IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
	:	**CRIMINAL ACTION**
	:	
v.	**:**	
	:	
DAVID O'NEIL SPENCER	**:**	**NO. 02-788**

MEMORANDUM AND ORDER

Schiller, J. **March , 2003**

The government has charged the Defendant, David O'Neil Spencer, with possession of a firearm in violation of 18 U.S.C. § 922(g)(1), possession of ammunition by a convicted felon in violation of the same, and possession of cocaine base in violation of 21 U.S.C. § 844(a). Presently before the Court is Defendant's motion to suppress all physical evidence obtained by the government in this case. Because I conclude that the government obtained this evidence in a constitutionally permissible manner, as explained below, I deny Defendant's motion.

I. BACKGROUND

Defendant contends that he was illegally stopped and frisked without reasonable suspicion and that the firearm, ammunition and narcotics are the fruit of the allegedly illegal stop and frisk. On March 6, 2003, the Court held an evidentiary hearing to address Mr. Spencer's motion to suppress. Reading Police Sergeant Barry Harding and Officers Kevin Berkel and Michael Wise, who were involved in the events giving rise to Defendant's motion, each gave testimony at the hearing. Based on the facts presented at that hearing, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT[1]

On June 21, 2002, at approximately 2:14 a.m., Reading Police Sergeant Barry Harding, sitting in a marked police car at a car wash in Reading, Pennsylvania, observed an individual who was later identified as David O'Neil Spencer emerge from a breezeway beside a house adjacent to the car wash. Sgt. Harding watched Mr. Spencer, who was approximately fifteen feet away from him and wearing a black sweatshirt with the hood up, stand for approximately three minutes and stare at the Getty Mart across the street. (March 6, 2003 Tr. at 6.) Sgt. Harding has served as a patrol officer, and his patrol has included the area around the Getty Mart, for 22 years. (*Id*. at 5.) Sgt. Harding knew that the area around the Getty Mart was a high crime area, and had been the site of previous late night robberies. (*Id*. at 4.)

Immediately, Sgt. Harding became suspicious that Mr. Spencer was preparing to rob the Getty Mart or to shoot someone in an ambush. (*Id*. at 8, 10.) In addition to Mr. Spencer's emergence from a breezeway and unusual observation of the Getty Mart, Sgt. Harding regarded the use of a hood as curious given the warm weather. (*Id*. at 8.) Sgt. Harding then observed Mr. Spencer turn towards him and then abruptly return to the breezeway beside the house and proceed away from the area on a nearby street. (*Id*.)

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[1] A judge presiding at a suppression hearing may receive and consider any relevant evidence, including affidavits and unsworn documents that bear indicia of reliability. *See United States v. Schaefer*, 87 F.3d 562, 570 (1st Cir.1996) (*citing United States v. Lee*, 541 F.2d 1145, 1146 (5th Cir.1976)). The Federal Rules of Criminal Procedure do not specifically mandate that a recorded finding of fact be made by the trial judge on a motion to suppress. However, at least one Circuit Court has indicated that district judges are "well advised" to record findings of fact and conclusions thereon, especially where the factual and legal context is somewhat complicated. *See United States v. Sicilia*, 457 F.2d 787, 788 (7th Cir.1972).

Sgt. Harding attempted to follow Mr. Spencer in his car, but could not find him and continued to search the immediate area. A short time later, Sgt. Harding found Mr. Spencer walking a few blocks away in the general direction of the Getty Mart. (*Id*. at 11.) As Sgt. Harding approached Mr. Spencer in his patrol car, Mr. Spencer turned away from the car with his hands out of sight and then turned to face Sgt. Harding with one of his hands in his front sweatshirt pocket. (*Id*. at 13.) As he faced Sgt. Harding, Mr. Spencer removed his hand from his sweatshirt. (*Id*.)

As Sgt. Harding approached Mr. Spencer he called for back-up, stating that he had made a pedestrian stop. (*Id*. at 14, 37.) Sgt. Harding drove up along side Mr. Spencer and asked, "what's up?" (*Id*.) Mr. Spencer replied that he was drunk and walking home. He stated that he had been drinking at the April III bar, but that he was walking to his house in the 600 block of North Second Street. (*Id*. at 14,16.) Sgt. Harding knew that the April III bar was located nearby and was supposed to have closed at 2:00 a.m. (*Id*. at 30.) Mr. Spencer told Sgt. Harding that he had identification, which he produced from his back pants pocket when Sgt. Harding asked to see it. (*Id*. at 30, 34.) Sgt. Harding took Mr. Spencer's identification and recorded its information. (*Id*. at 14-15.) The address on the identification did not precisely match the North Second Street address given by Mr. Spencer, but was in the immediate neighborhood. (*Id*. at 35.) Sgt. Harding engaged Mr. Spencer in small talk for approximately two minutes to allow the backup unit of Officers Berkel and Wise time to arrive. (*Id*. at 20, 37.) During these two minutes, Sgt. Harding held Mr. Spencer's identification, and did not return to him until either immediately before or after the backup unit arrived. (*Id*. at 39.)

Once Officers Berkel and Wise arrived in a marked patrol car, Sgt. Harding began questioning Mr. Spencer, with Officers Berkel and Wise standing a few feet away. (*Id*. at 18, 38.)

Sgt. Harding asked Mr. Spencer why he was walking in direction away from his nearby home and Mr. Spencer had no response. (*Id*. at 16.) Sgt. Harding then asked Mr. Spencer whether he was carrying any weapons or drugs and Mr. Spencer replied that he was not and that Sgt. Harding could search him. (*Id*. at 17.) Sgt. Harding also questioned Mr. Spencer as to what he was doing across from the Getty Mart, and Mr. Spencer indicated that he had intended to visit the Getty Mart but had heard people arguing and changed his mind. (*Id*. at 18.) Sgt. Harding had not heard any arguing from the Getty Mart, and had observed that the Getty Mart was quiet during the period in question. (*Id*.)

Sgt. Harding could see a square bulge in the front pocket of Mr. Spencer's sweatshirt and, after asking Mr. Spencer what it was, touched the bulge in a way that caused a rattling sound. (*Id*. at 45, 81.) Sgt. Harding asked Mr. Spencer what the sound was. Mr. Spencer replied it was "just something I have." (*Id*.) When Sgt. Harding asked if he could see what it was, Mr. Spencer pulled out a box of ammunition from the front of his sweatshirt and gave it to Sgt. Harding (*Id*.) Sgt. Harding asked Mr. Spencer if he had a gun, and Mr. Spencer replied that he did not. (*Id*. at 19.) Then, as Sgt. Harding went to place the box of ammunition on his car, Mr. Spencer began to run. (*Id*.)

Officers Berkel and Wise gave chase on foot. (*Id*. at 20.) Sgt. Harding observed Mr. Spencer holding his side as he ran (*Id*. at 21-22) and drove his car to a point where he thought he could cut Mr. Spencer off (*Id*. at 21). Officer Berkel observed Mr. Spencer grab at his front pants pocket as he began to run. (*Id*. at 55.) Officer Berkel, while pursuing Mr. Spencer on foot for several blocks, repeatedly yelled for Mr. Spencer to stop. (*Id*.) Ultimately, Mr. Spencer found his path blocked by a chain-link fence, and jumped up and made what Officer Berkel called "a slam-dunking motion over

top of the fence." (*Id*. at 57.) Officers Berkel and Wise took Mr. Spencer into custody after pulling him off the fence and subduing him. (*Id*. at 58.)

Officer Wise searched the area on the opposite side of the chain-link fence from which Mr. Spencer had been apprehended and recovered a small handgun. (*Id*. at 75.) Sgt. Harding compared this handgun to his own and determined that his own was cooler to the touch, which suggested to him that someone had recently had it on their person. (*Id*. at 24.)

A subsequent search of Mr. Spencer's person yielded cocaine base. The government took possession of the ammunition, the gun, and the cocaine base and seeks to introduce those items as evidence in this case.

III. CONCLUSIONS OF LAW

The Fourth Amendment provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

U.S. CONST. amend. IV. Under *Terry v. Ohio*, 392 U.S. 1 (1968) and subsequent cases, "an officer may, consistent with the Fourth Amendment, conduct a brief investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *United States v. Valentine*, 232 F.3d 350, 353 (3d Cir. 2000) (*quoting Illinois v. Wardlow*, 528 U.S. 119 (2000)). Evidence obtained from a search or seizure conducted in violation of the Fourth Amendment is deemed "fruit of the poisonous tree," and must be excluded from trial. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). Mr. Spencer argues that the ammunition, firearm and drugs were fruits of an illegal stop

and frisk and should therefore be suppressed.

A. Investigatory Stop

The Fourth Amendment is not implicated in the *Terry* context until a seizure occurs. *Valentine*, 232 F.3d at 357. A seizure does not occur simply because a police officer approaches an individual and asks a few questions. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may a court conclude that a seizure has occurred. *Id*. Thus, courts have determined that an investigative stop occurs when a reasonable person would believe he or she is not free to leave. *Id.* at 435.

Here, two crucial factors distinguish the scenario presented from one in which an officer simply approaches an individual to ask a few questions. First, although the precise moment when Sgt. Harding returned Mr. Spencer's identification is unclear, Sgt. Harding retained Mr. Spencer's identification while waiting for back-up. *See United States v. Martin*, 155 F. Supp. 2d. 381, 384 n.2 (E.D.Pa. 2001) (concluding that reasonable person would not have felt free to leave when plainclothes officers had shown suspect their badges, requested his driver's license, and asked him to exit his vehicle). While the back-up officers arrived only two minutes later, Sgt. Harding indicated that he deliberately delayed Mr. Spencer during those two minutes to allow backup to arrive. (*Id*. at 37.) Second, after his identification had been returned, Mr. Spencer found himself half-encircled by three uniformed officers while Sgt. Harding questioned him. *See United States v. Kim*, 27 F.3d 947, 954 (3d Cir.1994) (finding that number of officers present is factor in *Terry* stop analysis). Although, as the government notes, the officers did not physically restrain Mr. Spencer,

an actual physical touching is not required to effect a seizure. *Gallo v. City of Philadelphia*, 161 F.3d 217, 223 (3d Cir.1998). It is also clear that Mr. Spencer submitted to Sgt. Harding's questioning. I thus conclude that a reasonable person in Mr. Spencer's position would not have felt free to leave and that Mr. Spencer was seized when Sgt. Harding failed to promptly return his I.D. after recording the information.

Turning, then, to whether reasonable suspicion existed to justify the stop, I begin by noting that the reasonable suspicion determination does not depend upon any one factor, but on the totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1, 8, (1989). In making the determination of reasonable suspicion, the "legality of a stop must be judged by the objective facts known to the seizing officers rather than by the justifications articulated by them." *United States v. Hawkins*, 811 F.2d 210, 213 (3d Cir.1987). That is, whether reasonable suspicion exists hinges on an objective assessment of the police officers' actions in light of the facts and circumstances confronting them at the moment of the seizure or the search. *See Maryland v. Macon*, 472 U.S. 463, 470 (1985); *Terry*, 392 U.S. at 21-22.

The government bears the burden to show reasonable suspicion by a preponderance of the evidence. *See United States v. Coward*, 296 F.3d 176, 180 (3d Cir. 2002) ("the government must bear the burden of proving the existence of reasonable suspicion"); *United States v. Haynes*, 301 F.3d 669, 677 (6th Cir. 2002) ("The Government has the burden of proof to justify a warrantless search"); *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir.1995) ("once the defendant has established a basis for his motion ... the burden shifts to the government to show that the search or seizure was reasonable"); *United States v. Vasey*, 834 F.2d 782, 785 (9th Cir.1987) (government "must prove the existence of an exception to the Fourth Amendment Warrant Requirement by a

preponderance of the evidence").

Here, the government has shown sufficient facts to support Sgt. Harding's suspicion that Mr. Spencer was about to commit a robbery of the Getty Mart. First, Sgt. Harding had long experience as a patrol officer in district where the events in question took place. *United States v. Martin*, 155 F.Supp.2d 381, 386 (E.D.Pa. 2001).

Second, the area around the Getty Mart was known to Sgt. Harding as a high crime area. *See United States v. Rickus*, 737 F.2d 360, 365 (3d Cir.1984) ("The reputation of an area for criminal activity is an articulable fact upon which a police officer may legitimately rely"). It is well settled that the presence of an individual in a high crime area is not enough, by itself, to establish reasonable suspicion that the individual is committing a crime or is armed and dangerous. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Brown v. Texas*, 443 U.S. 47, 52 (1979). Moreover, I am loathe to punish residents of neighborhoods in which crimes occur frequently, like Mr. Spencer, by acquiescing in the trend of permitting greater suspicion of their activities.[2] Here, however, the government presented evidence that the Getty Mart, in particular, was known to Sgt. Harding as a site of late night robberies. (Tr. at 4.) *Cf. United States v. Carter*, Crim. A. No. 99-50, 1999 U.S. Dist. LEXIS 17185, at *15-16, 1999 WL 1007044, at *4 (D.Del. 1999). (refusing to consider fact that general area was "high crime" absent testimony as to specific area where stop occurred).

Third, the events in question in this high crime area occurred late at night. *See United States v. Valentine*, 232 F.3d 350, 356 (3d Cir. 2000). It must be conceded that the Getty Mart is open

[2] That is, I heed the Third Circuit's teaching that "the types of articulable facts that can provide reasonable suspicion cannot include 'circumstances which describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures' were the circumstances accepted as reasons for the investigation." *Karnes v. Skrutski*, 62 F.3d 485, 492-93 (3d Cir.1995) (*quoting Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam)).

twenty-four hours per day, and that Mr. Spencer offered a highly plausible and legitimate explanation for his presence in the area at that hour. Thus, this factor is only helpful in the context of the other facts present.

Fourth, and certainly most significantly, Mr. Spencer behaved in a manner that could reasonably give rise to suspicion that he was about to commit a crime. Mr. Spencer emerged from a breezeway next to a home with his hood up on a warm night and stood staring at the Getty Mart for approximately three minutes. When Mr. Spencer turned towards Sgt. Harding for the first time, he rapidly returned to the breezeway and left the area via a route that could have appeared evasive.[3]

Sgt. Harding had no specific information, such as a tip or radio call, that criminal activity was imminent or had occurred in the area. *See, e.g., Brown v. Texas*, 443 U.S. 47, 50 (1979) (men stopped "in close proximity to the crime scene a few minutes after the call of 'shots fired' was received"). His suspicion thus related to a robbery that had not yet occurred based on his observations of what appeared to be preparatory action. In this respect, the facts here are not unlike those confronting the Supreme Court in *Terry*. There, a lone officer observed two men engage in "elaborately casual and oft-repeated reconnaissance of [a] store window," leading the officer to suspect that the two men were preparing to rob the store. *Terry*, 392 U.S. at 6. In that case, however, the activity occurred in the afternoon and there was no evidence of high incidence of crime in the area of the store. *See id.* The Court there found that the officer had reasonable suspicion to conduct and investigative stop. *See id.* at 22-23. Here, while the ostensible "casing" of the Getty

[3] Of course, an individual may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience, an exaggerated fear of police brutality or harassment, a fear of being apprehended as the guilty party, or other legitimate personal reasons. *In re D.J.*, 532 A.2d 138, 142 n.4 (D.C. 1987). I thus consider this fact only as it relates to the circumstances present.

Mart was relatively short in duration and involved only one suspect, the late hour and the known history of crime in the specific area suggest that, under *Terry*, the total picture presented to Sgt. Harding would give rise to reasonable suspicion that a crime was about to occur.

It must also be noted that Mr. Spencer had ostensibly abandoned whatever plan he may have had for criminal action by the time Sgt. Harding reached him, such that, at first blush, it would seem to have been difficult for Sgt. Harding to suspect that Mr. Spencer was about commit a robbery of the Getty Mart at the point when he conducted the investigatory stop. In *Terry*, the suspects had moved away from the suspected target store by the time officer approached them, but they also still appeared to be plotting their crime. 392 U.S. at 6. Here, Mr. Spencer had walked at least a few blocks, and must have appeared to have been deterred from committing any crime at the Getty Mart by Sgt. Harding's presence.[4] Still, Mr. Spencer had taken a circular route that pointed him – when Sgt. Harding found him – in the general direction of the Getty Mart and away from his home, toward which he claimed to be walking. As Sgt. Harding approached in his patrol car, Mr. Spencer turned away from Sgt. Harding and appeared to be manipulating something in his front sweatshirt pocket. Faced with these facts, Sgt. Harding could have formulated a reasonable suspicion that Mr. Spencer would return to the Getty Mart and pursue criminal action.[5] Upon consideration of the totality of

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[4] The Supreme Court has said that unprovoked flight in a high crime area is sufficient for a finding of reasonable suspicion. *Wardlow*, 528 U.S. at 124. Yet I cannot regard Mr. Spencer's return to the breezeway as flight. There is no indication that he ran away from the Getty Mart area, and he did not flee from Sgt. Harding when approached in a patrol car.

[5] It would also be incongruous with the rationale behind allowing officers to briefly detain individuals based on particularized suspicion to require Sgt. Harding to have caught Mr. Spencer in the act of staring at the Getty Mart in order to permit his investigatory stop. Sgt. Harding gave diligent pursuit the moment Mr. Spencer departed from the area. However, the fact that an officer has reasonable suspicion at a particular point in time does not justify any subsequent investigatory stop of the suspect. For example, had Sgt. Harding satisfied himself that his

these circumstances, I conclude that the government has shown by a preponderance of the evidence that Sgt. Harding had reasonable suspicion to conduct an investigatory stop of Mr. Spencer.

B. Protective Frisk

Terry further held that "when an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." 392 U.S. at 24. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. . . ." *Adams v. Williams*, 407 U.S. 143,146 (1972).

A protective frisk must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 U.S. at 26. If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Sibron v. New York,* 392 U.S. 40, 65-66 (1968); *Baker v. Monroe Township*, 50 F.3d 1186, 1194 (3d Cir. 1995) ("when a protective search goes beyond a search for weapons and becomes a search for evidence, it is no longer valid under *Terry*"). Here, having formulated a belief that the square bulge in Mr. Spencer's pocket was not a gun, Sgt. Harding nevertheless touched the bulge with sufficient force to cause a rattling sound. This raises

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presence had finally deterred whatever action he suspected Mr. Spencer was poised to take and remained at the car wash, only to discover Mr. Spencer by chance at another location sometime later, I would be forced to reach a different conclusion about the existence of reasonable suspicion in this case.

the question as to whether to characterize Sgt. Harding's actions as a frisk or a full-blown search.[6]

In *Minnesota v. Dickerson*, the Supreme Court held that an officer overstepped the bounds marked by *Terry* when he determined that a lump in the pocket of the defendant's jacket was contraband crack cocaine only after squeezing, sliding and otherwise manipulating the contents of the defendant's pocket. 508 U.S. 366, 378 (1993). Since then, courts have concluded that "*Terry* and *Dickerson* must contemplate the permissibility of some form of tactile exploration of an object encountered during a frisk," but it is not always clear where that exploration becomes a search. *United States v. Ramirez*, 2003 WL 260572, at *7 (S.D.N.Y. 2003).

There is conflicting testimony as to how Sgt. Harding conducted his tactile exploration of the box of ammunition. Sgt. Harding testified that he "tapped" (Tr. at 44) – whereas officer Wise testified that "grabbed" and "shook" (Tr. at 81) – the box while it was inside the sweatshirt. Even if I adopt Officer Wise's version of the facts, however, Sgt. Harding's grabbing and shaking of the box does not, by itself, place Sgt. Harding's actions outside the bounds of *Terry*. *See, e.g.*, *United States v. Rogers*, 129 F.3d 76, 80 (2d Cir. 1997) (holding that officer who "grabbed" an object in suspect's pocket and "manipulated it for a few seconds" was within constitutional bounds).

The more difficult question is whether Sgt. Harding's conduct runs afoul of *Terry* and *Dickerson* by virtue of the fact that he knew that the square bulge in Mr. Spencer's pocket was not

[6] Notably, Sgt. Harding did not seize the ammunition. Instead, after hearing the sound it made, Sgt. Harding asked to see the item and Mr. Spencer produced it. Sgt. Harding only had the ammunition a short time before Mr. Spencer fled. Thus, Sgt. Harding's actions did not run afoul of the Supreme Court prohibition of the warrantless seizure of an item that is not a weapon and whose illegal identity is not immediately apparent. *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993).

a gun.[7] In *Dickerson* the officer had already conducted a protective frisk of the suspect and knew that pocket did not contain a weapon. 508 U.S. at 378. Here, Sgt. Harding could see a square item, which he "didn't presume to be a gun" because of its shape and yet he grabbed and shook the item through Mr. Spencer's sweatshirt. (Tr. at 47.)

In *United States v. Miles*, the Ninth Circuit confronted a similar question in a case involving a box of ammunition in a suspect's pocket. 247 F.3d 1009, 1010 (9th Cir. 2001). There, officers had detained an individual on suspicion that he had committed a shooting. *Miles*, 247 F.3d at 1011. In the midst of a pat down of the suspect's outer clothing, one of the officers came across what felt like a box in the suspect's pocket. *Id*. The officer "wrapped [his] hand around the box and sh[ook] it or move[d] it around." *Id*. After "hear[ing] the bullets clanking together" and concluding that the box contained bullets and that the suspect had committed the shooting, the officer retrieved a cardboard box containing .22 caliber shells from the suspect's pocket. *Id*. at 1011-12. The court concluded that the officer had "reached the outer limits of his pat down authority when it was clear that the object was a small box and could not possibly be a weapon." *Id*. at 1014. At that point, the court concluded, the officer's further manipulation of the box was impermissible; "[h]e had no cause to shake or manipulate the tiny box on the pretext that he was still looking for a weapon." *Id*. at 1015.

Here, it would appear that Sgt. Harding reached the point where the *Miles* court found further manipulation to be impermissible even before he laid a hand on Mr. Spencer. Yet the objective of *Terry* is to permit officers to conduct a pat down of a suspect's outer clothing for their own safety. In *Dickerson*, as noted, the officer had already conducted a protective frisk of the suspect and knew

[7] I can find no Third Circuit case that provides guidance as to this question.

that the pocket in which he continued to search did not contain a weapon. 508 U.S. at 378. Here, Sgt. Harding did not have the same assurance. He confronted a suspect whom he believed might be armed and who appeared to have tried to conceal something in his front pocket. Under these circumstances, although Sgt. Harding did not "presume" that the square bulge was a gun, I cannot say that his brief verification through touch of his visual observations exceeds the parameters of a *Terry* frisk.

The facts of this case are such that I need not reach the question of whether Sgt. Harding's frisk of Mr. Spencer was supported by reasonable suspicion that Mr. Spencer was armed and dangerous, *see Terry*, 392 U.S. at 28, because Mr. Spencer consented to a search of his person. When, as here, it is alleged that the defendant consented to the search, "[i]t is the Government's burden, by a preponderance of the evidence, to show through 'clear and positive testimony' that valid consent was obtained." *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir.1996) (*quoting United States v. Scott*, 578 F.2d 1186, 1188 (6th Cir.1978)). Here, Sgt. Harding testified that during his investigation, but prior to the frisk, Mr. Spencer told him, "you can go ahead and search me." (Tr. at 17.) Mr. Spencer does not challenge Sgt. Harding's assertion that he consented to the search. Moreover, the record facts reveal none of the indicia of involuntariness articulated in *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973). Sgt. Harding's testimony indicates that he did not use force or threats, or more subtle forms of coercion, but merely asked Mr. Spencer whether he was armed. Mr. Spencer evinced no unwillingness to consent. Under these circumstances, I conclude that the government has shown by a preponderance of the evidence that Mr. Spencer's consent to a search

of his person was valid.[8]

IV. CONCLUSION

For the foregoing reasons, I conclude that Sgt. Harding's investigatory stop and protective frisk of Mr. Spencer complied with the Fourth Amendment's requirements. Thus, I will deny Defendant's motion to suppress the evidence obtained during and after that interaction. An appropriate order follows.

[8] I thus need not address Mr. Spencer's incorrect contention that the frisk exceeded the permissible scope of *Terry* because it was not supported by reasonable suspicion that Mr. Spencer was armed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA		
	:	**CRIMINAL ACTION**
	:	
v.	**:**	
	:	
DAVID O'NEIL SPENCER	**:**	**NO. 02-788**

O R D E R

AND NOW, this day of **March, 2003**, upon consideration of Defendant's Motion to Suppress Physical Evidence, and the response thereto, and following a hearing on March 6, 2003, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's Motion to Suppress Physical Evidence (document no. 19) is **DENIED**.

2. Trial shall commence in this case on **April 9, 2003** at **2:00** p.m.

BY THE COURT:

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Berle M. Schiller, J.