IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 03-100-KAJ
	)	
JEMAINE HALL,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

Before me is a Motion to Suppress (Docket Item ["D.I."] 11; the "Motion") filed by the Defendant, Jemaine O. Hall. The Defendant alleges that the evidence seized from him during a search was unlawfully obtained. A hearing on the Motion was held on January 23, 2004, at which the United States offered evidence to support the search and seizure. For the reasons that follow, the Motion is denied.

I. FACTS

On November 19, 2003, the Defendant was indicted on one count of possession with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). (D.I. 6.) The indictment followed the Defendant's arrest on November 3, 2003, after the Defendant was found with crack cocaine in his pocket. The events leading to the arrest are largely undisputed.

Probation officers employed by the State of Delaware and members of the Newark, Delaware Police Department went to the Newark home of a state probationer named Kevin Fields to arrest him for violating his probation. (Tr. 4:20-5:5; 6:17-23; 8:7-15.) Probation Officer Janet New testified that her partner Robert Willoughby was

responsible for supervising the probation of Mr. Fields. (Tr. 6:22-25.) Mr. Fields had a history of criminal activity involving drugs and, at the time, was on probation for trafficking in cocaine. (Tr. 7:20-8:6.) He had been required to undergo drug testing and had recently tested positive for use of cocaine, marijuana, and amphetamines. (*Id*.) Officer Willoughby had been to Mr. Fields' home approximately two weeks earlier and had seen the remains of marijuana cigarettes in the house. (Tr. 7:1-20)

Officer Willoughby, with Officer New and another Probation Officer, Ron Paloni, and with two Newark police officers, went to Mr. Fields residence at 7:00 p.m. on November 3rd to arrest Mr. Fields. (Tr. 5:1-2; 6:17-23; 8:7-15.) When they arrived, they positioned themselves with officers at the front and the rear of the house and with one of the police officers at the side of the house where he could see movement through the windows of the home. (Tr. 9:10-23.) Officer Willoughby knocked and, after a delay that Officer New estimated as being about one minute, someone inside asked who was at the door. (Tr. 9:19-10:3.) The officer at the side of the house said he could see a moving shadow within the house going back and forth between the front door and the rear of the house. (Tr. 9:20-23.) There was further delay in answering the door, which raised the officers' suspicions that illegal activity was going on inside. (*See* Tr. 11:3-18.) They were already alert to the potential for criminal activity, given Mr. Fields' background, his recent positive drug tests, and the visit Officer Willoughby had paid to the residence two weeks earlier. (*See* Tr.7:1-11; 7:23-8:6; 8:24-9:5.) Among other things, the officers believed that, given Mr. Field's background, there was "a likelihood there may be some weapons involved" and they were proceeding cautiously. (*See* Tr. 9:2-5.)

After some period of time amounting to as much as five minutes (Tr. 11:22-24; 24:22-25:1), someone finally answered the door and the three probation officers, Willoughby, New, and Paloni, entered the house, in that order. (Tr. 12:3-11.) Officer Willoughby went directly to Mr. Fields, who was standing to the left of the door, and began to place him under arrest. (*See* Tr. 12:8-12.) Upon entering the house, Officers New and Paloni could see two men in the front room sitting on a small couch. (Tr. 12: 11-14; 13:12-17.) The two officers went and stood in front of the two men, one of whom was the Defendant. (Tr. 12:16-20.) According to Officer New the men on the couch were nervous, having a "'deer in the headlights' look." (*See* Tr. 12:16-20; 13:14-17.) She further described a "fight or flight" tension and a "feeling in my gut that probably something was not right." (Tr. 13:24-14:3.)

Officer New asked the two men to stand up. (Tr. 12:20-22.) As the Defendant got up, Officer New noticed that the pockets in the front of the Defendant's pants were bulging. (Tr. 16:4-8.) At the officer's request, the Defendant provided identification. (Tr. 26:15-17.) Officer New told the Defendant and the other man on the couch that they were going to be restrained with handcuffs. (Tr. 15:12-18.) She further explained that they were not under arrest but that were going to be restrained for the safety of the officers present and that "in the event that everything worked out and we didn't have any problems," they would be released. (Tr. 15:12-16:3.)

As she was placing the Defendant in handcuffs, Officer New asked him whether he had anything in his possession that she should be concerned about. (Tr. 16:14-16.) He said "no," and Officer New asked if the Defendant minded if she checked on that, to which he gave his assent, albeit in a mumbling way. (Tr. 16:13-22.) Officer New's

recollection of the Defendant's consent to her searching his person was confirmed by Officer Willoughby's report of the incident, which indicated that the Defendant had answered "yes" to the Officer's inquiry about checking what the Defendant had on his person. (*See* Tr. 27:8-21.) With the Defendant facing away from her, Officer New first checked the waistband of his pants, found nothing, then patted his left front pocket and felt an object with "some substance to it." (*See* Tr. 16:23-25; 19:16-22; 28:23-29:6.) Concerned that he might be carrying something dangerous in his pocket, she asked the defendant if there was anything in his pocket that might injure her, before she reached in to check. (Tr. 16:24-17:7.) It is unclear from the record whether he answered that question, but in response to the specific question, "what is in your pocket," the Defendant responded, "I don't know." (Tr. 17:1-11.) She then reached into his pocket and removed a wad of cash, which she handed to one of the Newark police officers who was nearby. (Tr. 17:13-25.) Officer New then patted the outside of the Defendant's right front pocket, felt another object which was not immediately discernable, and again inquired if the Defendant had anything in the pocket that might injure her. (Tr. 18:6-13.) This time the Defendant said, "no." (Tr. 18:13.) She reached into the pocket and pulled out "a large amount of what appeared to be crack cocaine." (Tr. 18:13-15.) Again, she handed what she had taken to the nearby police officer. (Tr. 18:16-18.)

II. LAW

The defense seeks to suppress the evidence that resulted from Officer New's search of the Defendant. (D.I.17 at 4.) The Defendant does not argue that the entry of

the probation officers and police officers into Mr. Fields' home was in itself unlawful.[1] Rather, the Defendant focuses on the search that Officer New performed on the Defendant personally. The Defendant argues that it was improper for the officer to have placed the Defendant in handcuffs (D.I. 17 at 9-12) and that any consent given to the search was not voluntary under the circumstances (*id.* at 12-14). Moreover, says the Defendant, there was no reasonably articulable suspicion to justify a pat-down (*id.* at 4-7), and, even if there had been, there was no basis to go beyond the pat-down and to reach into the Defendant's pockets (*id.* at 7-9). Because I hold that the circumstances were sufficient to justify both a pat-down search and the further search within the Defendant's pockets, I need not address the validity of the Defendant's consent to the search.

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." U.S. Const. amend. IV. The touchstone of any Fourth

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[1]Nor could he have persuasively done so. Setting aside any question of the Defendant's standing to contest the officers' entry into Fields' home, there is every likelihood that even a warrantless entry would be justifiable. While it is true that "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable[,]'" *Griffin v. Wisconsin,* 483 U.S. 868, 872 (1987), "the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (internal quotation marks and citations omitted). The Supreme Court has held that, in light of society's obvious "interest in apprehending violators of the criminal law, thereby protecting potential victims of criminal enterprise," the government "may ... justifiably focus on probationers in a way that it does not on the ordinary citizen" *id.* at 121, and may therefore, under appropriate circumstances conduct a warrantless search of a probationer's home. *Id.* at 117-18.

Amendment analysis is, as the Supreme Court has repeatedly emphasized, reasonableness. *E.g., United States v. Knights*, 534 U.S. 112, 118 (2001). It is reasonable, for example, for law enforcement officers to detain individuals who are on premises being searched, *see Michigan v. Summers*, 452 U.S. 692, 705 (1981), so that officers can protect themselves during the search, so that suspects do not flee, and so that evidence is not destroyed or hidden. *Id.* at 702-03; *cf. United States v. Harris*, No. Crim. A 03-06JJF, 2003 WL 21673551 at *1-*2 (D. Del. July 14, 2003) (noting that probation officers detained individuals on premises being searched incident to probation violation).

Accordingly, while one may presume that the restraint placed on the Defendant was not welcome, it was not, under the circumstances, unreasonable or unlawful, not only because of the character of the law enforcement action that was taking place when the restraint was imposed, but also because of several specific facts which reasonable law enforcement officers would have had in mind, and that Officer New in fact did have in mind. The home was known, from Officer Willoughby's visit two weeks earlier, to be the site of recent criminal activity. (Tr. 7:1-20.) The main occupant of the home was on probation for trafficking in illegal drugs, a trade which it is understood is frequently accompanied by violence. (*See* Tr. 8:24-9:5.) There was an unusual and unexplained delay in answering the officers' knock on the door, along with some apparent commotion within the home while someone inside hurried back and forth between the front and rear of the house. (Tr. 9:10-23; 11:3-18.) The Defendant appeared nervous and ready for "fight or flight" when the officer addressed him. (*See* Tr. 12:16-20; 13:14-

14:3.) Finally, the Defendant's pockets were obviously bulging and the officers were legitimately concerned that individuals might be armed. (*See* Tr. 8:24-9:5; 16:4-8.)

For the same reasons, it was reasonable for Officer New to conduct a pat-down search, once the Defendant was detained. *See Terry v. Ohio*, 392 U.S. 1, 26-27 (1968) (investigative stop based on reasonable, articulable suspicion justifies a protective search for weapons); *United States v. Kikumura*, 918 F.2d 1084, 1092 (3d Cir. 1990) ("A police officer may search a detained individual for weapons if he has reasonable suspicion that the individual could be armed and dangerous to the officer or others."); *cf. Baker v. Monroe Township*, 50 F.3d 1186, 1191 (3d Cir. 1995) ("The dangerousness of chaos is quite pronounced in a drug raid, where the occupants are likely to be armed, where the police are certainly armed, and the nature of the suspected drug operation would involve a great deal of coming and going by drug customers.")

The pat-down search, in turn, warranted the further intrusion of reaching into the Defendant's pockets. The bulges in the Defendant's pockets could not be identified by the simple pat-down, and the remaining, legitimate concern that the detainee possessed a weapon permitted a further minimal search to ascertain the character of the objects felt and to ensure the security and safety of the officers.[2] *See, e.g., United States v.*

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[2]Citing *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the Defendant argues that, because the nature of the bulge was not evident from the pat-down, Officer New was forbidden to pursue her search further by reaching into the Defendant's pockets. (D.I. 17 at 7-8.) As the government rightly observes, however (D.I. 19 at 2-3), the Defendant's argument rests on the mistaken assumption that a tactile search for contraband, conducted on the basis of probable cause, is the same as the prophylactic search sanctioned by *Terry*. Law enforcement officers are not required to give the benefit of the doubt to detainees if, as was so in this case, there is still a legitimate concern that an object felt during a pat-down may be a weapon. As explained recently by the Fifth Circuit, "[u]nlike the officer in *Dickerson*, [the police officer] did not rule out

Majors, 328 F.3d 791, 795 (5th Cir. 2003) (police officer who could not determine whether bulge in detainee's pocket was a weapon was justified under *Terry* in continuing search beyond the "initial 'plain feel'"); *United States v. Harris*, 313 F.3d 1228, 1237 (10th Cir. 2002) (police officer was justified under *Terry* in reaching into detainee's boot to further investigate a suspicious bulge*); United States v. Anderson*, 859 F.2d 1171, 1177 (3d Cir. 1988) (police officer who "felt a large bulge in [detainee's] pocket and removed its source to determine if it was a weapon" was justified in doing so because such a "procedure is the very essence of the practice sanctioned by *Terry v. Ohio*"). This was all the more justifiable because, while he was generally cooperative, the Defendant gave an odd "I don't know" answer when asked what was in his own pocket (*see* Tr. 17:1-11), thus adding an additional basis for Officer New's concern that the Defendant may have possessed something dangerous. *Cf. Harris*, 313 F.3d at 1236 (police officer concerned that defendant might be concealing a weapon in his pockets asked defendant to remove his hands from his pockets but defendant refused; "[w]hen Defendant refused to remove his hands, [the officer] was reasonably justified in believing that Defendant was armed and dangerous.").

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the possibility that the bulge in [the detainee's] pocket was a weapon; [the] continued search of the [the] pocket was therefore justified under *Terry* for the protection of himself and the other officers in the house." *United States v. Majors*, 328 F.3d 791, 795 (5th Cir. 2003).

III. CONCLUSION

Accordingly, because the evidence was discovered and seized pursuant to the type of legitimate and limited search permitted by *Terry* and its progeny, it is hereby ORDERED that the Defendant's Motion to Suppress (D.I. 11) is DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

April 8, 2004
Wilmington, Delaware