

18-1697-cr

United States v. Weaver

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5 August Term, 2019

6
7 (Argued: September 26, 2019

Decided: September 15, 2020)

8
9 Docket No. 18-1697
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13 UNITED STATES OF AMERICA,

14
15 *Appellee,*

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17 v.

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19 CALVIN WEAVER,

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21 *Defendant-Appellant.*
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25 Before: LIVINGSTON, *Chief Judge*, CALABRESI and POOLER, *Circuit Judges*.

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27 Appeal from an order of the United States District Court for the Northern
28 District of New York (Suddaby, C.J.) denying Weaver's motion to suppress a
29 firearm discovered after police officers pat-frisked Weaver during a traffic stop.

30 We hold that the officers lacked an objectively reasonable belief that Weaver was

1 armed and dangerous. Suppression of the firearm was accordingly warranted as
2 the fruit of an illegal search conducted in violation of the Fourth Amendment.

3 Reversed and remanded.

4 Chief Judge Livingston dissents in a separate opinion.

5 Judge Calabresi concurs in a separate opinion.

6
7 JAMES P. EGAN, Assistant Federal Defender, *for* Lisa
8 A. Peebles, Federal Public Defender for the Northern
9 District of New York, Syracuse, NY, *for Defendant-*
10 *Appellant.*

11
12 CARINA H. SCHOENBERGER, Assistant United States
13 Attorney, *for* Grant C. Jaquith, United States Attorney
14 for the Northern District of New York, Syracuse, NY, *for*
15 *Appellee.*

16
17 POOLER, *Circuit Judge:*

18 Calvin Weaver appeals from the December 20, 2017 order of the United
19 States District Court for the Northern District of New York (Suddaby, C.J.)
20 denying his motion to suppress a firearm that police officers discovered in the
21 course of a pat-down frisk of Weaver's person conducted during a traffic stop.

22 It is well established that the Fourth Amendment permits the police "a
23 narrowly drawn authority" to conduct "a reasonable search for weapons for the

1 protection of the police officer, where he has reason to believe that he is dealing
2 with an armed and dangerous individual, regardless of whether he has probable
3 cause to arrest the individual for a crime.” *Terry v. Ohio*, 392 U.S. 1, 27 (1968).
4 Here, however, the police lacked an “articulable and objectively reasonable
5 belief,” *Michigan v. Long*, 463 U.S. 1032, 1051 (1983), that Weaver was “armed and
6 presently dangerous to the officers or others,” *Terry*, 392 U.S. at 24. At most, the
7 officers had reason to believe that Weaver possessed something illicit. But the
8 Constitution requires more: it requires the officers have reason to believe this
9 something was dangerous. Accordingly, we REVERSE the district court’s denial
10 of Weaver’s motion to suppress and REMAND for further proceedings
11 consistent with this opinion.

12 BACKGROUND

13 At approximately 5 p.m. on Monday, February 15, 2016, Officers Quonce,
14 Tom, and Staub of the Syracuse Police Department (“SPD”) observed Weaver
15 walking along a street curb while they were driving in an unmarked police
16 vehicle with tinted windows on the westside of Syracuse, a high-crime area. As
17 the officers drove past, Weaver “stared into [their] vehicle, continued to stare, as
18 [they] approached, as [they] passed, and continued to stare as [they] proceeded

1 past him.” App’x at 150-51. According to Officer Quonce, Weaver stared for
2 “probably a few seconds but it seemed longer than typically one would look at a
3 vehicle.” App’x at 95.

4 The officers then saw Weaver walk towards a gray sedan and “adjust[] his
5 waistband.” App’x at 151. Officer Tom described this adjustment as “just a subtle
6 tug of his waistband, like an upward tug motion,” explaining that “his pants
7 were lower than waist level and it was kind of a tugging upward like
8 adjusting. . . .” App’x at 152. Weaver sat down in the front passenger seat, and
9 the car drove away.

10 The officers drove on but encountered the gray sedan again driving on
11 Davis Street. After the car stopped at a stop sign at the intersection of Davis
12 Street and Delaware Street, the driver turned on his right indicator light to signal
13 a turn. This constituted a traffic infraction, as New York Vehicle and Traffic Law
14 requires that all vehicles signal 100 feet *prior* to a turn. New York Veh. & Traf.
15 Law § 1163(b). The gray sedan turned onto Delaware Street and then quickly
16 turned onto South Geddes Street. The officers followed the sedan onto South
17 Geddes Street, turned on the police vehicle’s emergency lights, and pulled the
18 sedan over to the right side of the road.

1 When the gray sedan stopped, the officers observed that the rear
2 passenger's driver's side door quickly opened up into traffic. The officers
3 "believed that the rear passenger was about to flee from the vehicle." App'x at
4 103. When Officer Quonce instructed that party to stay in the vehicle, however,
5 the rear passenger closed his door and remained in the car. That passenger also
6 complied with police orders directing him to hold his arms in front of him and to
7 put his hands on his head.

8 Officer Tom observed Weaver sitting in the front passenger seat. As
9 Officer Tom approached the gray sedan, he testified that "from my vantage point
10 I can see into the cabin of the vehicle clearly, I see the front passenger with both
11 hands kind of pushing down on his pelvic area and squirming kinda in the seat
12 left and right, shifting his hips." App'x at 158. Officer Tom stated that Weaver
13 used two hands to make a "[d]ownward motion, trying to push something
14 down." App'x at 159.

15 Officer Tom asked Weaver to show him his hands, and Weaver complied.
16 Weaver also told Officer Tom, "I don't got nothin'." App'x at 159. Officer Tom
17 instructed Weaver to put his hands on his head, and he again complied. Officer
18 Tom then asked Weaver if he possessed identification and "visually inspected his

1 right pocket." App'x at 160. Concluding that "it didn't appear that there was any
2 bulges in his pocket," Officer Tom asked Weaver "to slowly use his right hand to
3 remove his ID from his pocket." App'x at 160. Weaver complied and handed
4 Officer Tom a New York State benefit card.

5 Officer Tom ordered Weaver to step out of the car and place his hands on
6 the trunk with his legs spread apart. Weaver also complied with this order.

7 Officer Tom testified that Weaver "was very close to the rear quarter panel of the
8 vehicle," so he "asked him to take a step back." App'x at 162. Weaver "took a

9 small step back, and then [Officer Tom] began to pat his waistband area." App'x

10 at 162. When Officer Tom patted Weaver's waist area, Weaver "immediately

11 stepped forward and pressed his pelvic area against the quarter panel of the

12 vehicle." App'x at 162. This prevented Officer Tom "from doing an effective pat

13 frisk of [Weaver's] waist area," so he asked Weaver "to take a step back and he

14 did but again he said it was slippery." App'x at 163. Officer Tom then pulled

15 Weaver "the distance where [Officer Tom] wanted him to be at so [he could]

16 effectively do a pat frisk," and Weaver "took a step back, his hands remain[ing]

17 on the rear of the vehicle." App'x at 164. As Officer Tom began to pat frisk

18 Weaver a third time, Weaver "again thrust his pelvic area against the rear

1 quarter panel of the vehicle.” App’x at 164. Officer Tom then placed Weaver in
2 handcuffs, pulled him away from the vehicle, and conducted a pat frisk of his
3 waist and front pockets.

4 Officer Tom felt nothing suspicious at Weaver’s waist, but he felt a “slight
5 small bulge” in Weaver’s front pocket. App’x at 165. Believing this bulge to be a
6 narcotic, Officer Tom reached into Weaver’s pocket and pulled out a white
7 powdery substance that field tested as cocaine. Officer Tom continued the pat
8 frisk, from Weaver’s right leg from the top down, and then back up his right leg
9 before transitioning to the groin area, left leg upper groin area, and left leg. At
10 that point, Officer Tom “felt something hard,” which he believed was a barrel of
11 a firearm. App’x at 166-67.

12 Officers Tom and Quonce placed the driver and remaining passenger in
13 handcuffs while Detective Staub secured Weaver. Detective Staub then motioned
14 Officer Quonce towards the front groin area of the pants Weaver had on. When
15 Officer Quonce conducted a pat-down frisk of the outside of Weaver’s clothing
16 of that area, he felt the barrel and handle of a gun through Weaver’s pants.
17 Officer Quonce unzipped Weaver’s pants and saw that Weaver had “long john
18 underwear on underneath [his pants] with . . . a button on the fly,” so Officer

1 Quonce “unbuttoned the fly and . . . removed the handgun.” App’x at 110. The
2 officers found live ammunition in the handgun’s magazine.

3 On August 31, 2017, Weaver was charged with one count of being a felon
4 in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), one count of
5 possession of a firearm with a removed serial number in violation of 18 U.S.C. §
6 922(k), and one count of simple possession of a controlled substance in violation
7 of 21 U.S.C. § 844(a).¹ Weaver moved to suppress the firearm as the fruit of an
8 unconstitutional search, arguing that the police lacked reasonable suspicion to
9 conduct a pat-down frisk of his person during the traffic stop.

10 The district court denied Weaver’s motion to suppress after a hearing. The
11 district court held in relevant part that the officers had reasonable suspicion to
12 conduct a pat-down frisk based on Weaver’s actions in (1) watching the police
13 vehicle as it drove past him; (2) pulling up on the waistband of his pants while
14 walking; (3) slouching down in his seat, pushing in a downward motion on his

¹ Weaver was initially charged in state court with criminal possession of a weapon in the second degree in violation of New York Penal Law § 265.03(3). On June 29, 2016, Onondaga County Court issued an order suppressing the firearm evidence on grounds that the SPD lacked reasonable suspicion to conduct a pat-down search of Weaver’s person, and therefore, the search violated the Fourth Amendment.

1 pelvic area with both hands, and squirming or shifting his hips left to right; (4)
2 telling Officer Tom that he “don’t got nothing”; and (5) trying to prevent the
3 officers from frisking his waist area, though it held that reasonable suspicion was
4 present even absent this last fact. The court also considered that the search
5 occurred in a high-crime area and another passenger in the car had swung his
6 door open immediately when the police stopped the car.

7 Weaver subsequently entered a guilty plea to the three charges pursuant to
8 a conditional plea agreement that allowed him to appeal the district court’s
9 denial of suppression. App’x at 232. Weaver was sentenced principally to 87
10 months’ imprisonment and three years’ supervised release.

11 Weaver timely appealed.

12 DISCUSSION

13 “On review of a challenged suppression order, we examine the district
14 court’s findings of fact for clear error, reviewing *de novo* questions of law and
15 mixed questions of law and fact, including the existence of reasonable suspicion
16 to stop or extend a stop.” *United States v. Santillan*, 902 F.3d 49, 56 (2d Cir. 2018).
17 We look at the totality of the circumstances from the view of a reasonable and
18 cautious officer on the scene. *Id.*

1 The Fourth Amendment protects “[t]he right of the people to be secure in
2 their persons, houses, papers, and effects, against unreasonable searches and
3 seizures.” U.S. Const. amend. IV. Generally, “searches conducted outside the
4 judicial process, without prior approval by judge or magistrate, are *per se*
5 unreasonable under the Fourth Amendment—subject only to a few specifically
6 established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347,
7 357 (1967) (footnote omitted).

8 In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized one such
9 exception when it held that police officers can stop someone whom they
10 reasonably suspect is involved in the commission of a crime and conduct a
11 protective search of this person for weapons, even absent a warrant or probable
12 cause for an arrest. Critically, this does not provide the police with a free pass to
13 search for *anything* illicit. The Court’s central preoccupation was the need to
14 protect officers from dangerous weapons, and its holding was tailored
15 accordingly: “When an officer is justified in believing that the individual whose
16 suspicious behavior he is investigating at close range is *armed and presently*
17 *dangerous* to the officer or to others, it would appear to be clearly unreasonable to
18 deny the officer the power to take necessary measures to determine whether the

1 person is in fact carrying a *weapon* and to neutralize the *threat of physical harm*.” *Id.*
2 at 24 (emphasis added).

3 To establish that an officer is justified in neutralizing such a threat, the
4 “police officer must be able to point to specific and articulable facts which, taken
5 together with rational inferences from those facts, reasonably warrant that
6 intrusion.” *Id.* at 21. We apply “an objective standard: would the facts available
7 to the officer at the moment of the seizure or the search warrant a man of
8 reasonable caution in the belief that the action taken was appropriate?” *Id.* at 21-
9 22 (internal quotation marks and citation omitted). While we have explained that
10 “the concept of reasonable suspicion is not susceptible to precise definition, . . .
11 some minimal level of objective justification is required,” not just “inchoate
12 suspicion or mere hunch.” *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000)
13 (internal quotation marks and citations omitted).

14 *Terry* has since been extended to a number of contexts, including that of
15 protective searches in the specific factual circumstance at issue here: an
16 investigative stop of an automobile. In *Pennsylvania v. Mimms*, 434 U.S. 106, 112
17 (1977), the Supreme Court held that police officers can conduct an investigative
18 stop of an automobile and frisk the driver of the car for weapons, reiterating the

1 *Terry* requirement that the officers have an objectively reasonable and articulable
2 belief that the driver is armed and dangerous. Similarly, in *Michigan v. Long*, 463
3 U.S. 1032, 1051 (1983), the Court allowed the police “to conduct an area search of
4 the passenger compartment to uncover weapons, as long as they possess an
5 articulable and objectively reasonable belief that the suspect is potentially
6 dangerous.” In line with its previous admonitions, the Court explicitly warned
7 that police officers cannot conduct searches “*whenever* they conduct an
8 investigative stop” of an automobile, because “[a] *Terry* search, unlike a search
9 without a warrant incident to a lawful arrest, is not justified by any need to
10 prevent the disappearance or destruction of evidence of crime. . . . The sole
11 justification of the search . . . is the protection of police officers and others
12 nearby.” *Id.* at 1049 n.14 (internal quotation marks and citation omitted).
13 Subsequent Supreme Court cases extended the rule in *Terry* and *Mimms* to
14 automobile passengers. *See Maryland v. Wilson*, 519 U.S. 408 (1997) (holding that
15 police officers can order automobile passengers out of the vehicle during traffic
16 stops); *see also Arizona v. Johnson*, 555 U.S. 323 (2009).

17 *Terry* makes clear that reasonable suspicion must be present at the
18 “inception” of the officer’s search. 392 U.S. at 20. Thus, our analysis of whether

1 reasonable suspicion was present considers only the facts known to the officer
2 that prompted him to search or seize. *See Dancy v. McGinley*, 843 F.3d 93, 108-09
3 (2d Cir. 2016); *United States v. Freeman*, 735 F.3d 92, 96-97 (2d Cir. 2013).

4 The central dispute in this case is whether the SPD had an objectively
5 reasonable belief that Weaver was “armed and presently dangerous to the
6 officers or to others.” *Long*, 463 U.S. at 1047 (internal quotation marks omitted). It
7 did not. None of the facts before us—individually or collectively—is sufficient to
8 establish that the SPD officers had an objectively reasonable suspicion that
9 Weaver was armed and dangerous.²

10 11 12 **I. The Inception of the Frisk**

² The dissent argues that the majority improperly considers facts piecemeal. With respect, that is simply not true. That we discuss the considerations independently does not mean that we assess each in isolation or fail to evaluate the facts cumulatively. We take a moment to repeat, as we do throughout this opinion, that whether analyzed singly or jointly, the circumstances before the SPD do not support an objectively reasonable suspicion that Weaver was armed and dangerous. Even when the facts and reasonable inferences drawn therefrom are stacked, they provide an insufficient basis for an objective, even cautious, officer to find reasonable suspicion that Weaver was armed or dangerous for the reasons we discuss in section II, *infra*.

1 As an initial matter, we consider only the events that occurred *before*
2 Officer Tom ordered Weaver to put his hands on the trunk of the car. It is clear
3 that Officer Tom had effectively initiated a search of Weaver when he instructed
4 him to place his hands on the trunk with legs spread apart (what may be referred
5 to as an “in search” position), because there is no other reason in our view to ask
6 Weaver to assume this position. A frisk is a search. And a search, like a seizure,
7 may begin before there is any physical contact, at the time when “a reasonable
8 person would have believed that the search was being initiated.” *Doornbos v. City*
9 *of Chicago*, 868 F.3d 572, 581 (7th Cir. 2017); *see also Dancy*, 843 F.3d at 108-09
10 (noting that because “ a stop must be justified ‘at its inception,’ we consider only
11 the facts known to [the officer] that prompted him to give [the order]” that
12 would have caused a reasonable person in the suspect’s position to believe “that
13 he was not free to leave” (internal quotation marks and citation omitted)).³
14 Actually touching a suspect “with the intention of frisking him,” of course,

³ The dissent states that our Court’s decision in *Dancy* is inapposite because our analysis focused on when an investigatory stop, not a search, occurred. *Dancy*, 843 F.3d at 108. But it makes little sense, on the one hand, to agree that a seizure for Fourth Amendment purposes may occur before physical force is used, but on the other hand, to maintain that a search only occurs after.

1 constitutes a search. *Dancy*, 943 F.3d at 108 n.12. But in this case, by the time
2 Officer Tom touched Weaver, he had already instructed Weaver to exit the car
3 and assume a position that any reasonable person could only have interpreted to
4 mean that the search had begun. Objectively, the search was therefore initiated
5 after Officer Tom ordered Weaver out of the car, but no later than the moment
6 when Officer Tom directed Weaver to assume this “in search” position. It is at
7 that point that Officer Tom must have had an articulable and objectively
8 reasonable belief that Weaver had something dangerous.

9 The dissent argues that the majority’s analysis is “both erroneous and
10 problematic” as it focuses only on conduct occurring before Officer Tom decided
11 to frisk Weaver. It provides two reasons for this assessment, neither of which is
12 appropriately explanatory.

13 First, the dissent notes, correctly, that an order to exit a vehicle during a
14 lawful stop amounts only to a de minimis intrusion on Weaver’s liberty. It then
15 accuses the majority of elevating this intrusion into something more. The dissent
16 reaches this conclusion by focusing largely on the order that Weaver get out of
17 the car and minimizing the order that he place his hands on the car and spread
18 his feet apart. But when Weaver exited the vehicle, Officer Tom directed him to

1 assume a position that indicated to Weaver that Officer Tom was about to frisk
2 him. And while asking a passenger to exit a vehicle might be a de minimis
3 intrusion on the passenger's liberty, ordering someone to spread-eagle on a car is
4 manifestly not. It is a search!

5 The dissent entirely elides this critical distinction. As *Terry* itself
6 recognized, a frisk "is a serious intrusion upon the sanctity of the person, which
7 may inflict great indignity and arouse strong resentment." 392 U.S. at 17; *see also*
8 *United States v. Tinnie*, 629 F.3d 749, 756 (7th Cir. 2011) (Hamilton, J., dissenting)
9 ("[W]e must recognize that a frisk is most certainly not a minor intrusion on
10 privacy."). "[I]t is simply fantastic to urge that [a frisk] performed in public by a
11 policeman while the citizen stands helpless, perhaps facing a wall with his hands
12 raised, is a 'petty indignity.'" *Terry*, 392 U.S. at 17-18. But this "fantastic" notion
13 is precisely what the dissent perpetuates by focusing on the minimally intrusive
14 order to exit the car while minimizing the maximally intrusive order to position
15 himself in a way that can only constitute a search. We cannot forget the *Terry*
16 Court's admonition that a frisk "is not to be undertaken lightly." 392 U.S. at 17.
17 Officer Tom's actions in ordering Weaver to step out of the car and assume a
18 position with his hands on the trunk and feet spread apart were undertaken

1 solely in order to frisk Weaver. That is why Officer Tom's order marks the point
2 at which reasonable suspicion that Weaver was armed and dangerous was
3 required.

4 Second, the dissent claims that considering this order of Officer Tom's to
5 be the initiation of the search runs afoul of the principle that an officer's
6 subjective intentions in frisking are irrelevant. It is true, as the dissent says, that
7 precedent instructs us to turn a blind eye to an officer's subjective intentions in
8 stopping, searching, or seizing. *See Whren v. United States*, 517 U.S. 806, 813
9 (1996). But this means only that we must ignore intent in determining *why* the
10 officer took the challenged action. It does not preclude us from looking at intent
11 in determining *when* the action was initiated. *See United States v. Williams*, 731
12 F.3d 678, 686 (7th Cir. 2013) (analyzing "the circumstances that [the officer] may
13 have relied upon in *deciding* to frisk [the defendant]" (emphasis added)).

14 The dissent's conflation of these two inquiries would significantly narrow
15 the scope of judicial review over police actions in a manner inconsistent with the
16 Fourth Amendment's reasonable-suspicion requirement. Because the purpose of
17 our inquiry is to ensure that reasonable suspicion was present to justify a frisk,
18 *see Terry*, 392 U.S. at 20; *see also Mimms*, 434 U.S. at 109 (explaining that

1 reasonableness serves to protect the individual's right to be "free from arbitrary
2 interference by law officers"), it makes little sense to rely on conduct postdating
3 the decision to frisk. Any subsequent events could not possibly factor into that
4 decision.

5 According to the dissent, a frisk only begins when an officer lays hands on
6 an individual. We cannot agree with such a formalistic view. "This narrow
7 definition of a frisk would require us to close our eyes to reality and would
8 encourage aggressive and intrusive police tactics, especially during pre-textual
9 traffic stops. . . . Bent over the hood of a car or pressed against a wall in the
10 middle of the night, most people would be extremely nervous and disoriented. It
11 would be easy enough for an enterprising officer to find some justification for a
12 frisk in any nervous responses," or behavior, "at such a vulnerable moment." *Tinnie*, 629 F.3d at 759 (Hamilton, J., dissenting). To assume, as the dissent does,
13 that a search only begins once there is physical contact would contradict long-
14 standing precedent that our analysis under *Terry* must be "flexible enough to be
15 applied to the whole range of police conduct in an equally broad range of
16 settings." *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988). For these reasons, we

1 respectfully disagree with the dissent's belief that the majority's approach is
2 "erroneous and problematic."

3 **II. Whether Reasonable Suspicion Was Present**

4 Because reasonable suspicion must be present at the inception of the frisk,
5 *Terry*, 392 U.S. at 20, we therefore only consider the following acts in determining
6 whether there was reasonable suspicion that Weaver was armed and dangerous:
7 (1) Weaver's staring at the unmarked police car as it drove by; (2) Weaver's
8 adjustment of his waistband while walking; (3) Weaver's statement that he had
9 nothing on him; and (4) Weaver's pushing down his pants and wiggling back
10 and forth while in the passenger seat.

11 The Government's strongest fact is Weaver's movements in the passenger
12 seat, which Officer Tom described as "with both hands kind of pushing down on
13 his pelvic area and squirming kinda in the seat left and right, shifting his hips."
14 App'x at 158. Officer Tom believed that Weaver was "trying to push something
15 down." App'x at 159. But nothing in Officer Tom's description that Weaver was
16 squirming and trying to push something down suggests that this "something"
17 was a weapon. Weaver's actions were equally consistent with the act of secreting
18 drugs or other nonhazardous contraband.

1 The distinction between the two is key, as is illustrated in our recent case
2 *United States v. Hussain*, 835 F.3d 307 (2d Cir. 2016). In *Hussain*, an officer pulled
3 over a car that defendant Cunningham was driving after it ran a stop sign. *Id.* at
4 310. After the car had been pulled over, the officer “observed Cunningham’s arm
5 move up and down in the middle console area.” *Id.* The officers also noticed that
6 the passenger in the front seat of the car was sitting in an “unnatural” position
7 that the officers believed was meant to obscure the front seat of the car from
8 view. *Id.* at 311. As an officer approached the car, he saw Cunningham with a
9 cellphone in his right hand. *Id.* at 310. Cunningham was ordered out of the car,
10 and when he complied, he told the officer that he had a knife in his pocket
11 (which was a legal pocket knife). *Id.* at 311. After discovering the pocket knife,
12 the officer searched Cunningham’s car and discovered a loaded gun under the
13 front passenger seat. *Id.* We held that the search was unconstitutional. Although
14 we acknowledged that “each of the officers subjectively suspected that
15 Cunningham and [the passenger] were hiding something and up to no good,”
16 we concluded that the officers had not pointed to articulable facts indicating that
17 Cunningham posed a danger to them. *Id.* at 314. We noted that the officers knew
18 Cunningham was holding a cellphone, not a firearm, in the car. *Id.* at 315-16. We

1 also rejected reliance on the passenger's unnatural seated position, reasoning that
2 it "may have been enough to believe that [the passenger] sought to hide
3 something. But insofar as dangerousness is the sole focus of our attention under
4 Long, [the passenger's] position by itself sheds insufficient light on whether he
5 was hiding something dangerous." *Id.* at 316.

6 *Hussain* is instructive in the present case. We have no doubt that Officer
7 Tom reasonably suspected that Weaver was hiding *something* based on his
8 downward motion and wiggling. But there are no specific or articulable facts that
9 Weaver was hiding something *dangerous*.⁴ As *Hussain* and Supreme Court
10 precedent establish, there is a distinction between hiding something and hiding
11 something dangerous. It is not enough that officers rely on a suspicion that a
12 suspect was hiding something, even if that something is contraband like drugs—

⁴ Indeed, in its decision, the district court found only that Officer Tom believed Weaver was "concealing *something*" —not something dangerous. App'x at 218 (emphasis added). This is consistent with Officer Tom's testimony at the suppression hearing, during which he said only that Weaver's movements were consistent with hiding "something"; he did not testify that he believed the movements were consistent with hiding something *dangerous*. App'x at 159. We also note that Officer Tom asked Weaver to reach into his pocket and pull out his identification, a fact which certainly calls into question whether the officers believed that Weaver possessed something dangerous.

1 rather, officers must have a suspicion based on articulable facts that the suspect
2 was “hiding something dangerous.” *Id.* For this reason, Weaver’s actions in the
3 front passenger seat did not provide the SPD with an objectively reasonable
4 belief that he was armed and dangerous.⁵

5 The other facts present also fail to support an objectively reasonable
6 suspicion that Weaver was armed and dangerous. The Government points to
7 Weaver’s adjustment of his waistband to bolster its claims. We are not convinced
8 that this action signals that Weaver carried a weapon on his person. Officer Tom
9 testified that Weaver made a “subtle tug of his waistband.” App’x at 152. But
10 given that Weaver’s pants were lower than waist level, such a subtle tug is no
11 more suggestive of a firearm than it is of Weaver simply wanting to raise his
12 pants because they slipped lower than he preferred.⁶ In other words, we cannot

⁵ Our discussion on this point also addresses the Government’s reliance on Weaver’s statement to Officer Tom that he “don’t got nothin’.” App’x at 159. Even if this statement could be interpreted to support Officer Tom’s suspicion that Weaver possessed something illegal, nothing about this statement suggests that Weaver possessed something dangerous.

⁶ The dissent makes the assertion that Weaver’s tug “suggest[s] that something hefty could be weighing down his pants.” This is a purely post hoc rationalization. The tug was slight, and there was no other reason at this point to suspect Weaver had a firearm. We are hard-pressed to see how a rational officer at the scene would take the dissent’s view.

1 say that an objectively reasonable officer who witnessed such an action would
2 conclude that Weaver carried a firearm.

3 This differentiates Weaver's case from *United States v. Padilla*, 548 F.3d 179
4 (2d Cir. 2008), in which we held that the officer had reasonable suspicion that
5 Padilla was armed and dangerous. In doing so, one of the facts (among several
6 others suggesting suspicious circumstances) that we relied on was Officer
7 O'Brien's testimony that he saw Padilla adjust something in the center of his
8 waistband in a manner "consistent with the adjustment of a gun lodged in one's
9 waistband" but *not* "consistent with any innocent explanation" based on his
10 experience in making nearly ten arrests of suspects carrying firearms in their
11 waistbands and how his colleagues adjusted their waistbands when carrying
12 firearms. *Id.* at 183. The magistrate judge, who twice requested that Officer
13 O'Brien make the same gesture at the suppression hearing, similarly
14 characterized it as a "distinctive gripping motion, as if holding and adjusting
15 (first up and then down) something comparable in size, shape, and heft to a
16 handgun." *Id.* at 184 (internal quotation marks omitted). This "'distinctive'
17 consistency with the adjustment of a firearm" was the focus of much of our
18 analysis. *Id.* at 189. Given the lack of any "distinctive consistency" in the case at

1 hand—coupled with the lack of other suspicious facts present in *Padilla*, like
 2 *Padilla*’s choice to eschew the lighted path and instead follow a suspected drug
 3 user down a dark path at night⁷—we do not believe Weaver’s subtle tug at his
 4 waistband supports an objectively reasonable suspicion that he was armed.⁸

5 The final bases offered by the Government are so meritless they warrant
 6 little discussion. One is Weaver’s presence in a high-crime area. While relevant,
 7 this factor does not necessarily “contribute meaningfully to a finding of
 8 reasonable suspicion.” *See Freeman*, 735 F.3d at 101. We cannot say that it
 9 contributes meaningfully here. The stop and frisk of Weaver occurred during

⁷ There are no shortage of facts distinguishing Weaver’s case from *Padilla*, but we highlight just one such fact here in particular. Namely, while Officer O’Brien saw *Padilla* reach into his clothing such that *Padilla* may have been reaching for his weapon, *Padilla*, 548 F.3d at 183, Officer Tom saw Weaver pushing something so far down his pants that no bulge was noticeable, suggesting that Weaver was attempting to make that item inaccessible. Practically speaking, then, Officer O’Brien had much greater cause for concern that the suspect was “armed and dangerous” than did Officer Tom.

⁸ The dissent believes the majority misreads *Padilla* and by focusing on how the movement in *Padilla* was inconsistent with any innocent explanation. Respectfully, the dissent misreads the majority opinion. We highlight the singular nature of the movement in *Padilla* only to explain why this case does not compel a finding of reasonable suspicion here. As we have said, it is the absence of this distinctive consistency factor *and* other suspicious actions present in *Padilla* that makes *Padilla* distinguishable.

1 daylight,⁹ and Officer Tom acknowledged that he did not witness Weaver or the
2 other occupants of the car engaging in criminal activity. The other basis the
3 Government puts forth is Weaver's staring at the unmarked police vehicle as it
4 drove by. Officer Tom testified that as their vehicle drove past Weaver, he stared
5 at the car for "a few seconds." App'x at 174. Besides the fact that there is nothing
6 objectively unusual about staring at an unmarked car with tinted windows
7 driving by slowly, citizens are well within their rights to stare at others in public,
8 including police officers. Very little, if anything, can be gleaned from such an act.
9 *Cf. Dancy*, 843 F.3d at 110 ("[L]ooking over one's shoulder at an officer in slow
10 pursuit is not suspicious behavior."). To conclude otherwise would yield the
11 troubling result of adverse consequences for the exercise of basic rights—
12 something we see far too much of in the case law as it is. *See generally* I. Bennett
13 Capers, *Criminal Procedure and the Good Citizen*, 118 Colum. L. Rev. 653 (2018).

14 The dissent takes issue with our conclusion that there is nothing unusual
15 about Weaver's staring. It believes that it indicates that Weaver was "attempting

⁹ The dissent emphasizes Officer Tom's testimony that it was dusk. While testifying that it was dusk, Officer Quonce twice confirmed that it was "still light out." App'x at 116, 144.

1 to avoid police surveillance.” But such an inference is insupportable. Given that
2 the vehicle was unmarked, and therefore Weaver would not have known that it
3 contained police officers, the dissent makes too great a leap. And even if Weaver
4 had been concerned about encounters with the police, the hard reality is that, in
5 light of incidences of police brutality and discriminatory policing, minority
6 citizens across the country fear encounters with the police, whether guilty or
7 innocent. *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (Sotomayor, J., dissenting) (“For
8 generations, black and brown parents have given their children ‘the talk’ —
9 instructing them never to run down the street; always keep your hands where
10 they can be seen; do not even think of talking back to a stranger—all out of fear
11 of how an officer with a gun will react to them.”); *Illinois v. Wardlow*, 528 U.S. 119,
12 132 (2000) (Stevens, J., concurring in part and dissenting in part) (explaining that
13 “[a]mong some citizens, particularly minorities and those residing in high crime
14 areas,” there may be a belief “that contact with the police can itself be
15 dangerous”).¹⁰

¹⁰ The dissent makes a similar presumption when it claims that the rear passenger of the vehicle “appears to have been ‘about to flee,’ as Officer Tom’s partner put it rather than being caught by law enforcement in the [dangerous or illicit] item’s vicinity.” The record is bereft of any indication as to why the rear

1 In sum, we do not believe that any of the facts the Government raises can
2 support an objectively reasonable suspicion that Weaver was armed and
3 dangerous. Whether assessed independently or collectively, *at most* the SPD had
4 a reasonable suspicion that Weaver was hiding something. But the Fourth
5 Amendment requires more.

6 The dissent disagrees. Despite agreeing that a *Terry* frisk involves a “more
7 specific analysis, requiring the officer to hold a reasonable suspicion that the
8 subject is ‘armed and dangerous’ as opposed to being generally suspicious,”
9 *Williams*, 731 F.3d at 686 (citation omitted), the dissent would have us hold that
10 Weaver’s ambiguous conduct gave rise to reasonable suspicion that he was
11 armed and dangerous. According to the dissent, the presence of alternative
12 explanations does not negate reasonable suspicion. But what we must look at is
13 “the degree of suspicion that attaches to particular types of noncriminal acts.”
14 *United States v. Sokolow*, 490 U.S. 1, 10 (1989). We agree that officers are not

passenger opened the door, and we therefore cannot say what his intentions were. But we are wary of imputing his conduct to Weaver. *See United States v. I.E.V.*, 705 F.3d 430, 438 (9th Cir. 2012) (rejecting the district court’s partial reliance on the defendant’s proximity to a “fidgety” individual in assessing whether the frisk of the defendant was constitutional).

1 required to rule out every innocent explanation, but that does not mean, as the
2 dissent would have us believe, that any conduct consistent with, or possibly
3 suggestive of, weapon possession satisfies the reasonable-suspicion standard.
4 That proposition is belied by our decision in *Hussain*, 835 F.3d at 316. And while
5 we give “due weight” to officers’ reasonable inferences, *Ornelas v. United States*,
6 517 U.S. 690, 699 (1996), due weight is not determinative weight.

7 The importance of Fourth Amendment rights demands careful scrutiny of
8 those facts offered by the police to support reasonable suspicion. This need is
9 perhaps even greater when searches or seizures do result in criminal evidence.
10 “When a search uncovered criminal evidence, enterprising cops soon learned
11 what was expected of them: an additional fact besides the violation of some
12 traffic law. Articulating something out of the ordinary—a nervous glance,
13 shaking hands, a revealing smell—when asked for one in a court of law was
14 especially easy when they caught someone red-handed.” Sarah A. Seo, *Policing*
15 *the Open Road* 237 (2019). But as Seo explains, “Requiring an ‘unusual’ fact did
16 little to eliminate pretextual stops.” *Id.* “In practice, more often than not, ‘all the

- 1 facts and circumstances’ rationalized discretionary” —and often discriminatory,
- 2 we might add—“policing of people who were, in fact, guilty.” *See id.*¹¹

¹¹ The dissent laments that “the majority . . . forgets the[] lessons of the Warren Court” regarding the dangers facing officers. It worries that our decision today invites unnecessary risks for officers and threatens to undermine the safety of “the broader community.” We think such a concern to be overstated, and to the extent the dissent devolves into such speculation on consequences, we caution that unfettered deference to officer discretion paves the road for the sort of threats to community safety the dissent augurs.

“The erosion of Fourth Amendment liberties comes not in dramatic leaps but in small steps” *Tinnie*, 629 F.3d at 754 (Hamilton, J., dissenting). Drawing the inferences the dissent asks us to draw and concluding that such weak facts support reasonable suspicion would be far reaching. Officers could subject individuals to the humiliations and dignitary harms incident to unwarranted frisks based on mundane acts, such as a look, a nervous response, or an adjustment of one’s clothes. This unfettered discretion in turn “could lead to harassment of minority groups and severely exacerbate police-community tensions.” *Dancy*, 843 F.3d at 111 (internal quotation marks and citation omitted).

As we have seen time and again, such harassment is neither new nor innocuous, as carefully documented in Seo’s book. Seo notes that “midcentury Americans recognized, to varying degrees, that the police picked on racial minorities.” Seo, *Policing the Open Road* 169. Seo explains that like white citizens, “Black citizens were also policed in their cars, but the experience for them was often much more terrifying than a series of nosy questions.” *Id.* at 214. Communities should not have to “decide between their constitutional rights against unwarranted searches and seizures” and “governmental protection that is readily afforded to other communities.” *United States v. Curry*, 965 F.3d 313, 333 (4th Cir. 2020), as amended (July 15, 2020), as amended (July 16, 2020) (Gregory, C.J., concurring).

Because the officers lacked an objectively reasonable belief that Weaver was armed and dangerous, the frisk was unconstitutional, and the firearm seized must be suppressed as the fruit of an unconstitutional search.

CONCLUSION

For the foregoing reasons, we reverse and remand the district court's denial of Weaver's motion to suppress.