

10 Things You Should Know About Gun Cases, But Might Not

Craig W. Albee, Senior Litigator
Federal Defender Services of Wisconsin, Inc.

Winning Strategies - 2016

January 29, 2016
San Antonio, Texas

1. The observation of a concealed firearm by police might not provide reasonable suspicion for a *Terry* stop.

- A. The evolution of second amendment rights provides expanded protection for individuals carrying firearms in public and should demand more than just suspicion of gun possession to justify a stop.
1. *United States v. Ubiles*, 224 F.3d 213, 214-15 (3d Cir. 2000) (holding that stop and search of defendant based solely on information he possessed a gun was unreasonable because possessing a firearm is not necessarily a crime on Virgin Islands); *compare United States v. Gatlin*, 613 F.3d 374 (3d Cir. 2010) (finding reasonable suspicion based solely on concealed handgun because under Delaware law having a CCW license is an affirmative defense).
 2. *United States v. Williams*, 731 F.3d 678 (7th Cir. 2013). Police received a report that twenty-five people, several with "guns out," were loitering outside a troubled bar in a high crime area. When officers arrived they found only eight to ten people milling about peacefully, but conducted patdowns anyway. The court held that the stop was justified, but the pat frisk was not, finding that avoiding eye contact and pocketed hands were of little value. The concurring opinion questioned the validity of

*Federal Defender Services
of Wisconsin, Inc.*

the *Terry* stop, emphasizing that “as public possession and display of firearms become lawful under more circumstances, Fourth Amendment jurisprudence and police practices must adapt.” Given that merely possessing or displaying a gun without criminal or malicious intent does not violate the law, “even if the display is disturbing or frightening to others,” the concurring opinion doubted that a report of “guns out” constituted reasonable suspicion. “[A]ll of us involved in law enforcement, including judges, prosecutors, defense attorneys, and police officers, will need to reevaluate our thinking about these Fourth Amendment issues and how private possession of firearms figures into our thinking.” Finally, the concurrence emphasized the obligation of the courts to protect Second Amendment rights for people in bad neighborhoods as well as good ones.

3. *United States v. Leo*, 792 F.3d 742 (7th Cir. 2015). The court rejected the government’s contention that the possibility of a gun in Leo’s backpack posed a unique threat that justified a full search of the bag on less than probable cause. Wisconsin law generally permits a person who is 21 or older and has not been convicted of a felony to obtain a concealed-carry license. At the time of the search, the officers knew neither Leo’s age nor criminal history, nor did they inquire whether he had a license to carry a concealed firearm. The Supreme Court has made clear that the Second Amendment protects the individual right to keep and bear arms, as has the Seventh Circuit, including the right to carry a gun in public. *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The court cited Judge Hamilton’s concurrence in *Williams*.
4. *United States v. Jones*, 606 F.3d 964 (8th Cir. 2010) – An Omaha officer on routine patrol saw Jones walking in a high-crime area on a 68-degree afternoon. Jones clutched the front area of his long-sleeved hoodie pocket with his

right hand and watched the squad drive by. He stopped walking only when the squad pulled up on him. The government argued the officer had reasonable suspicion to believe Jones held a firearm, based on the officer's testimony and that of his "street survivor" trainer at the police academy. The court disagreed, holding that the officer lacked reasonable suspicion that Jones was carrying a concealed firearm in his hoodie pocket, as opposed to some other object, or no object at all. The concurrence went further: because the government offered no evidence that the officer had reasonable suspicion Jones lacked a valid permit to carry a gun, it failed to prove a valid stop based on Nebraska's CCW law.

5. *United States v. Montague*, 437 Fed. App'x. 833, 835-37 (11th Cir. 2010) (because precedent in the Florida appellate district where the stop took place held that having a license is an affirmative defense in Florida, reasonable suspicion was present based on observation of concealed firearm). For an extended discussion of this issue, see R. Leider, *May I See Your License? Terry Stops and License Verification*, 31 *Quinnipiac L. Rev.* 387.

B. Open Carry

1. *United States v. Black*, 707 F.3d 531 (4th Cir. 2013) – Court finds no reasonable suspicion for stop based on: lawful open carry of firearm; high crime area; out-of-district address; and prior arrest history of defendant's companion – "we encounter yet another situation where the Government attempts to meet its *Terry* burden by patching together a set of innocent, suspicion-free facts, which cannot rationally be relied on to establish reasonable suspicion."

- a. The court rejects reliance on an openly carried firearm as justification for detention: “Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states. . . .That the officer had never seen anyone in this particular division openly carry a weapon also fails to justify reasonable suspicion. From our understanding of the laws of North Carolina, its laws apply uniformly and without exception in every single division, and every part of the state.”
- b. With respect to the high crime area: “In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.”
- c. The court added: “The facts of this case give us cause to pause and ponder the slow systematic erosion of Fourth Amendment protections for a certain demographic. In the words of Martin Luther King, Jr., we are reminded that ‘we are tied together in a single garment of destiny, caught in an inescapable network of mutuality,’ that our individual freedom is inextricably bound to the freedom of others. Thus, we must ensure that the Fourth Amendment rights of *all* individuals are protected.”

2. A conviction for aiding and abetting under 924(c) requires the government to prove that the defendant actively participated in the underlying violent or drug crime with *advance knowledge* that a confederate would use or carry a gun during the crime's commission.

- A. *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014) – Rosemond and two others drove to a park to sell a pound of pot to Gonzales. Gonzales grabbed the drugs and fled. Someone in Rosemond's car got out and began firing shots in Gonzales's direction. The police soon arrived and Rosemond was charged under 924(c). Rosemond's theory was that someone else fired the gun and he knew nothing beforehand about its presence, but the court's instruction on aiding and abetting didn't require proof of advance knowledge of the gun and Rosemond was convicted.
- B. The Supreme Court reversed Rosemond's conviction, holding that the government must prove the defendant had "advance knowledge" of the gun, meaning knowledge "at a time the accomplice can do something with it – most notably, opt to walk away." *Id.* at 1249-50.
- C. The court rejected Rosemond's other argument that the government also must prove the defendant affirmatively desired that one of his confederates use a gun.
- D. *United States v. Rodriguez-Martinez*, 778 F.3d 367 (1st Cir. 2015) – Police stopped a car driven by Santini for a traffic violation. When the car pulled over, Rodriguez exited, thanked Santini, and walked away from the car while making a cell phone call. His hands were shaking. Police searched both men, finding a pistol on Rodriguez and drugs on Santini. The court reversed Rodriguez's 924(c) conviction because there was no evidence he knew Santini was selling drugs other than his

nervousness, which was explained by the gun possession. Santini's 924(c) conviction was reversed because nothing showed he knew of Rodriguez's gun possession.

3. That your client lived with others in a home where a gun was openly present does not in itself establish that he possessed the gun; nor does a fingerprint or DNA on a gun necessarily establish possession.

- A. *United States v. Griffin*, 684 F.3d 691 (7th Cir. 2012) – Griffin was convicted of possession of a shotgun found behind the kitchen door of a house he shared with his parents. The court noted that there was no evidence that Griffin ever had physical possession of the gun and he did not have exclusive control over the premises. More importantly, the court rejected the government's argument that mere residency and knowledge that the contraband was present was sufficient to prove constructive possession. Rather, something more than mere proximity is required and access does not equal possession. Conviction reversed on sufficiency of the evidence grounds.
1. In cases where a defendant jointly occupies a residence, a defendant's "substantial connection" to the residence is insufficient to establish constructive possession of contraband in that residence. "[P]roof of constructive possession of contraband in the residence requires the government to demonstrate a 'substantial connection' between the defendant and the contraband itself, not just the residence." *Id.* at 697 (emphasis added).
 2. Rather, "[p]roximity must be coupled with other evidence, including connection with an impermissible item, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise in order to sustain a guilty verdict." *United*

States v. Reed, 744 F.3d 519, 526 (7th Cir.2014) (citing *Griffin*, 684 F.3d at 696.

B. Other cases

1. *United States v. Hooks*, 551 F.3d 1205, 1213-15 (10th Cir. 2009)(evidence insufficient to establish constructive possession based on defendant's presence in vehicle with three others and no showing of knowledge or dominion and control).
2. *United States v. Mills*, 29 F.3d 545 (10th Cir. 1994). Mills lived with another woman in a house where guns were found. The housemate testified that the guns belonged to her and she had put them in the house without the defendant's knowledge. Court refused to infer that Mills had "dominion and control" over the guns, adding: "Even if the jury disbelieved the entire defense testimony, that disbelief cannot constitute evidence of the crimes charged and somehow substitute for knowing constructive possession in this joint occupying situation."
3. *United States v. Mergerson*, 4 F3d 337 (5t Cir. 1993) (where gun was found between box spring and mattress of bed where defendant slept with girlfriend after moving in a month earlier, and weapon purchased by girlfriend at earlier date, evidence insufficient to establish constructive possession).

C. **Fingerprints or DNA alone don't necessarily establish possession.**

1. *United States v. Katz*, 582 F.3d 749 (7th Cir. 2009) – In *Katz*, the defendant was charged with possessing a shotgun on February 15, 2007, that was found at his girlfriend's house with his fingerprint on it. The parties stipulated that prior to February 15, 2007, Katz had been convicted of a felony.

Because the fingerprint technician could not say how long the print had been on the gun, the court found there was “absolutely no evidence” that Katz was in possession of the gun on February 15. And Katz’s presence at the property didn’t establish constructive possession either.

2. *Miller v. State*, 107 So. 3d 498 (Fla. Ct. App. 2013) – Gun with defendant’s DNA found between mattress and box spring of defendant’s sister’s bed in house they shared with others–insufficient evidence because unknown when DNA left on gun.
3. *Finley v. State*, 139 So. 3d 940 (Fla. Ct. App. 2014) – A burglar ransacked Finley’s apartment. When police responded they found a handgun lying on a box spring left exposed by an overturned mattress. DNA from the handgun and magazine matched Finley’s DNA. Court reverses on sufficiency of the evidence grounds because no evidence as to when DNA placed on gun, and “more significantly . . . secondary DNA transfer was possible . . . without Finley ever having touched the handgun.” Finley’s theory was the burglar put the gun in the apartment: “The State did not put the burglar on the stand to deny possession of the gun, and even more, the investigators never even tested the burglar’s DNA to compare to the handgun and magazine.”

- D. Obviously, reversals for insufficient evidence will remain rare. The benefit of cases like *Griffin* and *Katz* may lie in crafting helpful jury instructions.

4. Mistake-of-fact is a defense to making a false statement on an ATF form.

- A. *United States v. Bowling*, 770 F.3d 1168 (7th Cir. 2014). The government charged Bowling under 18 U.S.C. § 922(a)(6), with falsely stating on an ATF form 4473 that he was not under an indictment for a felony when he attempted to purchase a firearm. He also was charged with a second count for providing an address that was on his driver's license, which was not where he lived, although he had an office there and received mail at that address.
- B. In support of a mistake-of-fact defense, Bowling sought to elicit from the county prosecutor testimony that Bowling had been offered (and later accepted) a plea to a misdemeanor. The district court sustained government objections to this testimony. The Seventh Circuit reversed, finding that Bowling should have been allowed to introduce the evidence to show that he mistakenly believed that he was not under felony indictment at the time he filled out the form. The court concluded: "detrimental reliance on second-hand information may be a weak defense, but it is one recognized by law; given the facts of this case, it appears to be the only defense Bowling had for one of the counts." *Id.* at 1176.
- C. As for the second count, which alleged that Bowling provided a false address, the trial court instructed the jury that a false address is material as a matter of law. The Seventh Circuit did not decide the propriety of the instruction because it was granting a new trial, but said that the court's prior case law "never went so far as to declare that providing a false address, in every case, is material as a matter of law." *Id.* at 1177.
- D. **Entrapment by estoppel**—This defense applies when a government official with apparent authority assures the

defendant that certain conduct is legal (possession of a firearm) and the defendant reasonably believes that official. *United States v. Baker*, 438 F.3d 749 (7th Cir. 2006). In *United States v. Talmadge*, 829 F.2d 767 (9th Cir. 1987), the court reversed a felon-in-possession conviction based on advice the defendant relied on from a *federally licensed* gun dealer. *Talmadge* has not been followed in the other circuits. *See also United States v. Miles*, 748 F.3d 485 (2d Cir. 2014) (rejecting defense attempt to raise this defense based on state guns-for-cash program as defendant must show reliance on advice of federal official).

5. A burglary conviction may not be a burglary for ACCA and guidelines purposes.

A. When is a burglary not a burglary?

1. *Descamps v. United States*, 133 S. Ct. 2276 (2013) – To qualify as a “burglary” under ACCA’s enumerated offenses clause, the elements of the statute of conviction must be the same, or narrower, than the elements of generic burglary.
2. Generic burglary requires: (1) unlawful or unprivileged entry, or remaining in, (2) a building or structure; (3) with intent to commit a crime.
3. California’s burglary statute is not a generic burglary, and therefore not a violent felony, because it does not require unlawful entry. *Descamps*, 133 S. Ct. at 2293. The burglary statutes of a number of other states are similar. *E.g.*, *United States v. Hiser*, 532 Fed. Appx. 648 (9th Cir. 2013) (Nevada’s burglary statute not a crime of violence under 2K2.1(a)(2)).

4. Alabama third-degree burglary is not a generic burglary for ACC purposes because the definition of “building” encompasses vehicles and water craft. *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014).
5. For purposes of the career offender and firearms guidelines, burglary means burglary of a dwelling not of a building.
6. It appears that this will be a moot point as to career offender and the firearms guidelines as burglary is being eliminated from list of crimes of violence.

B. When is an arson not an arson?

1. Delaware Third-Degree Arson is not a crime of violence because it may be committed by criminal recklessness. *Brown v. Carraway*, 719 F.3d 583 (7th Cir. 2013).

C. Conspiracies and attempts.

1. *United States v. James*, 550 U.S. 192 (2007) – Attempted burglary is not a burglary.

6. Not all felony drug dealing offenses are “serious drug offenses” under ACCA.

- A. See *United States v. Spencer*, 739 F.3d 1027 (7th Cir. 2014) – Under ACCA, a “serious drug offense” is one carrying a maximum term of imprisonment of ten years or more. Under Wisconsin law, a Class F felony (such as distribution of one to five grams of coke) is punishable by “imprisonment not to exceed 12 years and 6 months.” **Not a serious drug offense**, because the initial confinement portion of sentence is less than ten years.

- B. *United States v. Tucker*, 703 F.3d 205 (3d Cir. 2012) (holding that Pennsylvania drug conspiracy conviction was not serious drug offense because from the record of the prior conviction it could not be determined if the drug of conviction was pot (5 year max) or cocaine (10 year max)).
- C. *Spencer* illustrates the need to dig in to criminal history looking for challenges and that it cannot be assumed that a particular out-of-state offense qualifies under ACCA.

7. If your client might be ACC, propose pleading to a statute other than §922(g).

- A. **Alternatives to 922(g)** – If your client is an Armed Career Criminal, you’ll be begging and pleading for the government to have mercy on your client and avoid the mandatory fifteen-year minimum sentence. But unless your client is cooperating (and perhaps even if he is), you’ll want to propose an alternative charge to avoid application of ACC. Some possibilities are:
 - 1. Unlawful receipt of firearm while under indictment, 18 U.S.C. § 922(n).
 - 2. Possession of a stolen firearm, 18 U.S.C. § 922(j).
 - 3. 18 U.S.C. § 924(c).
 - 4. Disposal of firearm to prohibited person, 18 U.S.C. § 922(d).
 - 5. § 1001 (false statement).
 - 6. Receipt of firearm with obliterated serial number.

- B. Especially in light of *Johnson v. United States*, 135 S.Ct. 25 (2015), there are likely to be cases in which it is unclear whether your client is ACC. In such cases, it may make sense to request a pre-plea PSR asking for the probation office to determine your client’s criminal history and whether he is ACC before entering in to a plea agreement.

8. Don’t overlook challenging the firearms guidelines based on the Sentencing Commission’s failure to exercise its proper institutional role in adopting the guidelines.

- A. When the Sentencing Commission fails to fulfill its “characteristic institutional role” of basing a new sentencing range on study, expertise, empirical data, or national experience, the district court should consider rejecting the guideline. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007). As the Supreme Court has emphasized, the sentencing court is free to consider whether a particular guideline “exemplif[ies] ‘the Commission’s exercise of its characteristic institutional role,’ *Kimbrough*, 552 U.S. at 109, or “reflects an unsound judgment.” *Rita v. United States*, 551 U.S. 338, 351 (2007). Fd.org has an abundance of materials to assist in “deconstructing the guidelines.”
- B. *United States v. Fogle*, 694 F. Supp. 2d 1014 (E.D. Wis. 2010) (Adelman) – *Fogle* recognizes that when the Commission revised § 2K2.1 in 1991 to increase the base offense level for defendants with prior convictions for crimes of violence or felony drug crimes, it failed to meaningfully explain or support the change. Because “a controlled substance offense need not involve violence, weapons, or any sort of aggressive behavior, it is unclear why a conviction for such an offense should generally denote a greater threat with a gun.” *Id.* at 1017. See also Adelman & Dietrich, *Improving the Guidelines Through Critical*

Evaluation: An Important New Role for District Courts, 57 Drake L. Rev. 575, 587-88 (2009).

- C. Stolen guns and obliterated serial numbers—Under § 2K2.1(b)(4), the offense level is increased if the firearm involved was stolen or had an obliterated serial number. These enhancements are ripe for challenge as they do not require proof that the defendant knew the gun was stolen or had an obliterated serial number and the Commission adopted these increased offense levels without exercising its proper institutional role. *See United States v. Jordan*, 740 F. Supp. 2d 1013 (E.D. Wis. 2010); *See also United States v. Davy*, 433 Fed. Appx. 343 (6th Circ. 2011) (district court abused discretion by not considering defendant’s request for a variance because there was no evidence he knew the gun was stolen).
1. The history of the guideline is illuminating. It originally called for a *one-level* adjustment if the defendant *knew or had reason to believe* that the firearm had an altered or obliterated serial number. In 1989, the Commission made the adjustment a two-level increase to “better reflect the seriousness of this conduct.” U.S.S.G. App. C Amend. 189 (Nov. 1, 1989). The mens rea requirement was removed without explanation in 1991. U.S.S.G. App. C, Amend. 374. The Commission added the application note in 1993 to clarify that the enhancement applies regardless of any proof of mens rea. Amend. 478.
 2. In 2006, the Commission increased the enhancement to four levels, asserting that the “increase reflects both the difficulty in tracing firearms with altered or obliterated serial numbers and the increased market for these types of weapons.” Amend. 691. But that justification was not supported by hearing testimony or any other evidence concerning the alleged market for firearms with obliterated serial numbers.

9. Three strategies in dropsy cases.

A. The Government didn't test the evidence for DNA or fingerprints/the results didn't identify anyone.

1. *United States v. Poindexter*, 942 F.2d 354 (6th Cir. 1991). (abuse of discretion to forbid defense counsel in closing from arguing that absence of fingerprints raises reasonable doubt);
2. *Washington v. State*, 951 A 2d 885, 180 Md. App. 458 (2008) (error to preclude defendant in closing from arguing that fingerprint report indicating "negative" meant that there were fingerprints found and the results were negative for the defendant; trial court erred in adopting state's interpretation of the report as meaning no fingerprints had been found).
3. *Wheeler v. United States*, 930 A. 2d 232 (D.C. Ct. App. 2007) (finding that trial court committed plain error by instructing the jury that the lack of fingerprint evidence could not, as a matter of law, constitute reasonable doubt).

B. Government did not conduct the right tests.

1. *Smith v. United States*, 27 A. 3d 1189 (D.C. Ct. App. 2011) (conviction reversed because defendant not allowed to present evidence that the success rate of lifting usable prints from guns with the Superglue method was much greater than with the powder method).

C. **Call a photogrammetric expert.**

1. *State v. Washington*, 2014 WI App 24 (unpublished) – Defense counsel held ineffective for not making effort to show it was implausible that defendant threw gun from car while driving as claimed by police. Police testified that as they pursued fleeing car they observed Washington throw a shiny object out the window. Shortly thereafter (but after gun shots were heard in the same area) a gun was found thirty feet off the road. Washington’s fingerprints and DNA were not on the gun and the gun did not have scratch marks consistent with being thrown from a moving vehicle. Postconviction counsel called a law student who had experimented with throwing a gun out of a window to see how far away it would land. Counsel also called a photogrammetric expert (“the science of making reliable measurements by the use of photographs”), to demonstrate that Washington could not have physically thrown that far under the circumstances.

10. When all else fails, play for the fumbles: creative defenses and government screw ups.

- A. **Innocent possession** – *E.g.*, *United States v. Baird*, 712 F.3d 623 (1st Cir. 2013) (defendant bought stolen handgun and returned it two days later when, he claimed, he first learned it was stolen; court reverses conviction because “innocent possession” instruction should have been given); *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2001); *but see United States v. Gilbert*, 430 F.3d 215 (4th Cir. 2005) (one of several circuits rejecting this defense as to 922(g)(1)).

- B. **Didn't know it was a real gun** – *United States v. Jones*, 222 F.3d 349 (7th Cir. 2000) (recognizing that the government must prove that defendant consciously possessed what he knew to be a firearm, but rejecting defendant's claim that evidence showed only that he thought gun was a BB gun. Rap video defense – defendant thought only a prop. *See also United States v. Edwards*, 90 F.3d 199, 204 (7th Cir. 1996) (government must prove that the defendant knew the barrel of his shotgun was less than 18 inches), relying on *United States v. Staples*, 511 U.S. 600 (1994).
- C. **Duress** – *United States v. Dixon*, 548 U.S. 1 (2006) – The Court assumes that duress is a defense to gun possession, but finds that it's constitutional to place the burden of proving the defense on the defendant.
- D. **Entrapment** – *United States v. Sistrunk*, 622 F.3d 1328 (11th Cir. 2010).
- E. **Justification/Necessity** – *United States v. Ricks*, 573 F.3d 198 (4th Cir. 2009); *United States v. White*, 552 F.3d 240 (2d Cir. 2009).
- F. **Chain of custody/discovery violation** – *United States v. Mackin*, 793 F.3d 703 (7th Cir. 2015) (reversing conviction where defense relied on incomplete chain of custody continuity slip produced in discovery to craft what he believed to be a viable defense and then produced the complete slip at trial after defense attacked chain of custody).
- G. **Conviction record bearing defendant's name but no other identifying information is insufficient by itself to identify conviction as defendant's** – *United States v. Allen*, 383 F.3d 644 (7th Cir. 2004) ; *United States v. Jackson*, 368 F.3d 59 (2d Cir. 2004).
- H. **Insanity** – *United States v. Allen*, 449 F.3d 1121 (10th Cir. 2006).

- I. **The government's evidence proved possession of different gun than in indictment** – *United States v. Leichtman*, 948 F.2d 370 (7th Cir. 1991).

- J. **Interstate Commerce** – Defendant convicted of felon-in-possession based on citizen testimony he possessed a shotgun that never was recovered. Government offered testimony that Indiana did not have any major manufacturers of shotguns and therefore if defendant had a shotgun, it traveled in interstate commerce. Evidence held insufficient to establish interstate commerce element because no definition of major manufacturer presented. *United States v. Groves*, 470 F.3d 311 (7th Cir. 2006).