

No. SC93296

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

TYOKA L. LOVELADY,

Appellant.

**Appeal from Jackson County Circuit Court
Sixteenth Judicial Circuit
The Honorable W. Brent Powell, Judge**

RESPONDENT'S SUBSTITUTE BRIEF

**CHRIS KOSTER
Attorney General**

**TODD T. SMITH
Assistant Attorney General
Missouri Bar No. 63638**

**P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-0481
Fax: (573) 751-5391
Todd.Smith@ago.mo.gov**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

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SUMMARY

The trial court did not clearly err in overruling Defendant's motion to suppress and admitting evidence of the cocaine found in Defendant's pocket during a search incident to arrest. The fact that Defendant, apparently intoxicated, was riding a bicycle in the street, at night, in a high-crime area when he inexplicably announced to patrolling police officers that "they went that way" supported prolonging the *Terry* stop for a few minutes to conduct a warrant check even after the officers discovered that the handgun protruding from his waist was a fake.

STATEMENT OF FACTS

Tyoka L. Lovelady (Defendant) was charged by indictment in a Jackson County Circuit Court with one count of felony possession of a controlled substance. §195.202, RSMo 2000; (L.F. 8).¹ Appellant’s case was tried at a bench trial on August 19, 2011, with the Honorable W. Brent Powell presiding. (Tr. 1,3).² Defendant was found guilty and sentenced to a two-year prison term. (L.F. 36-38; Tr. 114, 117). The execution of that sentence was suspended and Defendant was placed on probation for a period of two years. (L.F. 37; Tr. 117). Defendant does not contest the sufficiency of the evidence to support his convictions. Viewed in the light most favorable to the verdict the evidence at trial showed that:

At approximately 10:45 p.m. on May 30, 2009, two Kansas City police officers in a marked patrol car noticed Defendant riding a bicycle in circles, in a dimly lit intersection, in a high-crime area. (Tr. 9, 10, 18, 22, 57-58, 65). As the officers drove by Defendant, he pointed away from himself and announced “They went that way.” (Tr. 10). As soon as Defendant caught the officers’ attention, one of them noticed what appeared to be a handgun

¹ Abbreviated citations are to the Transcript (Tr.), the Legal File (L.F.), Exhibits (Ex.), and Defendant’s Brief (Def’s. Brief).

² Defendant formally waived his right to a jury trial. (L.F. 35).

protruding from Defendant’s waistband. (Tr. 22, 11). After reversing their car and quickly exiting, the officers drew their weapons, and ordered Defendant to the ground. (Tr. 62, 11). After he complied, the officers disarmed Defendant and placed him in handcuffs. (Tr. 11). Defendant appeared to under the influence of some substance and he could not explain his suspicious behavior. (Tr. 13, 15-16). The officers realized the weapon was an “Airsoft gun” which fires plastic BB’s. (Tr. 16-17).

Two-and-half minutes after the patrol car stopped, the vehicle’s dash camera began to record audio. (Ex. 3).³ The footage recorded Defendant spelling out his first and last name approximately three minutes into the stop.⁴ A few seconds later, an unseen officer explained that Defendant’s gun was a fake. (Ex. 3). Approximately five minutes into the stop, the radio dispatcher’s voice announced that Defendant had a pick-up order for auto theft. (Ex. 3; Tr. 17). Defendant, having been placed under arrest pursuant to

³ This evidence is variously referred to as Defendant’s Exhibit 3 or 4. Exhibit 3 is the DVD and Exhibit 4 is the sleeve containing the disc. (Tr. 77-78).

⁴ The dash camera footage features a time-of-day display, including seconds, from which all time calculations were computed. (Ex. 3). For the reader’s convenience, these times are reproduced in chart form in the Argument section and, in greater detail, in the Respondent’s Substitute Appendix.

that warrant, was searched. (Tr. 16). The officers found in Defendant's pocket a kitchen knife and a plastic baggie containing a white, rock-like, substance. (Tr. 16; Ex. 3). This material was later determined to be 0.83 grams of cocaine base. (Tr. 112).

As trial approached, Defendant filed a motion to suppress physical evidence that raised only a general objection to the officers' search. (L.F. 10-12). The court denied the motion following a hearing at which both officers presented testimony and the dash camera footage was admitted into evidence. (L.F. 13-15; Tr. 5-104; Ex. 3). Defendant then filed a detailed motion to reconsider, which the court also denied. (L.F. 16-34). Defendant was subsequently found guilty after a bench trial. (L.F. 36-37; Tr. 114).

ARGUMENT

As officers had reasonable suspicion to stop Defendant and conduct a warrant check, the trial court did not clearly err in overruling Defendant’s suppression motion and admitting that evidence at trial.

A. Defendant’s Claim

Defendant claims the trial court erred in denying his motion to suppress. (Def’s Brief 10). Specifically, Defendant argues that the officers lacked probable cause to detain him while a warrant check was conducted, rendering the subsequent search incident to arrest improper and the cocaine discovered in his pocket subject to suppression. (Def’s Brief 10). The crux of Defendant’s theory is that the instant the officers discovered that his gun was fake, their reasonable suspicion was completely dispelled. (Def’s Brief 19).

B. Standard of Review

“A trial court’s ruling on a motion to suppress is reviewed to determine if it is supported by substantial evidence, and it will be reversed only if it is clearly erroneous. The evidence is viewed in the light most favorable to the trial court’s ruling and deference is given to the trial court’s determinations of credibility.” *State v. Johnson*, 207 S.W.3d 24, 44 (Mo. banc 2006); *See State v. Norfolk*, 366 S.W.3d 528, 531 (Mo. Banc 2012) (“contrary evidence and inferences are disregarded”). The determination “as to whether conduct

violates the Fourth Amendment is an issue of law that this Court reviews *de novo*.” *State v. Waldrup*, 331 S.W.3d 668, 672 (Mo. banc 2011).

C. Relevant Evidence

Defendant’s motion to suppress physical evidence raised only a general objection to the officers’ warrantless search. (L.F. 10-12). At a hearing on that motion in June 2011, the two officers involved gave testimony and the footage from their patrol car dash camera was admitted into evidence. (L.F. 6; Tr. 5-104, Ex. 3). The officers had, respectively, 5 and 4½ years of experience with the Kansas City Police Department. (Tr. 56, 7). They testified that Defendant was observed “riding a bicycle, doing circles in the intersection” at around 10:45 p.m. (Tr. 9, 18, 10, 59-60). The intersection was in an area with high levels of drug activity, prostitution, and “lots of guns.” (Tr. 57-59). The officer driving the car testified that he felt it was uncommon to see a bicycle rider in that area, especially at night. (Tr. 61-62, 72).

As they approached, his partner heard Defendant say “They went that way.” (Tr. 10). As Defendant spoke, he pointed toward the officers’ direction, away from himself. (Tr. 10, 13). The passenger officer testified that he “attempted to gain more information from him about what he was talking about, but [Defendant] was unable to describe anything.” (Tr. 10). “[Defendant] appeared to be under the influence of some kind of foreign

substance to his body.” (Tr. 13). The officer driving thought Defendant was under the influence of drugs or alcohol. (Tr. 51).

The passenger officer testified “I’d seen what I believed to be a gun in his waistband.” (Tr. 13). When he said something to the effect of “back up, he has a gun,” his partner reversed the car and stopped. (Tr. 62). Both officers exited, drew their weapons, pointed them at Defendant, and ordered him to the ground. (Tr. 13, 64). The passenger officer explained “we took further examination of the firearm and determined it to be an Airsoft, commonly called an Airsoft gun. ... It is an actual gun that fires a plastic BB-type projectile from its muzzle.” (Tr, 16-17).

Having disarmed Defendant, the officer placed him in handcuffs for “everyone’s safety.” (Tr. 14, 25). The officers then conducted a record check of Defendant’s name, which determined that he had an outstanding “pickup order” on file.⁵ (Tr. 15). An officer testified “at that point he was under arrest for a warrant, and we conducted a more thorough search of his body and

⁵ The officer testified that he was “not sure of all the ins and outs of what a pickup order is issued for.” (Tr. 15, 30-31.) The trial court concluded that Defendant was arrested pursuant to an active arrest warrant. (L.F. 33). Defendant does not dispute that he was arrested pursuant to an active arrest warrant.

clothes” for drugs or weapons. (Tr. 16). They found a kitchen knife and a plastic “baggie” containing 0.83 grams of cocaine base in his pockets. (Tr. 16, 46, 112).

After both officers testified at the suppression hearing, the DVD footage of the patrol car dash camera was admitted into evidence. (Tr. 77-78, Ex. 3).⁶ While most of the events occurred off camera and the officers’ microphones were only active for a portion of the episode, five major events were recorded: (1) visual footage of the patrol car stopping, then backing up a few feet to stop again, (2) audio of Defendant spelling out his first and last name, (3) audio of an officer reporting “Okay, we were rolling around, this guy, on his bike, we’re comin this way, he stops right here on his bike, and points that way, and as he points there’s a gun right here, turns out the gun’s fake,” (4) audio of a radio dispatcher reporting “The Lovelady party [indiscernible number] pick-up order out of Shoul Creek Property Crime for auto theft,” and (5) footage of the knife and drugs being discovered. (Ex. 3). These events are listed below along with the time of day as displayed on-

⁶ The disc contains three different media files. The footage actually admitted into evidence is stored to the file labeled 5293@20090530223219, which is the footage from the patrol car dash camera. (Tr. 80).

screen along with the time elapsed from when the patrol car came to stop before reversing. (Ex. 3).

<u>Time of Day (p.m.)</u>	<u>Event</u>	<u>Elapsed Time</u>
10:34:35	Patrol Car Stops, Reverses	0
10:37:33 - 10:37:45	Defendant Spells Out Name	2:58 - 3:10
10:37:48 - 10:37:59	Officer Reports Fake Gun	3:13 - 3:24
10:39:39 - 10:39:49	Dispatch Reports Warrant	5:04 - 5:14
10:42:01 - 10:42:38	Contraband Found	7:26 – 8:13

The footage does show, at various times, Defendant struggling to maintain his balance while standing still. (Ex. 3). The exhibit does not clearly indicate, either visually or audibly, the precise moment officers first encountered Defendant or exactly when they learned the gun was a fake. (Ex. 3).

At the close of the suppression hearing, the Court ruled that “after hearing them testify, I do find the officers credible.” (Tr. 100). After the hearing, the Court denied Defendant’s motion, noting in its order that “the detention only lasted a few minutes. After the officers realized that the weapon was a toy gun, they immediately ran the background check that revealed an active warrant for Defendant’s arrest. These actions do not violate Defendant’s Fourth Amendment rights.” (L.F. 14). Defendant filed a detailed motion to reconsider, which the court also overruled, citing precedent that allows for a detention “for a short period of time ... after the reasons for

the detention are found to be unwarranted.” (L.F. 16-33); *citing State v. Grayson*, 336 S.W.3d 138, 146, fn. 4. (Mo banc 2011).

At trial, by stipulation of the parties, Defendant was tried on the evidence presented at the suppression hearing. (Tr. 106). Defendant was granted a continuing trial objection that echoed his suppression motion. (Tr. 111). Defendant’s oral motion for acquittal at the close of the evidence was denied. (Tr. 113). The Court found Defendant guilty. (Tr. 114).

D. The officers reasonably detained Defendant.

“Article I, § 15 of the Missouri Constitution provides that ‘the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures....’” *State v. Rushing*, 935 S.W.2d 30, 34 (Mo. banc 1996). “This provision parallels the Fourth Amendment of the United States Constitution, which preserves “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....”*Id.* Defendant claims the officers in this case violated those protections when they held him for approximately three or four additional minutes to check his name for warrants after discovering that his gun was a “fake.”⁷ (Def’s Brief 10; Ex. 3). Because of those few minutes, he

⁷ From the time the officers first stopped to the time of the recorded report that “the gun’s fake,” three minutes and thirteen seconds passed. (Ex. 3). At

argues the trial court should have suppressed the cocaine discovered in his pocket. (Def’s Brief 10). While “generally, evidence discovered and later found to be derivative of a Fourth Amendment violation must be excluded as fruit of the poisonous tree,” that is not the situation in this case. *State v. Miller*, 894 S.W.2d 649, 654 (Mo. 1995) (citing *Nardone v. United States*, 308 U.S. 338, 341(1939)). Contrary to Defendant’s claim, at each stage of this stop, the police officers acted in compliance with the 4th Amendment.

Initial Stop

The officers in this case were statutorily authorized

to stop any person abroad whenever there is reasonable ground to suspect that he is committing, has committed or is about to commit a crime and demand of him his name, address, business abroad and whither he is going. When stopping or detaining a suspect, they may search him for a dangerous weapon whenever

some point during that time, the officers discovered Defendant’s weapon was an Airsoft gun. (Tr. 16, Ex. 3). The radio dispatcher finished announcing Defendant’s warrant at 5:14 elapsed time. (Ex. 3). If, for example, the officers made the Airsoft discovery ninety seconds after stopping their vehicle, the allegedly improper detention would have lasted just three minutes and forty-four seconds.

they have reasonable ground to believe they are in danger from the possession of such dangerous weapon by the suspect.

§ 84.710.2 (RSMo 2000) (arrest powers for Kansas City police). This authority is consistent with the United States Supreme Court’s precedent holding that police officers are constitutionally permitted to briefly stop and detain persons without sufficient probable cause to effect an arrest. *See Terry v. Ohio*, 392 U.S. 1 (1968). Specifically, *Terry* established the principle that while the Fourth Amendment is engaged “whenever a police officer accosts an individual and restrains his freedom to walk away,” the requirements of that amendment are satisfied when the officer can “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the stop. *Id.* at 16, 21. “An officer need not be certain that criminal conduct is taking place; the officer needs merely to have reasonable suspicion of criminal activity.” *State v. Goff*, 129 S.W.3d 857, 864 (Mo. banc 2004) (*citing United States v. Sokolow*, 490 U.S. 1, 9-10 (1989)).

In evaluating such suspicion, Missouri courts

must determine 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.

In evaluating reasonable suspicion, courts must determine if the content of the information possessed by the police and its degree

of reliability is sufficient to create a reasonable suspicion of criminal activity. We are mindful that police officers are permitted to make use of all of the information available to them when forming a particularized and objective basis for suspecting criminal activity.

Norfolk, 366 S.W.3d at 533-34 (Mo. banc 2012) (internal citations omitted). When evaluating a stop, courts “must consider the totality of the circumstances surrounding the encounter.” *State v. Sund*, 215 S.W.3d 719, 725 (Mo. banc 2007); *See United States v. Arvizu*, 534 U.S. 266 (2002) (apparently innocent behavior can support *Terry* stop).

This Court demonstrated the totality analysis in a *Terry* case where officers happened upon suspects acting suspiciously in a grocery store parking lot. *See Goff*, 129 S.W.3d 857 (Mo. banc 2004). In affirming the trial court’s denial of the defendant’s motion to suppress the evidence of theft of money from vending machines, this Court noted several factors supporting the officer’s stop. *Id.* at 866, 861, 865. The suspects were illegally parked near a locked store entrance at 3:00 a.m. *Id.* at 865. They were seen at another parking lot soon after. *Id.* The suspects acted differently when they were aware of the officers’ presence. *Id.* The circumstances in Defendant’s case similarly justified a *Terry* stop.

The facts and circumstances that justified the initial stop (and the subsequent investigation discussed below) included:

- Defendant was visibly armed with what appeared to be a firearm. (Tr. 13); *See Terry*, 392 U.S. at 27 (1968) (permitting “a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual....”).
- Defendant was riding a bicycle around in circles in the middle of an intersection. (Tr. 10); *See Miller*, 894 S.W.2d at 651 (Mo. 1995) (“Police are allowed to conduct *Terry* stops of moving vehicles upon a reasonable suspicion that the occupants are involved in criminal activity.”); *See* § 307.190, RSMo 2000. (bicycles required to be safely ridden on the right side of the roadway).
- The intersection in question was located in a neighborhood suffering from frequent criminal activity, such that officers assigned to patrol that area work in pairs. (Tr. 57-58, 8); *See State v. Long*, 303 S.W.3d 198, 202-03 (Mo. App. W.D. 2010) (“that the suspicious activity occurred in a high crime area, while not determinative by itself, is among the relevant contextual considerations in a *Terry* analysis.”).

- It was approximately 10:30 p.m. (Tr. 9); *See Goff*, 129 S.W.3d at 864 (Mo. banc 2004) (officers “entitled to consider the lateness of the evening in determining whether there was criminal activity”).
- Defendant reacted to the officers’ presence by speaking and gesturing at them in fashion intended to draw the officers’ attention away from him, implying he did not want to encounter them. (Tr. 10, 13). *See State v. Hernandez*, 954 S.W.2d 639, 644 n.4 (Mo. App. W.D. 1997) (“an attempt to avoid an encounter with the police can be a significant factor in reasonable suspicion.”).
- Defendant was unable to explain his unusual behavior. (Tr. 10, 72); *See State v. Stover*, 388 S.W.3d 138, 149 (Mo. banc 2012) (“An officer may continue to detain the individual beyond the time period necessary to investigate the traffic violation ... based on the behavior and responses of the individual during the traffic stop.”).
- Defendant appeared to be under the influence of drugs or alcohol. (Tr. 13, 51); *See State v. Keeth*, 203 S.W.3d 719, 726 (Mo. App. S.D. 2006) (among other factors supporting reasonable suspicion, the defendant’s “speech was slurred, and he stumbled as he got out of his vehicle.”).

Taken together, these factors provided reasonable suspicion to stop Defendant. These officers reasonably believed that there might be criminal activity afoot when they saw a man yelling while riding a bicycle in circles in a crime-ridden neighborhood at night with a gun. *See State v. Grayson*, 336 S.W.3d 138, 143 (Mo. banc 2011) (“Under *Terry*, where a police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity may be afoot the officer may briefly stop the suspicious person and make reasonable inquires aimed at confirming or dispelling his suspicions.”). The totality of the circumstances readily justified stopping Defendant.

To the extent some of these individual factors might not be indicative of a crime, this Court has explained that “although *Terry's* facts involved a suspicion of criminal activity, nothing in the Fourth Amendment requires the ‘specific and articulable facts’ to be limited to criminal activity. Insisting that every encounter be based on suspicion of criminal activity ignores law enforcement officers’ community caretaking functions.” *State v. Schroeder*, 330 S.W.3d 468, 472-73 (Mo. banc 2011) (*citing Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). This function of safeguarding the community would certainly encompass protecting against potential gun violence. It is difficult to imagine what would more fully provide reasonable suspicion and legitimate concern for safety than seeing a possibly intoxicated person with a

gun. Indeed, Defendant has expressly conceded this point, arguing that “the only reason to stop [Defendant] was that he appeared to have a gun on his person.” (Def’s Brief 16). Although the officers here had other reasons to detain Defendant, the fact of him being apparently armed with a deadly weapon alone justified the stop.⁸ After all, an “officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *State v. Goff*, 129 S.W.3d 857, 865 (Mo. banc 2004). Here, the arresting officer did not have a vague hunch that Defendant might have a gun. He could plainly see that Defendant was armed. (Tr. 13). Furthermore, Defendant was in possession of another actual weapon; a concealed knife. (Tr. 16; Ex. 3). This interesting fact, while not required to render the search proper, certainly demonstrates the officers’ concerns were justified.

In sum, the officers had reasonable suspicion to stop Defendant and disarm him, as Defendant has conceded. That suspicion was based upon a

⁸ In *Terry*, the Supreme Court found the search of defendants did not violate the Constitution and affirmed the denial of their motion to suppress even though the arresting officer never actually saw the concealed firearms until after the stop. *Terry*, 392 U.S. at 6-7.

number of different factors, only one of which was the fact that he was apparently armed with a deadly weapon. The officers' initial *Terry* stop was proper.

Investigation

“Having established the validity of the stop, the propriety of the ensuing search must next be addressed. A *Terry* stop must be carefully tailored to its underlying justification.” *Waldrup*, 331 S.W.3d at 674 (Mo. banc 2011) (citations omitted). On this point, Defendant argues that the moment the officers discovered that his gun was a fake, he should have been released “without further ado.” (Def’s Brief 20). This suggests that the sole ground for reasonable suspicion was the presence of the gun. While it was admittedly the most provocative aspect of the situation, as shown above, it was not the only basis for the stop. Learning about the gun did not explain what Defendant meant by his gesturing and saying “they went that way.” (Tr. 10). Was he trying to tell the officers a crime had been committed and the fleeing fugitives had just passed by? Presumably that was what Defendant hoped the officers would conclude. Of course, his plan to draw their attention away from himself produced the opposite result.

Additionally, discovering that the gun was an Airsoft pistol did nothing to explain why Defendant was erratically riding a bicycle in an intersection, in that area, at night. The nature of the gun did not explain Defendant’s

confused state. While not illegal, the presence of the gun raised the legitimate question of why Defendant had a realistic-looking Airsoft gun in his waistband.⁹ All these unanswered questions justified an investigation. The officers did not violate Defendant’s rights when they asked him for his name and then held him for a few minutes to conduct a warrant check.

Even if Defendant were correct, and the gun was the sole reason the officers had for stopping him, they would still have been entitled to check for warrants. In fact, “most [federal] circuits have held that an officer does not impermissibly expand the scope of a *Terry* stop by performing a background and warrant check, even where that search is unrelated to the circumstances that initially drew the officer's attention.” *Klaucke v. Daly*, 595 F.3d 20, 26 (1st Cir. 2010).¹⁰ In *Klaucke*, “it took less than eight minutes to perform both

⁹ While the officers were not aware of Defendant’s convictions for federal bank robbery and first-degree tampering at the time they stopped him, his status as a felon made it illegal for him to have a real gun. (Tr. 42, 114); §571.070, RSMo 2000. (convicted felons prohibited from possessing firearms).

¹⁰ Citing *United States v. Rusher*, 966 F.2d 868, 876–77 (4th Cir. 1992); *United States v. Cavitt*, 550 F.3d 430, 437 (5th Cir. 2008); *United States v. Kirksey*, 485 F.3d 955, 957 (7th Cir. 2007); *United States v. Long*, 532 F.3d

the license validity and warrant check.” *Id.* In the present case, the officers’ learned of Defendant’s warrant even faster. From the time their car reversed to the time the radio dispatcher announced the warrant, just five minutes and fourteen seconds had elapsed. (Ex. 3). But again, the officers’ reasonable suspicion persisted beyond the discovery of the gun owing to Defendant’s odd behavior and the setting. Their reasonable suspicion was not dispelled.

This Court recently ruled that when the police have a lawful basis for the initial stop and have concern about the presence of a weapon, they are justified in prolonging the defendant's stop for the officers' safety. *Waldrup*, 331 S.W.3d at 675 (Mo. banc 2011) (noting searches lasting up to one hour have been found acceptable). Specifically, when “an officer possesses reasonable suspicion that an individual not possessing identification has immediate access to a weapon, he may perform a warrant check of that person's information, in furtherance of his efforts to dispel his reasonable suspicion.” *Id.* This is precisely what happened in the present case, when Defendant spelled out his name, meaning he presumably did not have identification with him. *See State v. Chaney*, 967 S.W.2d 47, 53 (Mo. banc 1998) (“An appellate court ‘faced with a record of historical facts that

791, 795 (8th Cir. 2008); *United States v. Villagrana-Flores*, 467 F.3d 1269, 1275–77 (10th Cir. 2006).

supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.” *quoting Jackson v. Virginia*, 443 U.S. 307, 326 (1979)). The officers, having realized that Defendant was carrying a handgun, acted under the rule provided in *Waldrup* to protect everyone’s safety. (Tr. 14, 25). Again, the reality that Defendant had another deadly weapon (the concealed knife) reinforces the conclusion that the officers’ continued investigation was entirely reasonable. (Tr. 16; Ex. 3).

Defendant claims that *Waldrup* is distinguishable from his case. (Def’s Brief 17). The factual similarities between that decision and the present case demonstrate otherwise. Mr. Waldrup, while stopped at a Highway Patrol license checkpoint, seemed “concerned with [the troopers] presence” when he ducked down to the floorboard and then acted “differently as if he were under the influence of some substance or suffered from a mental or physical disability.” *Waldrup*, 331 S.W.3d at 670-71. After patting-him down, the troopers ran a “radio check,” which determined he had several warrants. *Id.* A subsequent search incident to arrest for those warrants uncovered his hidden cocaine. *Id.* at 671-72, 676. This Court affirmed the trial court’s denial of Mr. Waldrup’s suppression motion and his conviction for felony drug possession. *Id.* In other words, *Waldrup* was about a suspect that was

behaving suspiciously, which triggered a warrant check, which in turn led to the discovery of cocaine via search incident to arrest. That is essentially what occurred in the present case.

Even supposing for the sake of argument that the officers did violate Defendant’s rights by holding him for a few additional minutes, that technical violation did not warrant suppression, which is a “last resort, not our first impulse.” *Herring v. United States*, 555 U.S. 135, 141 (2009) (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). “Evidence should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.” *Herring* at 143. This not the situation presented in this case. The officers’ decision to quickly execute a warrant check is not the kind of police misconduct that is plainly improper, which is the level of misconduct that exclusion is intended to deter. See *United States v. Leon*, 4687 U.S. 897, 911 (1984) (“an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus.”).

Finally, as a matter of policy, Defendant’s view of the Fourth Amendment sets a strict time limit on the length of a *Terry* stop. The crux of his argument to this Court is that officers may not extend their investigations once the initial suspicion has been dispelled. This is contrary

to the direction of United States Supreme Court, which has explained strict limits “would undermine the equally important need to allow authorities to graduate their responses to the demands of a particular situation.” *United States v. Place*, 462 U.S. 696, 709 n.10 (1983). The Court has explained that

While it is clear that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion, we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Much as a “bright line” rule would be desirable... we [have] expressly rejected the suggestion that we adopt a hard-and-fast time limit for a permissible *Terry* stop.

United States v. Sharpe, 470 U.S. 675, 685-86 (1985) (quotations omitted). By arguing that the officers could not take even a few minutes to process a warrant check, Defendant has effectively invited this Court to establish a strict time limitation, which is imprudent.

If officers were required to release suspicious suspects before checking their names, some of those individuals would surely use that window of opportunity to flee the scene, forcing the officers to recapture the fugitive via hot-pursuit. Here, had the officers released Defendant, he would presumably

have ridden off on his bicycle, particularly if he was aware of the outstanding warrant. The officers would have then faced the prospect of pursuing an armed, confused, convicted-felon in a high-crime neighborhood. This prospect was avoided by a de minimis increase in the length of Defendant’s detention. *See State v. Johnson*, 316 S.W.3d 390, 398 (Mo. App. W.D. 2010) (“The governmental interest in apprehending individuals with outstanding arrest warrants outweighs the minimal intrusion on the liberty of an individual occasioned by a brief detention to determine the status of the warrant.”).

In sum, the officers’ reasonable suspicion was not dispelled upon discovery that Defendant’s gun was an Airsoft gun. That information did not explain his other unusual behavior. The officers were justified in continuing their investigation of the situation, including prolonging the stop for a few minutes to complete a warrant check.

Search Incident to Arrest

Having learned of Defendant’s outstanding warrant, the officers placed him under arrest. (Tr. 16). “Pursuant to a lawful arrest, a search may be performed of the ‘arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Waldrup*, 331

S.W.3d at 676 (Mo. banc 2011).¹¹ Applied here, the search incident to arrest doctrine permitted the officers to check Defendant’s person for accessible weapons and evidence of criminality. Such a search would encompass a thorough examination of the contents of Defendant’s pockets. *See State v. Dickson*, 252 S.W.3d 216, 221 (Mo. App. E.D. 2008) (“... and the ensuing search of the coat, as searches incident to arrest ... did not violate the Fourth or Fourteenth Amendments.”). The search incident to arrest that found Defendant’s cocaine was proper. Defendant has not contested the legality of the search itself in his brief.

Conclusion

Defendant’s claim that the officers violated his constitutional rights when they found his cocaine is without merit. The officers had appropriate and well-supported reasonable suspicion to stop Defendant and investigate his behavior. That investigation, which lasted only a few minutes, properly led to Defendant being arrested pursuant to an outstanding warrant. This, in turn, resulted in a justified search of Defendant’s person, which uncovered his cocaine. That evidence was constitutionally obtained. Consequently, the

¹¹ *Citing Arizona v. Gant*, 556 U.S. 332 (2009) (*quoting Chimel v. California*, 395 U.S. 752, 763 (1969) (announcing “search incident to arrest” exception to the 4th Amendment)).

trial court's denial of Defendant's suppression motion was not clearly erroneous.

CONCLUSION

Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Todd T. Smith
TODD T. SMITH
Assistant Attorney General
Missouri Bar No. 63638

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-0481
Fax: (573) 751-5391
Todd.Smit@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 5,843 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that a copy of this brief was sent through the electronic filing system on 13th day of September, 2013, to:

Susan Hogan
Office of Public Defender
920 Main Street, Suite 500
Kansas City, MO 64106

/s/ Todd T. Smith
TODD T. SMITH
Assistant Attorney General
Missouri Bar No. 63638

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-0481
Fax (573) 751-5391
Todd.Smith@ago.mo.gov

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI