UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 03-10313-RGS

UNITED STATES OF AMERICA

v.

DERRICK ROGERS

FINDINGS OF FACT, RULINGS OF LAW
AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

March 1, 2005

STEARNS, D.J.

FINDINGS OF FACT

The facts are taken from the testimony and exhibits offered at the two-day suppression hearing, the transcript of the detention hearing testimony of Officer Gregory Brown, and the undisputed facts set out in the pleadings.

1. Number 19 Castlegate Road is a neatly maintained, three-family home on one of the most dangerous streets in the Grove Hall neighborhood of Boston. The home is enclosed by a chain-link fence. The gate to the fence is secured by a latch which can be opened by visitors to the home, including mail carriers and delivery persons. Vernelia Coffie, the owner of the property, resides on the third floor of the building. Shanita[1] McDaniel, the girlfriend of defendant Derrick Rogers, resides in the second floor unit with her mother and her two young daughters. Rogers is an occasional visitor to the apartment, but does not reside with McDaniel.

[1]In defendant's pleadings, the spelling is "Schnitta." Ms. Cofie spelled McDaniel's name "Shanita."

2. On July 14, 2003, Boston police officers Gregory Brown, Craig Jones, and Darryn Brown, assigned to the Youth Violence Strike Force, were patrolling in the Castlegate Road area looking for signs of drug and gang activity.[2] The officers knew Grove Hall to be a high crime area plagued by gang-related shootings, drug dealing, assaults, and robberies. Castlegate Road in particular had bequeathed its name to one of Boston's most violent street gangs. Rogers was known to the officers, having been arrested by Gregory Brown in 1998 for dealing in crack cocaine. Rogers had been convicted federally, and after serving a two-year sentence, had returned to the Grove Hall neighborhood on supervised release. Brown also knew that Rogers had state court convictions for firearms and drug offenses. As the officers drove up Castlegate Road, they saw Rogers standing on the side of the street talking to Charles Webb, a member of the Castlegate gang and a reputed cocaine dealer. Upon seeing the officers, Webb began quickly to walk away. Questioned by the officers, Rogers denied using or dealing in crack cocaine.

3. On July 29, 2003, while on a patrol joined by Massachusetts State Trooper Derek Outerbridge, the same officers saw Rogers riding a bicycle on the sidewalk of Washington Street in the vicinity of Castlegate Road. Ten minutes later, as the officers turned on to Castlegate Road, they spotted Rogers sitting on the top step of the landing of number 19 in the company of two other men, both of whom were known to the officers

[2]Two other officers in a separate vehicle observed the July 14, 2003 encounter with Webb and Rogers but were referenced at the hearing only in passing.

as members of the Castlegate gang.[3] When Rogers saw the officers, he jumped up, clutched the waistband of his jeans, and moved quickly towards the front door, leaving behind on the stoop a baseball cap that he had been holding between his legs.[4] Gregory Brown exclaimed "He's running." Nothing was said by the officers to Rogers. Believing that Rogers was concealing a firearm, the officers stopped their vehicle and prepared to give chase. Rogers bumped into the front door of number 19 and disappeared inside before the officers could exit the cruiser. As Gregory Brown ran up the stoop towards the door of number 19, he saw in the upturned cap folded tissue paper and a protruding plastic knot. Brown recognized the knot as characteristic of crack cocaine packaging.[5] In the cap he found five plastic bags of crack cocaine wrapped in the tissue paper, which was wet to the touch.[6]

4. Gregory Brown and Craig Jones rang the buzzer and, after identifying themselves as police officers, were admitted to the building by Vernelia Coffie. Darryn

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[3]Gregory Brown had previously arrested one of the men for dealing in crack cocaine.

[4]This was the same cap with a New Jersey Nets logo that Gregory Brown had seen Rogers wearing a few minutes earlier on Washington Street.

[5]As Gregory Brown picked up the cap, one or both of the two men who had remained on the stoop, said something to the effect of "I can't believe that he left that shit here with us."

[6]Officer Gregory Brown believed that Rogers had been concealing the bags in his mouth – a common practice among street dealers – and that the moisture he observed on the tissue was Rogers' saliva. Subsequent testing of the tissue yielded no trace of Rogers' DNA.

Brown and Trooper Outerbridge ran towards the rear of number 19 to cut off any escape.[7] From the backyard of number 21, Darryn Brown saw Rogers emerge from a door opening onto a porch at the rear of the second floor apartment. Brown asked Rogers, "What are you doing?" Rogers replied, "I am looking for my stuff." Darryn Brown then saw Rogers pick up a dark colored duffel bag. A few seconds later, Officer Craig Jones radioed to report that Rogers had been taken into custody. When Darryn Brown joined Gregory Brown and Jones at the second floor apartment, he asked Gregory Brown if he and Jones had found the bag. When Gregory Brown said "What bag?," Darryn Brown began searching the stairwell, eventually finding the bag on the first floor landing. The bag contained a bullet proof vest.[8]

5. Shanita McDaniel had responded to the officers' knock at the door of the second floor apartment. Gregory Brown and Craig Jones asked Ms. McDaniel if Rogers was in the apartment. McDaniel said that he was and invited them in. Gregory Brown walked through the apartment to the rear door. When he opened the door, he found Rogers standing outside. Brown pulled Rogers back into the apartment and placed him under arrest. When McDaniel asked what was happening, the officers explained that Rogers was under arrest for dealing in crack cocaine and that they believed that he had hidden a handgun in her apartment. The officers then summoned a supervisor to the apartment. After speaking with the supervising officer, McDaniel signed a consent to search form. In the

[7]A mistaken turn took the officers to the rear of number 21 instead of number 19.

[8]The vest had been stolen from an FBI agent's vehicle parked in the lot next to the Moakley federal courthouse.

search that followed, Gregory Brown found a fully loaded .45 caliber semi-automatic pistol under a mattress in Ms. McDaniel's bedroom. She stated that no gun had been in the apartment before Rogers' arrival.[9]

RULINGS OF LAW

Rogers makes two arguments in support of his motion to suppress. His principal contention is that the cap in which Gregory Brown found the bags of crack cocaine (which provided probable cause to arrest Rogers) was seized incident to an unlawful Terry stop and that the seizure of the bullet proof vest and the handgun was the poisonous fruit of this illegality. Alternatively, Rogers argues that the police unlawfully searched the stoop at the entrance to 19 Castlegate Road without a warrant.

A. The Terry Stop

Not every encounter between police and citizens rises to the level of a stop or seizure. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). Whether a citizen's liberty has been "restrained" by police for Fourth Amendment purposes depends on whether a reasonable person in similar circumstances would feel free to leave or otherwise "disregard the police presence and go about his business." Michigan v. Chesternut, 486 U.S. 567, 576 (1988). United States v. Mendenhall, 446 U.S. 544, 553-554 (1980) (same). Cf. California v.

[9]Rogers does not challenge the consented to search and the seizure of the firearm. He rather argues that the drugs and the firearm were the fruits of an illegal Terry stop. This paragraph is included simply to complete the story.

Hodari D., 499 U.S. 621, 628 (1991) (the Terry-Mendenhall test "states a *necessary*, but not a *sufficient*, condition for seizure" – there must also be a physical restraint or a submission to an assertion of authority).[10]

It is on this latter principle that Rogers' Terry argument crumbles. A police officer may follow or closely watch a suspect without infringing the suspect's constitutional rights. See Chesternut, 486 U.S. at 574-576 (officers shadowed a running suspect by driving alongside his path in their cruiser). An officer also does not violate the Fourth Amendment by "approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion). A suspect need not, of course, cooperate with police and may shun any contact, although the manner in which he does so may invite suspicion. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). If the officer

[10]I will assume for sake of argument that the police did not have "a particularized and objective basis" for seizing Rogers when they exited the cruiser with the intent of searching his person for a firearm. United States v. Cortez, 449 U.S. 411, 417-418 (1981). Nonetheless, a good case could be made that they did when one in the totality of the circumstances considers: (1) the officers' knowledge of Rogers' prior convictions for drugs and weapons offenses, see United States v. Kimball, 25 F.3d 1, 7 (1st Cir. 1994); (2) his presence in the company of known gang members, see United States v. Burgos, 720 F.2d 1520, 1524 (11th Cir. 1983); (3) the fact that the encounter took place on a street notorious for drug dealing and assaults, see United States v. Atlas, 94 F.3d 447, 450-451 (8th Cir. 1996); (4) Rogers' attempt to avoid contact, see United States v. Gordon, 231 F.3d 750, 757 (11th Cir. 2000); and (5) most significantly, Rogers' furtive reach into his waistband, see Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 45-46 (2002), filtered through the eyes of a veteran officer, see United States v. Arvizu, 534 U.S. 266, 277 (2002).

pursues, that fact alone, does not amount to a seizure for Fourth Amendment purposes, even if pursuit is accompanied by an assertion of authority. "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. . . . [A seizure] requires *either* physical force . . . or, where that is absent, *submission* to the assertion of authority." Hodari D., 499 U.S. at 626. See Brower v. Inyo County, 489 U.S. 593, 597 (1989) (a high-speed pursuit is not a seizure). Because Rogers did not surrender to police, even briefly, no Terry stop was effectuated, and any resulting "fruit of the poisonous tree" analysis is irrelevant. Compare United States v. Coggins, 986 F.2d 651, 654 (3d Cir. 1993).

B. The Seizure of the Cap

(1) Abandonment

While it falls to the government to establish that a warrantless search was reasonable, a defendant bears the threshold burden of demonstrating that a legitimate expectation of privacy, personal to him, was infringed by a state actor, that is, he must show that a search in the Fourth Amendment sense took place. Privacy analysis involves a two-part inquiry. First, did the defendant manifest a subjective expectation of privacy in the searched premises or property? Second, is that expectation one that society is prepared to recognize as objectively reasonable? Rakas v. Illinois, 439 U.S. 128, 143-144 n.12 (1978). As Justice Powell noted in his concurring opinion in Rakas, the reasonableness of an asserted interest in privacy is determined in the totality of the

circumstances. "Thus, the Court has examined whether a person . . . took normal precautions to maintain his privacy. . . . Similarly, the Court has looked to the way a person has used a location, to determine whether the Fourth Amendment should protect his expectations of privacy. . . . The Court on occasion also has looked to history to discern whether certain types of government intrusion were perceived to be objectionable by the Framers. . . . And, as the Court states today, property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas. . . ." Id., 439 U.S. at 152-153.

Among the normal precautions a person must take is that of maintaining custody of his belongings. "Search or seizure of abandoned property, even without a warrant, is simply not unreasonable." United States v. Wilson, 472 F.2d 901, 902 (9th Cir. 1973). Abandonment in a Fourth Amendment sense is not a function of property law.

> In the law of property, the question is whether the owner has voluntarily, intentionally and unconditionally relinquished his interest in the property so that another, having acquired possession, may assert a superior interest. . . . In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure is reasonable within the limits of the Fourth Amendment. In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.

City of St. Paul v. Vaughn, 237 N.W.2d 365, 370-371 (Minn. 1975). Thus, "even an inadvertent leaving of effects in a public place, whether or not an abandonment in the true sense of that word, can amount to a loss of any justified expectation of privacy." LaFave,

1 Search and Seizure § 2.6(b), at 575-576 (1996).[11] By leaving his cap on the stoop, open to inspection by any casual visitor to the premises, Rogers forfeited any expectation of privacy in its contents. He therefore lacks "standing" to object to the seizure of the cap and the five bags of crack cocaine.[12]

(2) Plain View

The government urges an alternative "plain view" theory to justify the seizure of the cap. Plain view rises to constitutional significance as a justification for warrantless seizures, not searches. "It is important to distinguish 'plain view,' as used . . . to justify seizure of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search. . . , the former generally does implicate the Amendment's limitations upon seizures of personal property." Texas v. Brown, 460 U.S. 730, 738 n.4 (1983) (plurality opinion).

To sustain a plain view seizure the government must show a prior valid intrusion into a constitutionally protected area and an "immediate" recognition of the seized item's evidentiary significance (that is, probable cause for the seizure). Horton v. California, 496 U.S. 128, 140-141 (1990). Assuming that there is some legitimate expectation of privacy in the stoop leading to the front door of a multi-unit dwelling, a doubtful proposition as I will shortly demonstrate, an officer may legitimately enter a private area that is impliedly open

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[11]Whether a defendant has retained an objectively reasonable expectation of privacy in allegedly abandoned property is a matter of law for the court. United States v. Austin, 66 F.3d 1115, 1118 (10th Cir. 1995).

[12]That a defendant may have plans to eventually retrieve abandoned property is irrelevant. United States v. Thomas, 864 F.2d 843, 846 n.5 (D.C. Cir. 1989).

to the public to make observations and seize evidence. See Commonwealth v. Pietrass, 392 Mass. 892, 901 (1984) (walkway and porch); State v. Rose, 909 P.2d 280, 283 (Wash. 1996) (same); People v. Shorty, 731 P.2d 679, 681-682 (Colo. 1987) (apartment stairwell).

A more difficult issue is raised by the "immediacy" requirement. "[T]he use of the phrase 'immediately apparent' [in Coolidge v. New Hampshire, 403 U.S. 443 (1971)] was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." Brown, 460 U.S. at 741. The doctrine requires only that an officer have probable cause in its ordinary sense before seizing an incriminating item. Minnesota v. Dickerson, 508 U.S. 366, 376 (1993). Compare Riddick v. State, 571 A.2d 1239, 1250-1251 (Md. 1990)[13] (officer recognized a spoon as drug paraphernalia only *after* he seized it) with Hippler v. State 574 A.2d 348, 354 (Md. Ct. Spec. App. 1990) (officer recognized a bottle protruding from defendant's pocket as a PCP container *before* he seized it). See also Arizona v. Hicks, 480 U.S. 321, 326-327 (1987) (mere suspicion, however reasonable, that stereo components were stolen did not justify shifting their position to reveal corroborating serial numbers). An officer's training and experience should be given deferential weight in assessing probable cause for a plain view seizure. Brown, 460 U.S., at 746 (Powell, J., concurring) (experienced officer recognized that an innocent-looking party balloon was knotted in a fashion commonly used to package

[13]Riddick and several of the subsequent cases cited were technically overruled by the Supreme Court's decision in Horton, but only to the extent that the cases cite Coolidge's inadvertence (absence of prior probable cause) requirement as a prerequisite of a proper plain view seizure. In Horton, Justice Stevens, writing for a majority of the Court, rejected the reasoning of Coolidge on this point. Horton, 496 U.S. at 138-140.

heroin); United States v. Johnston, 784 F.2d 416, 421 (1st Cir. 1986) (experienced officer recognized adding machine tapes and written notations as drug related). While Gregory Brown testified that he moved the tissue paper apart to confirm the presence of crack cocaine in Rogers' cap, I credit his testimony that he was familiar with the common use by crack cocaine dealers of knotted plastic bags to package their wares. Thus, I conclude that Brown had probable cause to seize the cap and its contents even though he could not see the actual cocaine.

C. The Search of the Stoop

Rogers' final contention is that the stoop leading to the door of number 19 Castlegate Road is deserving of at least some constitutional protection either because it lies within the building's curtilage or because it should be viewed as an extension of the living areas of the dwelling.

> The stoop of a small apartment building in an urban environment harbors the "intimate activity associated with the 'sanctity of man's home and the privacies of life,'" that gives rise to Fourth Amendment protections. United States v. Dunn, 480 U.S. 294, 300 (1987) (internal citations omitted). Stoops are used as an extension of the apartment; they are places to socialize, relax, or to simply take a break from an apartment. As such, stoops have become a significant part of the urban home. Obviously, the stoop also serves as the entrance to the building. However, this does not necessarily mean that a stoop is "open to the public: to the extent that it should be stripped of all privacy expectations. . . . Indeed, the conditions of contemporary urban life, particularly in less wealthy neighborhoods where space is more limited, requires that some spaces serve both private and public functions. The

> stoop is one of those spaces. Its diverse role, however, should not be allowed to negate otherwise reasonable expectations of privacy and the accompanying Fourth Amendment protections.

Defendant's Brief, at 11-12.[14]

While the curtilage of a dwelling in the early English common-law was generally defined to include any building or structure within a bowshot of the manor house, the modern definition of curtilage focuses on the expectation of privacy and accords protection not because of proximity, but because of the strong concepts of intimacy, personal autonomy, and privacy associated with the home. Oliver v. United States, 466 U.S. 170, 180 (1984). See Dunn, 480 U.S. at 301 ("Curtilage questions [in a Fourth Amendment context] should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.").

That the stoop falls within the curtilage of 19 Castlegate Road cannot be gainsaid. Ms. Coffie, after all, had gone to the trouble of erecting a gated chain-link fence, and had posted No Trespassing signs with the view of discouraging undesirable visitors (like Rogers' Castlegate gang associates) from loitering on her property. But to say that a

[14]As a preliminary matter, there is an issue as to whether Rogers has "standing," that is, an expectation of privacy in the stoop of 19 Castlegate Road (assuming that the stoop is a constitutionally protected area). Although the evidence is thin on the point (Vernelia Coffie testified that while she did not know Rogers and did not believe that he lived with Ms. McDaniel, she did recognize him as an occasional visitor to her apartment), I will assume that the protections of Minnesota v. Olson, 495 U.S. 91 (1990), extend to social guests as well as overnight visitors. See Minnesota v. Carter, 525 U.S. 83, 109 n.2 (1998) (Ginsburg, J., dissenting).

structure is within the curtilage of the home is not necessarily to endow it with the same high degree of protection that is accorded to the dwelling itself. The reality is that permitting access to one's home even by strangers – Ms. Coffie mentioned tradesmen, the postman, police and emergency workers – is generally thought desirable by homeowners and reasonable by the general public. Consequently, the law is pretty much of the view that there is no reasonable expectation of privacy in driveways, walkways, and porches that lead to the front door of a dwelling, and unless unusual precautions are taken, these approaches are considered open to the public, including the police. See State v. Clark, 859 P.2d 344, 349 (Idaho App. 1993) (window opening on a horseshoe driveway); United States v. Redmon, 138 F.3d 1109, 1113-1114 (7th Cir. 1998) (en banc) (trash cans placed on a combination driveway-walkway); United States v. Roccio, 981 F.2d 587, 591 (1st Cir. 1992) (vehicle parked on a driveway); State v. Cloutier, 544 A.2d 1277, 1280 (Me. 1988) (basement window viewable from a residential walkway); Pietrass, 392 Mass. at 901 (dwelling window viewable from a walkway and porch); Commonwealth v. Simmons, 392 Mass. 45, 50 (1984) (vehicle viewable from a driveway); Shorty, 731 P.2d at 681-682 (apartment stairwell). Compare United States v. Diehl, 276 F.3d 32, 35, 39 (1st Cir. 2002) (posted 500 foot driveway hidden from public view and reachable only from a discontinued public way did not invite public access); Commonwealth v. Straw, 422 Mass. 756, 759 (1996) (same, fenced-in back yard); State v. Hoke, 866 P2d 670, 675 (Wash. App. 1994) (same, littered and obstructed side yard). Here, even assuming standing, Rogers had no legitimate expectation that a cap left on the stoop of number 19

would remain unexamined by police, a visitor to the house, or a curious passerby.[15]

ORDER

For the foregoing reasons, the motion to suppress is DENIED. The Clerk will set the case for trial.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE

[15]In a post-hearing memorandum, Rogers challenges the seizure by officer Darryn Brown of the duffel bag containing the vest. Even granting Rogers an expectation of privacy in Ms. McDaniel's apartment, he had no legitimate expectation of privacy in the first floor landing. The law does not recognize an expectation of privacy in the common areas of a multi-unit building. See United States v. Acosta, 965 F.2d 1248, 1252 (3d Cir. 1992) (common hallways); United States v. Thornley, 707 F.2d 622, 624-625 (1st Cir. 1983) (common cellar); Commonwealth v. Boswell, 374 Mass. 263, 269 (1978) (hallway).