United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3137

United States of America,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
Aaron Derrell Walker,	*	
	*	
Defendant - Appellant.	*	

Submitted: December 14, 2006
Filed: July 20, 2007

Before LOKEN, Chief Judge, JOHN R. GIBSON, and MURPHY, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

Aaron Derrell Walker entered a conditional plea of guilty to the charge of being a felon in possession of a firearm in violation 18 U.S.C. § 922(g)(1). The district court[1] sentenced Walker to 180 months' imprisonment, five years of supervised release, and a $100 special assessment, concluding that two previous convictions for auto theft and temporary auto theft were violent felonies and that Walker was subject to the Armed Career Criminal Act (ACCA). See 18 U.S.C. § 924(e)(1). On appeal, Walker argues that (1) his stop and arrest were unlawful; (2) his previous convictions

[1]The Honorable Donovan W. Frank, United States District Judge for the District of Minnesota.

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for auto theft and temporary auto theft are not violent felonies for purposes of the ACCA; and (3) the district court erred in refusing to consider two other felony convictions as related. We affirm.

On November 11, 2005, Walker was driving his vehicle in Minneapolis, traveling eastbound on Lake Street near the intersection of Cedar Avenue. Officer Daniel Ungurian of the Minneapolis Police Department testified that as Walker turned left from Lake Street to Cedar Avenue, Walker swerved in front of his vehicle on Cedar Avenue, nearly striking it. Ungurian also testified that as Walker turned left, he observed some sort of altercation occurring between Walker and a female passenger. Officer Matthew Blade of the Minneapolis Police Department was traveling on Lake Street at the same time, approximately one car length behind Walker's vehicle. He testified that he observed Walker turning left on to Cedar Avenue, squealing his tires as he turned. Both officers then began to follow Walker as he traveled northbound on Cedar Avenue. Officer Blade pulled behind Walker first and ran Walker's license plate to determine if it was stolen. The search revealed that the vehicle was not stolen. Officer Ungurian testified that as he approached Walker's vehicle, he continued to observe movement in the vehicle, indicating a fight. Ungurian decided to activate his lights and siren in order to pull Walker's vehicle over. Walker, however, did not immediately pull over, but instead drove for several more blocks and made two additional turns.

After Walker stopped, Ungurian pulled up, immediately stepped out of his squad car, and approached Walker's vehicle. As Ungurian neared the vehicle, the driver's side door opened and Walker placed his hands outside of the car. Ungurian pulled Walker out of the vehicle and immediately handcuffed him. Blade testified that he stopped his vehicle soon after Ungurian pulled Walker over. Blade observed that the female passenger was "moving around in the front seat" and that it appeared as though "she was trying to put something on the floor by her feet." Blade then approached the passenger and opened the passenger door in an effort to see her hands.

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After opening the passenger door, Blade immediately noticed a rifle lying between the passenger's legs, partially obscured by a gray sweatshirt. Blade removed the passenger from the vehicle and handcuffed her. On November 14, 2005, investigators interviewed Walker. After being read his Miranda[2] rights, Walker agreed to speak with the investigators, stating that he "got real close to the police car" and that he made a "bad decision in his turn."

Walker was indicted on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Walker filed two motions to suppress, challenging the stop of his vehicle, his subsequent arrest, and statements made to investigators following his arrest. A magistrate judge[3] recommended the denial of the motion, concluding that "Officer Ungurian had specific and articulable facts, taken together with rational inferences, to detain Walker and determine if there was criminal activity underway." The district court adopted the report and recommendation of the magistrate judge following a de novo review.[4] Walker now brings the present appeal.

I.

When reviewing a district court's denial of a motion to suppress, we examine the findings of fact for clear error and review de novo whether the investigatory stop and search violated the Fourth Amendment. Ornelas v. United States, 517 U.S. 690, 699 (1996); United States v. Morgan, 270 F.3d 625, 630 (8th Cir. 2001).

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

[3]The Honorable Janie S. Mayeron, United States Magistrate Judge for the District of Minnesota.

[4]Hereinafter the magistrate judge's findings of fact and conclusions of law will be attributed to the district court.

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Walker contests the legality of the investigatory stop and subsequent search. Walker argues that the police officers did not have reasonable suspicion to stop the vehicle. For an officer to perform an investigatory stop of a vehicle, there must be reasonable suspicion as required under Terry v. Ohio, 392 U.S. 1, 30 (1968). See United States v. Bell, 480 F.3d 860, 863 (8th Cir. 2007) (applying the Terry standard of reasonable suspicion to an investigatory traffic stop). Under the Terry standard, law enforcement officers are permitted to detain an individual for a brief period of time if they have a reasonable suspicion that criminal activity is afoot. See 392 U.S. at 30. In order for such a stop to be constitutional under the Fourth Amendment, the officer must be aware of "particularized, objective facts, which, taken together with rational inferences from those facts, reasonably warrant suspicion that a crime is being committed." United States v. Martin, 706 F.2d 263, 265 (8th Cir. 1983). "Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances." United States v. Halls, 40 F.3d 275, 276 (8th Cir. 1994) (quotation marks omitted). "While 'reasonable suspicion' must be more than an inchoate 'hunch,' the Fourth Amendment only requires that police articulate some minimal, objective justification for an investigatory stop." United States v. Fuse, 391 F.3d 924, 929 (8th Cir. 2004).

The district court cited the following facts in concluding that Officer Ungurian possessed a reasonable suspicion to stop the vehicle: (1) Walker swerved towards Officer Ungurian's squad car as he turned left onto Cedar Avenue; (2) Officer Ungurian observed a possible altercation between Walker and another passenger; and (3) Walker failed to pull over immediately after Ungurian activated his lights. In its factual conclusions, the district court relied on the testimony of officers Ungurian and Brown and the videotape of the stop recorded by Officer Ungurian and submitted into evidence.

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Walker offers two arguments as to why these circumstances do not support a determination that Officer Ungurian possessed reasonable suspicion to perform an investigatory stop of Walker's vehicle. First, Walker argues that because Officer Ungurian did not testify that Walker's erratic driving constituted a traffic violation, the driving could not support a reasonable suspicion of criminal activity. Walker is correct that any traffic violation provides probable cause for a traffic stop. United States v. Olivera-Mendez, 484 F.3d 505, 509 (8th Cir. 2007). However, that does not require the conclusion that for driving behavior to support a reasonable suspicion of criminal activity, it must necessarily violate some traffic law. We have held before that police properly relied on unusual, but not illegal, driving behavior in determining that an investigatory stop was warranted. See United States v. Wright, 565 F.2d 486, 489 (8th Cir. 1977) (holding that it was permissible for the police in performing an investigatory stop to take into account, together with other suspicious circumstances, that defendants' "forward-backing driving activity was not necessary to move from the curb into the road"). In this case, considering the totality of the circumstances, it is apparent that Walker's erratic driving supported Officer Ungurian's suspicion that criminal activity was occurring. Officer Ungurian observed an altercation and what was possibly a criminal assault. Walker's driving therefore confirmed for Ungurian the seriousness of the altercation and the potential threat not only to the occupants in the vehicle but to the other vehicles on the road. The district court was correct that Walker's erratic driving supported a reasonable suspicion of criminal activity.

Second, Walker contests the district court's factual determinations that (1) Walker engaged in unusual driving; (2) he and his passenger were involved in an altercation; and (3) Walker failed to pull over immediately. Reviewing the evidence, we are unable to conclude that the district court committed clear error in its factual findings. Walker argues that the district court erred in finding that Walker engaged in erratic driving because Officer Blade testified that he did not see anything unusual about Walker's turn on to Cedar Avenue. Walker also argues that the videotape belies Officer Ungurian's testimony regarding an altercation in Walker's car. These

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arguments are not persuasive. Officer Blade did not provide contradictory testimony, but instead testified that he did not witness the erratic driving. This was nothing more than a failure to corroborate Officer Ungurian's testimony. Similarly, while the videotape shows significant movement in the car by both Walker and the passenger, it neither demonstrates conclusively that there was an altercation occurring at the time nor contradicts Officer Ungurian's testimony. Despite the lack of corroboration for Officer Ungurian's testimony, the district court decided to credit his testimony. Such credibility determinations by district courts are "virtually unreviewable on appeal," United States v. Heath, 58 F.3d 1271, 1275 (8th Cir. 1995), and we therefore see no basis for disputing Officer Ungurian's account of the events. Finally, contrary to Walker's argument otherwise, the videotape demonstrates that Walker had several opportunities to pull over, but chose not to. In conclusion, the district court was not clearly erroneous in its factual findings and there was reasonable suspicion for Officer Ungurian's investigatory stop.[5]

Walker also argues that Officers Ungurian and Blade exceeded the scope of the investigation by removing Walker and his passenger from the vehicle and immediately handcuffing them. During a Terry stop, officers are permitted to check for weapons and to take any additional steps "reasonably necessary to protect their personal safety and maintain the status quo during the course of the stop." United States v. Hensley, 469 U.S. 221, 235 (1985). Protective searches allow for the use of handcuffs. United States v. Miller, 974 F.2d 953, 957 (8th Cir. 1992). The removal of Walker and the passenger from the vehicle and the use of handcuffs by the police were part of a protective search and the district court committed no error in denying Walker's motions to suppress.

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[5]Having determined that there was reasonable suspicion of criminal activity, we have no need to review the district court's determination that the community caretaking doctrine was an alternative basis for the stop.

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II.

Walker next argues that his previous convictions for auto theft and temporary auto theft are not violent felonies as defined in 18 U.S.C. § 924 (e)(2)(B)(ii) and that the district court erred in sentencing Walker under the Armed Career Criminal Act. We review de novo whether a previous offense is a violent felony under the ACCA. United States v. Brown, 408 F.3d 1016, 1017 (8th Cir. 2005).

We have addressed the issue of whether auto theft is a violent felony under § 924 (e)(2)(B)(ii) before, holding that "theft or attempted theft of an operable vehicle is a crime of violence" for the purpose of the identically worded U.S.S.G. § 4B1.2. United States v. Sun Bear, 307 F.3d 747, 753 (8th Cir. 2002). Walker argues that Sun Bear is "directly at odds" with the Supreme Court's decision in Leocal v. Ashcroft, 543 U.S. 1 (2004) (holding that a Florida drunk driving conviction was not a "crime of violence" under 18 U.S.C. § 16(b)). We distinguished 18 U.S.C. § 16(b), however, from the violent felony provision in § 924 (e)(2)(B)(ii) in our decision in United States v. McCall, 439 F.3d 967, 971 (8th Cir. 2006) (en banc) (noting that 18 U.S.C. § 16(b) has a mens rea component while § 924 (e)(2)(B)(ii) does not). In any event, another panel following our decision in McCall determined that a conviction for grand theft auto was a crime of violence under § 4B1.2, United States v. Johnson, 448 F.3d 1017 (8th Cir. 2006) (per curiam), cert. denied, __ U.S. __, 127 S. Ct. 1125 (2007), and we are not permitted to overturn it. See Jackson v. Ault, 452 F.3d 734, 736 (8th Cir. 2006) (only en banc court can overturn panel decision), cert. denied, __ U.S. __ , 127 S. Ct. 946 (2007). We therefore conclude that the district court did not err in concluding that the two previous convictions for auto theft and temporary auto theft were violent felonies under the ACCA.[6]

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[6]During oral argument, Walker suggested that the Minnesota auto theft statute was overinclusive and could possibly be distinguished from the Florida grand theft auto statute in Johnson. Because this point was raised for the first time at oral argument, and has not been briefed, it is waived. United States v. Mitchell, 31 F.3d 628, 633 n.3 (8th Cir. 1994).

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In addition to the two convictions for auto theft, Walker also has convictions for second degree burglary and attempted third degree murder, which he argues are related and cannot be used for sentencing under the ACCA. In light of our determination, however, that the two convictions for auto theft were violent felonies, Walker's argument is moot and we have no need to analyze it.

III.

For the foregoing reasons, we affirm the judgment of the district court.

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