000). Furthermore, despite the fact that Gibson saw Johnston speaking with Stanley less than one minute before approaching Johnston's vehicle, Johnston repeatedly denied knowing who "Mr. Stanley," even after Gibson explained that Stanley was the person who Johnston had just been talking to.<sup>6</sup> And although Johnston said he was waiting to meet his godbrother to play basketball at Westhaven, he was dressed in street clothes (rather than athletic attire) and was parked several blocks away from the basketball courts. Neither Johnston nor his godbrother were residents of Westhaven; in fact, Johnston's car was registered in a city located 150 miles away from Charlottesville. These factors, combined with the trespassing violation and the potential violation of city and state open container laws, were more than sufficient to justify Gibson's initial *Terry* stop and the subsequent detention of Johnston under the circumstances.

Johnston argues that, regardless of the validity of the initial stop, the length of the officers' investigative detention was unreasonable and thus violated the Fourth Amendment. When evaluating the reasonableness of an investigative stop, courts must examine "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. While there is no "bright line" rule for determining whether an investigative detention is too long in duration, courts should consider:

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<sup>6</sup> At the hearing, Johnston explained that he did not know who "Mr. Stanley" was because he only knew that individual by his street nickname. Whether or not that was actually true is immaterial because the lawfulness of an officer's actions depends on an objective assessment of the circumstances. *See Branch*, 537 F.3d at 337. Because

whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing. A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But the fact that the protection of the public might, in the abstract, have been accomplished by less intrusive means does not, by itself, render the search unreasonable. The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.

*United States v. Sharpe*, 470 U.S. 675, 686-87, 84 L. Ed. 2d 605, 105 S. Ct. 1568 (1985)

(citations and quotations marks omitted). In *Sharpe*, the Supreme Court explicitly rejected “the contention that a 20-minute stop is unreasonable when the police have acted diligently and a suspect’s actions contribute to the added delay about which he complains.” *Id.* at 687-88.

It is not entirely clear from the record exactly how long the encounter between Johnston and the officers lasted. Gibson testified that five to ten minutes passed between his initial call to the canine unit and its actual arrival, but none of the witnesses at the hearing opined as to how long Gibson detained Johnston before making the call. Towards the end of the hearing, counsel for Johnston suggested that the entire interaction lasted around seventeen minutes. Regardless, the facts make it clear that Gibson’s actions were justified at the inception of the interaction and were reasonably related in scope to the circumstances that initially brought about the interference. *See Terry*, 392 U.S. at 20. As explained above, Gibson’s initial detention of Johnston was justified by his reasonable suspicion that Johnston was trespassing and potentially in violation of city and state open container laws. Once Officer Flaherty arrived, Gibson had Flaherty run both Johnston’s information and the passenger’s information through local and

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Gibson saw Johnston talking to “Mr. Stanley” less than a minute before he approached Johnston and asked where “Mr. Stanley” went, it objectively appeared that Johnston was either purposely stalling, evading or lying.

national databases to check for outstanding warrants and other information before attempting to issue trespass barment notices. Although the officers eventually obtained the information necessary to issue barment notices, the notices were located in Flaherty's vehicle, which was not immediately adjacent to the scene of the stop. Gibson also wanted to continue to question Johnston about Mr. Stanley's whereabouts and address the issue of the open containers in Johnston's vehicle. Before Gibson could issue Johnston a barment notice, the canine unit arrived and Johnston made or received several phone calls, thus hindering Gibson's effort to properly conclude the investigation and contributing to the added delay about which Johnston now complains. *See Sharpe*, 470 U.S. at 687-88. During this time, Gibson was also directed to call his commanding sergeant to receive permission to do a free air search of Johnston's vehicle.

While it might be possible to posit some alternative means by which the officers' objectives might have been met, the record demonstrates that the officers acted reasonably and diligently in pursuing their particular means of investigation, especially given the hectic and quickly developing scenario brought on by Johnston's own behavior at the scene. *See Sharpe*, 470 U.S. at 687. Given the officers' need to: (1) check for outstanding warrants on Johnston and his passenger in two different criminal databases, (2) obtain and fill out trespass barment notices, (3) investigate the whereabouts of Mr. Stanley, (4) resolve the issue of the open containers in Johnston's vehicle, (5) deal with Johnston's evasive behavior and frustration of their investigation, and (6) clear a free air search with a commanding sergeant, I cannot hold that the length of the detention was constitutionally unreasonable. To the contrary, the length of the detention was "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. The officers had a reasonable basis for effecting the investigatory detention of Johnston under the circumstances and therefore did not violate the

Fourth Amendment's prohibition on unreasonable searches and seizures.

### III. CONCLUSION

Johnston's trespassing violation and potential violation of state and city open container laws, combined with his evasive behavior (apparently lying to or eluding Gibson about the whereabouts of Mr. Stanley and making numerous cell phone calls during Gibson's investigation) and the particularly suspicious circumstances at issue (Johnston was waiting in a parking lot 150 miles from his home to play basketball at a housing complex with another individual who did not live at the housing complex; wearing street clothes; associating with a wanted individual in an area known for frequent drug activity and violence) were all specific, articulable facts that, when viewed from an objective standpoint, amounted to reasonable suspicion justifying the *Terry* stop and detainment of Johnston. Furthermore, the length of the detention was reasonably related in scope to the circumstances that validated the officers' initial interference. Any delay complained of by Johnston was reasonably related to the intended and lawful purposes of the ongoing investigation. The officers' seizure and subsequent search of Johnston's vehicle were therefore constitutionally reasonable under the Fourth Amendment. Johnston's Motion to Suppress Evidence will therefore be **DENIED** in a separate Order to follow.

It is so **ORDERED**.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and the accompanying Order to all counsel of record and to Johnston.

Entered this \_\_\_\_ day of June, 2009.

  
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NORMAN K. MOON  
UNITED STATES DISTRICT JUDGE