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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES,

Plaintiff - Appellee,

v.

MANUEL ROMERO, JR.,

Defendant - Appellant.

No. 18-2180

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 2:17-CR-02190-KG-1)

Daniel Rubin, Assistant Federal Public Defender (Stephen P. McCue, Federal Public Defender, and Jane Greek, Assistant Federal Public Defender, on the briefs), Las Cruces, New Mexico, for Defendant-Appellant.

Benjamin J. Christenson, Assistant United States Attorney (John C. Anderson, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **TYMKOVICH**, Chief Judge, **EBEL**, and **LUCERO**, Circuit Judges.

EBEL, Circuit Judge.

Manuel Romero was charged with one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and one count of knowingly possessing a

stolen firearm under 18 U.S.C. § 922(j). Romero filed a motion to suppress the firearm that a Las Cruces police officer discovered in Romero's backpack during a search incident to his arrest for obstructing an officer in violation of New Mexico Statute § 30-22-1(D). The officer arrested Romero for obstruction because he failed to immediately comply with the officer's request that he submit to a pat-down search. Romero argued in his motion that the firearm must be suppressed because the officer had neither (1) reasonable suspicion to conduct the pat-down search nor (2) probable cause to arrest Romero for obstruction. The district court denied Romero's motion. We reverse, because we agree with Romero's latter argument that there was insufficient probable cause to support an arrest under section 30-22-1(D). Thus, the search of the backpack cannot be supported as a search incident to arrest. Because of this ruling, we do not address Romero's first argument that there was no reasonable suspicion to support the initial pat-down search. We remand this case to the district court for further proceedings.

I. BACKGROUND

In reviewing a district court's ruling on a motion to suppress evidence, we view the evidence in the light most favorable to the prevailing party and "accept the district court's findings of fact unless they are clearly erroneous." United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017). The district court found the following facts, none of which are clearly erroneous.

On Friday, April 29, 2017, Officer Matthew Dollar was on patrol in Las Cruces, New Mexico. At approximately 5:30 p.m., Officer Dollar drove past a

church where he observed Romero standing at the front entry, peering into the window. Because he passed by it often on patrol, Officer Dollar knew that the church did not hold services at that time. Additionally, several days earlier, Officer Dollar learned that there had been reports of theft and vandalism occurring at other churches in the area. Given his observations of Romero and knowledge of the vandalism, Officer Dollar drove into the church parking lot to investigate.

Upon arriving, Officer Dollar observed Romero crouching down to fill up a water bottle from the outdoor hose connected to the church. He also noticed that Romero had a "pocket clip" for a folding pocket knife on his waist band near his right hip and a "linear bulge" on his right bicep that Dollar suspected was another knife. ROA Vol. I at 33-34. Officer Dollar's body-worn camera recorded the following exchange between him and Romero.

Officer Dollar:	Police Department. Hey, what's up man? How are you?
Mr. Romero:	Pretty good.
Officer Dollar:	What's going on?
Mr. Romero:	I'm getting some water and charging my phone. [Romero gestures to the cellphone and water bottle that he is holding, one in each hand.][1]
Officer Dollar:	What's that?
Mr. Romero:	I'm getting some water and trying to charge my phone.

[1] The descriptions in brackets come from our observation of the video evidence filed as Supp. R. Vol. I. The verbal exchange is identical to that noted in the district court's opinion.

Officer Dollar: You don't have any weapons or anything on you, do you?

Mr. Romero: No, I got a --. [Romero gestures to the pocket clip on his waistband.]

Officer Dollar: Don't reach for it. [Romero immediately lifts both hands up to chest level.]

Mr. Romero: Okay.

Officer Dollar: Set that down. Let me pat you down real quick.

Mr. Romero: Oh, man. Why?

Officer Dollar: Listen to me. This can go smoothly or it can go rough for you. I suggest that you go with what I'm asking you, alright, or I'll charge you with resisting, obstructing. It's your choice.

Mr. Romero: Are you going to give me a ticket or what?

Officer Dollar: I'm going to put you in handcuffs and take you to jail --

Romero: I don't want to go to jail.

[At this point in the encounter, Officer Dollar drew his taser and pointed it at Mr. Romero.]

Officer Dollar: --or we can go this route. Put it down. [Romero sets his cell phone and water bottle on the ground.]

Officer Dollar: Put your hands on the wall.

Mr. Romero: Can I take this off? [Gesturing to drawstring backpack.]

Officer Dollar: No, don't reach for anything.

Mr. Romero: Ah, man. Why do you want to (unintelligible)?

Officer Dollar: Hey, you're at a church. You don't belong here right now. Okay? It can go one of two ways.

Mr. Romero: Why do you want to take me to jail?

Officer Dollar: You can go to the ground or you can comply. [Romero begins slowly lowering his body to the ground.]

Mr. Romero: Please don't tase me.
Officer Dollar: Go to the ground.
Mr. Romero: I don't want to go to get tased [sic].

Dist. Ct. Op. at 3.

As noted above, when Officer Dollar pointed his taser at Romero and said "put it down," Romero put the cell phone and water bottle that he was holding on the ground. Then, Officer Dollar immediately directed Romero to put his hands on the wall. Romero responded promptly by turning toward the church wall. After a few more exchanges, Officer Dollar says to Romero, "You can go to the ground." Id. At that directive, Romero began lowering his body to the ground, arriving there just five seconds after the command. Officer Dollar then conducted a pat-down search that revealed a knife. Shortly thereafter, the video that we have been provided ends. Ultimately, Officer Dollar determined that Romero was resisting and failing to obey his commands and arrested him for violating N.M. Stat. § 30-22-1(D). Dollar searched Romero incident to that arrest and discovered a gun in his drawstring backpack.

As a result, the government charged Romero with one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and one count of knowingly possessing a stolen firearm under 18 U.S.C. § 922(j). Romero filed a motion to suppress the gun evidence, arguing, as relevant here, that Officer Dollar had neither reasonable suspicion to perform a pat-down search nor probable cause to arrest Romero for obstruction. If true, either shortcoming would independently render

Romero's arrest unlawful under the Fourth Amendment, as well as the search incident to his arrest that uncovered the gun. The district court denied the motion, concluding that Officer Dollar both performed a lawful frisk, see Terry v. Ohio, 392 U.S. 1, 27 (1968), and had probable cause to support his arrest. In the alternative, the district court determined that, if Officer Dollar lacked probable cause to arrest Romero, he effectuated the arrest under a reasonable mistake of law, making the incident search reasonable nonetheless. Romero pled guilty to both charges, but he reserved his right to appeal the suppression issues. We reverse.

II. DISCUSSION

Romero appeals the district court's reasonable suspicion and probable cause determinations as well as its alternate conclusion that Officer Dollar made a reasonable mistake of law. We assume without deciding that Officer Dollar conducted a lawful Terry frisk. However, even so, we agree with Romero that Officer Dollar lacked probable cause to arrest him for violating N.M. Stat. § 30-22-1(D). Furthermore, we reverse the district court's alternate mistake of law conclusion.

A. No probable cause to arrest

We first consider whether Officer Dollar had probable cause to arrest Romero for violating section 30-22-1(D) in order to justify conducting a search incident to that arrest. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." In general, warrantless searches and seizures are

per se unreasonable, Katz v. United States, 389 U.S. 347, 357 (1967), but that rule is subject to several exceptions. First, "[l]aw enforcement personnel may arrest a person without a warrant if there is probable cause to believe that person committed a crime." United States v. Gordon, 173 F.3d 761, 766 (10th Cir. 1999). Second, police may search a person that has been legally arrested because, as the Supreme Court has explained, the probable cause to support the arrest supports the search incident to the arrest. United States v. Robinson, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."). However, because "the fact of the lawful arrest . . . establishes the authority to search," where probable cause for the arrest is lacking, the subsequent search is unconstitutional unless supported on other grounds. Id. Here, the government relies entirely on the purported lawfulness of the arrest to support the subsequent search, and, because we hold that Officer Dollar lacked probable cause to arrest Romero for obstruction, the subsequent search of his backpack was unlawful.

We review a district court's probable cause determination "de novo," but we "review findings of historical fact only for clear error and . . . give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. 690, 699 (1996). Like the district court, we rely primarily on a video with sound that is included in the record.

We have held that an officer has probable cause to arrest if, under the totality of the circumstances, he learned of facts "that would lead a reasonable person to

believe that an offense has been or is being committed by the person arrested. Probable cause does not require facts sufficient for a finding of guilt; however, it does require more than mere suspicion." United States v. Morris, 247 F.3d 1080, 1088 (10th Cir. 2001) (internal quotation marks and citations omitted). "Probable cause must be evaluated in light of circumstances as they would have appeared to a prudent, cautious, trained police officer." United States v. Snow, 82 F.3d 935, 942 (10th Cir. 1996).

Officer Dollar arrested Romero for resisting an officer in violation of N.M. Stat. § 30-22-1(D), which forbids "[r]esisting, evading or obstructing an officer" by, inter alia, "resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties." The New Mexico Court of Appeals has so far interpreted the phrase "resisting or abusing" in section 30-22-1(D) to prohibit three types of conduct: (1) "physical acts of resistance," State v. Wade, 667 P.2d 459, 460 (N.M. Ct. App. 1983), (2) the use of "fighting words" to attack an officer, id. at 461, and (3) the refusal to "obey" lawful police commands, New Mexico v. Diaz, 908 P.2d 258, 259–62 (N.M. Ct. App. 1995); see also State v. Jimenez, 392 P.3d 668, 682 (N.M. Ct. App. 2017) ("[A]nother way a person can violate Subsection (D) is by avoiding doing something required, including refusing to comply with an officer's orders.").

The district court concluded that,

> [b]ecause Mr. Romero did not comply with Officer Dollar's orders to place his water bottle, cell phone, and cell phone charger on the ground, and place his hands on the wall, Officer Dollar had probable cause to arrest Mr. Romero for refusing to comply with a lawful order in violation of Section 30-22-1(D).

Dist. Ct. Op. at 14 (emphasis added). Consistent with that conclusion, the government does not argue that Romero either physically resisted Officer Dollar or used fighting words to attack him. The government asserts only that Romero violated section 30-22-1(D) by refusing to obey Officer Dollar's commands. Based on the facts found by the district court that are supported by substantial evidence and the evidence in the record before us, we conclude that Romero did not refuse to obey Officer Dollar's commands in any way that could constitute unlawful "resistance" under section 30-22-1(D).

New Mexico and Tenth Circuit cases provide only a few examples of what it means to refuse to obey lawful police commands in violation of section 30-22-1(D). However, in each relevant case where a defendant is found to have unlawfully resisted an officer, the commands given by the officer are clear and repeated, the defendant is given a reasonable opportunity to comply with the commands under the circumstances, and the defendant nonetheless overtly refuses to comply. For example, in Diaz, the New Mexico Court of Appeals held that the defendant unlawfully resisted police under section 30-22-1(D) when he refused to drop a knife that he was holding despite being "repeatedly ordered" to do so by the police. 908 P.2d at 259 (N.M. Ct. App. 1995). There, police were dispatched to investigate a domestic violence situation. When they arrived, defendant was holding a knife and drunkenly yelling at his wife on the street. Id. Police repeatedly told defendant to "put down," "drop," or "throw" the knife that he was holding, but the defendant

refused and instead backed away from the semi-circle of four police officers trying to apprehend him, continuing down the street for 150-200 yards until he was cornered and arrested. Id. The court of appeals determined that those facts were sufficient to support the jury's verdict finding the defendant guilty of violating section 30-22-1(D). Id. at 262.

Then, in City of Roswell v. Smith, the New Mexico Court of Appeals held that a defendant who refused to leave a Denny's restaurant parking lot after being repeatedly instructed by several police officers to do so unlawfully resisted an officer in violation of a city ordinance identical to section 30-22-1(D). 133 P.3d 271, 272–73 (N.M. Ct. App. 2006). In that case, the defendant was engaged in a loud argument with a few people in the parking lot when police arrived. Id. Although they determined no crime had been committed, the officers ordered everyone in the parking lot to go their separate ways to avoid causing a disturbance of the peace. Id. The defendant refused to leave. Id. The court of appeals upheld his conviction under the city obstruction ordinance.

Finally, in Storey v. Taylor, a police officer responding to a domestic violence call at the defendant's home asked the defendant six times to "step out of the house," and the defendant verbally refused to comply each time:

Officer:	Sir, step out of the house.
Defendant:	No.
Officer:	Step out of the house.
Defendant:	I'm not doing it.
Officer:	You're going to step out of the house.

Defendant:	No.
Officer:	Listen. You shall obey my command and step outside the house or you go to jail. Step outside.
Defendant:	I am not doing that.
Officer:	Step out of the house.
Defendant:	Why are you doing this?
Officer:	You are going to comply with a lawful order. You don't want to deal with this, you can go to jail.

696 F.3d 987, 991 (10th Cir. 2012) ("Officer" and "Defendant" used in place of actual names). The officer then arrested the defendant for violating section 30-22-1(D). Id. The Tenth Circuit observed that the defendant's conduct "[c]learly" disobeyed the officer's order to step out of the house, despite ultimately concluding that the order to step outside was unlawful. Id. at 993.

In contrast with the above cases, in Keylon v. Albuquerque, the Tenth Circuit held that the defendant did not unlawfully resist an officer under section 30-22-1(D) when she declined to provide her identification to a police officer when asked for it. 535 F.3d 1210, 1217 (10th Cir. 2008). In that case, the defendant, Bertha Keylon, was approached by a police officer outside her home. Id. at 1213. The officer was investigating Keylon's son for committing a felony. Id. He asked Keylon for her son's birth date and address. Id. She said she did not know the information. Id. Then, the officer asked Keylon for identification. Id. Keylon did not produce an ID and instead walked away, stating "I'll get my ID when I'm ready." Id. The officer arrested Keylon for resisting an officer under section 30-22-1(D). Id. The arresting officer claimed that he had probable cause to suspect Keylon of violating section 30-

22-1(D) because she gave "evasive answers." Id. at 1216. In Keylon's 18 U.S.C. § 1983 action against the officer for violating her Fourth Amendment rights, the Tenth Circuit held that "merely evasive" speech does not constitute "[r]esisting, evading or obstructing an officer" under section 30-22-1(D). Id. at 1216-17. Although we know from Diaz and Smith that physical resistance is not necessary to violate section 30-22-1(D), Keylon serves as the other bookend, standing for the principle that evasive speech is not a refusal to obey orders unless combined with the type of resolute noncompliance exhibited by the defendants in Diaz and Smith.

Given these background cases, Romero's conduct would not lead a reasonable person—a prudent, cautious, trained police officer—to believe that Romero was resisting in violation of section 30-22-1(D). Romero complied with Officer Dollar's instructions during their conversation, only fifty seconds of which is relevant to this probable cause analysis. During that brief encounter, Officer Dollar issued five clear instructions to Romero: (1) "[d]on't reach for it," (2) "[s]et that down," (3) "[l]et me pat you down," (4) "[p]ut your hands on the wall," and (5) "[g]o to the ground." Dist. Ct. Op. at 3. Romero complied with all of those commands except for the instruction that he put his hands on the wall, which became moot when Officer Dollar subsequently commanded Romero instead to go to the ground.

First, Officer Dollar said, "[d]on't reach for it," referring to Romero's belt. Romero immediately raised both hands up near his face. Supp. R. Vol. I at 1:01-02. Then, Officer Dollar commanded, "Set that down. Let me pat you down real quick." Id. at 1:02-03. At that point, Romero exhibited some consternation, stating, "Oh,

man. Why?" Id. at 1:06-07. However, instead of repeating his command that Romero set his things down and submit to a pat-down search, Officer Dollar raised his voice, threatened to arrest Romero and take him to jail, and drew his taser and pointed it at Romero before he issued any further commands:

> Officer Dollar: Listen to me. This can go smoothly or it can go rough for you. I suggest that you go with what I'm asking you, alright, or I'll charge you with resisting, obstructing. It's your choice.
>
> Romero: Are you going to give me a ticket or what?
>
> Officer Dollar: I'm going to put you in handcuffs and take you to jail--
>
> Romero: I don't want to go to jail.
>
> [At this point in the encounter, Dollar drew his taser and pointed it at Romero.]
>
> Officer Dollar: --or we can go this route. Put it down. Put your hands on the wall.

Id. at 1:07-1:30. Romero then immediately put his things down on the ground and, at first, turned toward the wall, but then turned back to face Officer Dollar to ask a few more questions. Id. at 1:32-41. Officer Dollar answered Romero's questions without issuing new commands. Finally, Officer Dollar ordered Romero to "go to the ground," and within five seconds Romero laid on the ground. Id. at 1:41-45.

Unlike the culpable defendants in the cases above, Romero did not physically retreat from Dollar nor aggressively approach him nor verbally refuse to comply with his directives. He stood next to the church hose where he was first approached throughout the conversation and directly answered all of the questions that he was

asked.[2] Id.; Dist. Ct. Op. at 3-4. Although Romero exhibited some frustration during the encounter, the fact that in one minute's time he complied with every unrevoked order that Officer Dollar gave distinguishes this case from Diaz, Smith, and Storey, and makes it more like Keylon. Therefore, we conclude that the district court erred by denying Romero's motion to suppress because Officer Dollar lacked probable cause to arrest Romero for resisting an officer under section 30-22-1(D), which rendered the search-incident-to-arrest likewise lacking in probable cause in violation of the Fourth Amendment.

B. No reasonable mistake of law

Finally, any mistake of law by Officer Dollar was not reasonable. The Supreme Court has held that "reasonable suspicion can rest on a mistaken understanding of the scope of a legal prohibition." Heien v. North Carolina, 135 S. Ct. 530, 536 (2014). The Second Circuit has extended the mistake of law analysis to a probable cause determination in United States v. Diaz, 854 F.3d 197, 203-05 (2d Cir. 2017), although we have not. Assuming without deciding that Heien can be applied to Officer Dollar's probable cause determination, Officer Dollar cannot benefit from the rule from Heien in this case.

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[2] Officer Dollar: Police Department. Hey, what's up man? How are you?
Romero: Pretty good.
Officer Dollar: What's going on?
Romero: I'm getting some water and charging my phone.
Officer Dollar: You don't have any weapons or anything on you, do you?
Romero: No, I got a --.

First, the Heien majority stressed that "[t]he Fourth Amendment tolerates only reasonable mistakes," id. at 539 (emphasis in original), and the concurrence explained that the laws that might be amenable to such mistakes of law are "genuinely ambiguous" and "pose[] a quite difficult question of interpretation" that involves "hard interpretive work," id. at 541-42 (Kagan, J., concurring). One panel of our court has held that "an officer's mistake of law may be reasonable if the law is ambiguous (reasonable minds could differ on the interpretation) and it has never been previously construed by the relevant courts." United States v. Cunningham, 630 F. App'x 873, 876–77 (10th Cir. 2015) (unpublished) (emphasis added).

However, as detailed above, section 30-22-1(D) has been interpreted several times by the New Mexico Court of Appeals. The only potentially ambiguous language in section 30-22-1(D) is the phrase "resisting or abusing," and the New Mexico Court of Appeals has clarified that language by explaining that "resisting or abusing" can refer to an arrestee's overt physical act, use of fighting words, or refusal to obey lawful police commands. See Diaz, 908 P.2d at 259–62; Wade, 667 P.2d at 460. Given the on-point case law that exists, it was error for the district court to apply the rule from Heien at all. Moreover, even if Heien is applicable here, it was not objectively reasonable for Office Dollar to think Romero's conduct constituted "resisting or abusing" in this case. As explained above, Romero was far more compliant than the defendants in Diaz, Smith, and Storey. Therefore, we reverse the district court's alternate conclusion that Officer Dollar committed a reasonable mistake of law.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's denial of Romero's motion to suppress and REMAND this case to the district court for further proceedings.

18-2180, *United States v. Romero*
TYMKOVICH, C.J., concurring in part and dissenting in part.

I would affirm the district court's decision. I would hold that Officer Dollar had reasonable suspicion Romero was armed and dangerous and could therefore perform a protective pat-down search of Romero's outer clothing. Officer Dollar had reasonable suspicion of burglary and observed a knife clip at Romero's hip, which constitutes more than sufficient facts to satisfy the *Terry* standard.

I would also hold that Officer Dollar had probable cause to arrest Romero for resisting. Romero did not comply with multiple orders from Officer Dollar until the officer threatened to tase him—and even then did not comply fully with perfectly reasonable commands. We cannot require more than do the New Mexico courts, and Romero's actions prove sufficient to support probable cause under a recent decision from the New Mexico Court of Appeals. *See New Mexico v. Jimenez*, 392 P.3d 668 (N.M. Ct. App. 2017).

I. Protective Frisk

The majority assumes without deciding that Officer Dollar had reasonable suspicion to perform a protective frisk. Because I would not reverse the district court's probable cause determination regarding Romero's arrest, I would reach the *Terry* frisk issue and hold that Officer Dollar reasonably ordered Romero to submit to a pat-down search of his outer clothing. I would clarify that even if the officer were investigating mere vandalism or theft, as Officer Dollar testified, he could have reasonably suspected

Romero was dangerous. I also stress that we should not consider the requirements of a protective frisk—that (1) criminal activity be afoot and (2) the individual be armed and (3) dangerous—in a vacuum and as wholly independent elements. Each element informs and reinforces the others.

Romero conceded below that Officer Dollar initially had reasonable suspicion to investigate him for burglary. The district court relied heavily on that fact. The court reasoned that burglary is the "type of offense[] that would support reasonable suspicion that person may be armed and dangerous" because "burglary is 'a crime normally and reasonably expected to involve a weapon.'" *United States v. Romero*, Cr. No. 17-2190, 2018 WL 1896551, at *6 (D. N.M. Apr. 19, 2018) (citing *United States v. Barnett*, 505 F.3d 637, 640 (7th Cir. 2007).

Then Romero changed course before us at oral argument, noting that Officer Dollar never asserted he was investigating Romero for burglary. The officer knew only that churches in the area had been vandalized and items stolen, so he had questioned Romero on suspicion of vandalism or theft. Oral Arg. at 3:50–4:10. The United States, according to Romero's counsel, inserted suspicion of burglary into the proceedings, and the district court accepted that characterization. *Id.* Romero then proclaimed to us that suspicion of vandalism or theft cannot, without independent evidence of the suspect's dangerousness, result in reasonable suspicion that a person is armed and dangerous.

Romero forfeited his challenge to the district court's determination that Officer

Dollar had reasonable suspicion to investigate Romero for burglary by conceding that argument below and in the briefing before this court. But Romero continues to maintain that even if Officer Dollar had reason to suspect him of burglary the officer did not have reasonable suspicion to frisk him for weapons because Officer Dollar had no evidence Romero was dangerous. The officer merely suspected him of burglary and observed a knife clip.

Yet both of Romero's arguments misapply Supreme Court case law in the area. We do not analyze dangerousness separately from suspicion of criminality and possession of a weapon. And officers do not need to be investigating a violence-prone crime for a presumption of dangerousness to arise.

The analysis is governed by *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, the Court laid out the primary justification for protective pat-down searches, noting "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Id.* at 24. The Court therefore held when an officer reasonably "conclude[s] in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous," the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Id.* at 30.

We need look no further than the facts of *Terry* and later Supreme Court cases to determine what constitutes reasonable suspicion that an individual suspected of criminal activity is armed and dangerous. The *Terry* Court upheld a protective pat-down when a police officer observed two men suspiciously peering into the windows of several businesses. In light of his experience, the officer suspected the men of planning a robbery. He frisked the men upon receiving only mumbled responses to his initial inquiries. *Id.* at 6–7. Importantly for our purposes, beyond the men's suspicious actions the officer pointed to no specific evidence that these men were armed or dangerous. *Id.* And yet the Supreme Court upheld the frisk. The reasoning of the Court was simply that since robberies often "involve the use of weapons," reasonable suspicion the suspects might engage in a robbery also yielded reasonable suspicion those men were armed and dangerous. *Id.* at 28; *see also* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 9.2(a) (5th ed. 2018) (courts "view the right to frisk as being 'automatic' whenever the suspect has been stopped upon the suspicion . . . [of] a type of crime for which the offender would likely be armed").

Thus, one reading of *Terry* could require officers to be investigating a potentially violent crime—or observe some other indicia of dangerousness—before concluding a suspect is dangerous. But the Supreme Court has flatly rejected such a cabined reading. Over the course of the next two decades, the Court upheld two *Terry* frisks where police were investigating non-violent or routine matters.

The Court first decided a case where "officers stopped [a] vehicle for the purpose of issuing a traffic summons." *Pennsylvania v. Mimms*, 434 U.S. 106, 106 (1977). Rather than stand on the side of the road in traffic, one of the officers ordered the driver to exit his vehicle. When the driver stepped out, the officer observed a large bulge under the man's sports jacket. The officer proceeded to frisk the man and discovered a loaded .38-caliber revolver. The driver challenged his conviction for illegally carrying a concealed firearm, and the Supreme Court rejected his contention that the officer lacked reasonable suspicion to frisk him for weapons—noting "there is little question the officer was justified." *Id.* at 111–12.

Later the Court upheld a frisk when officers stopped to investigate a vehicle that had swerved into a ditch. *Michigan v. Long*, 463 U.S. 1032, 1035 (1983). The officers noted the driver "appeared to be under the influence of something" and requested he provide his vehicle registration. When the driver approached his vehicle to fetch the document, both officers "observed a large hunting knife on the floorboard of the driver's side of the car. The officers then stopped Long's progress and subjected him to a *Terry* protective pat-down." *Id.* at 1036. The Court upheld the search for weapons on his person—and in the vehicle—because the hunting knife gave officers reasonable suspicion the man was armed and dangerous. *Id.* at 1051–53. The Court "stress[ed] that a *Terry* investigation, such as the one that occurred here, involves a police investigation 'at close range,' when the officer remains particularly vulnerable"— such that an "officer must

make a 'quick decision as to how to protect himself and others from possible danger.'" *Id.* at 1052 (citing *Terry*, 392 U.S. at 24, 28) (internal citations omitted).

The combined teaching of these cases is, first, police must have reasonable suspicion that "criminal activity may be afoot." *Terry*, 392 U.S. at 30. Nothing substitutes for reasonable suspicion of criminal activity, since frisking a person based on a suspicion—or even a knowledge—that an individual is armed, "without more, serves to erode the precious protections of the Second and Fourth Amendments." *See United States v. House*, 463 Fed. App'x 783, 789 (10th Cir. 2012); *see also* LaFave, Search and Seizure § 9.2(a) (an officer may not frisk a pedestrian who is not engaged in suspicious conduct even if that officer "sees a suspicious bulge which possibly could be a gun").

Second, police need not be investigating a potentially violent crime, or one typically involving weapons, to develop reasonable suspicion that a person may be presently dangerous. The Supreme Court in *Mimms* and *Long* held that officers could perform a protective pat-down despite the non-violent or routine nature of the crimes for which the officers were investigating the suspects. But the cases also suggest that when investigating routine, non-violent crimes, police must point to specific and articulable facts suggesting the suspect is *armed* or otherwise dangerous.

And third, we do not analyze the *Terry* prongs wholly independently and in a vacuum. When officers have reasonable suspicion a suspect is armed—even when investigating routine or non-violent crimes—those same facts may give rise to reasonable

suspicion the suspect is presently dangerous. This is explicit in *Mimms*. The Court stated simply, "The bulge in the jacket permitted the officer to conclude that Mimms was armed and *thus* posed a serious and present danger to the safety of the officer." 434 U.S. at 112 (emphasis added); *United States v. Garcia*, 751 F.3d 1139, 1143 n.7 (10th Cir. 2014) (noting that "an officer's suspicion that an individual is dangerous can affect that officer's suspicion that an individual is armed, and vice versa").

The officers in *Mimms* and *Long* presented no evidence beyond reasonable suspicion of criminal activity and of the suspect being armed to conclude the suspect might be dangerous. The officers did not know the suspects' criminal history. They did not observe any violent behavior. They were investigating crimes that typically do not involve weapons. The officers simply observed a weapon or a suspicious bulge and, in the course of their investigation, made a "quick decision as to how to protect [themselves] and others from *possible* danger." *Long*, 463 U.S. at 1052 (emphasis added). Indeed, the en banc Fourth Circuit recently came to a similar conclusion, treating "armed and dangerous" as a unitary concept and reasoning that *Mimms*, by using "'and thus' recognizes that the risk of danger is created simply because the person, who was forcibly stopped, is armed." *United States v. Robinson*, 846 F.3d 694, 700 (4th Cir. 2017) (en banc).

These quick decisions certainly will result in officers frisking many individuals who are not in any way dangerous to officers on the scene. But the reasonable suspicion

standard allows for just such a result. Reasonable suspicion, after all, "is not, and is not meant to be, an onerous standard." *United States v. Petit*, 785 F.3d 1374, 1379 (10th Cir. 2015). Indeed, the reasonable suspicion standard allows police actions, such as a *Terry* frisk, "even if it is more likely than not that the individual" is not dangerous to officers or others. *See id*. (citing *United States v. Johnson*, 364 F.3d 1185, 1194 (10th Cir. 2004)).

The Fourth Amendment's prohibition against *unreasonable* searches and seizures, therefore, entitles an officer to frisk a potentially armed suspect for weapons, regardless of the nature of the investigation, because a *Terry* stop "involves a police investigation 'at close range.'" *Long*, 463 U.S. at 1052 (citing *Terry*, 392 U.S. at 24). And what begins as a routine matter may quickly devolve into a more serious matter. *Cf. Arizona v. Johnson*, 555 U.S. 323, 331 (2009) ("[T]he risk of a violent encounter in a traffic-stop setting" stems from "the fact that evidence of a more serious crime might be uncovered during the stop." (citation and internal quotation mark omitted)); *Mimms*, 434 U.S. at 110 ("[A] significant percentage of murders of police officers occurs when the officers are making traffic stops.'" (citing *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)). Thus, the Supreme Court has not "required that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter." *Long*, 463 U.S. at 1052.

Officer Dollar did not offend these principles when he attempted to frisk Romero for weapons. This remains true even if Officer Dollar was investigating mere vandalism

or theft at the church. The officer observed Romero peering through the window of a church when no church services were being held, and Officer Dollar was aware of recent reports of vandalism and theft at nearby churches. The officer undoubtedly had reasonable suspicion to investigate further. And when, as the district court found, Officer Dollar approached Romero, he "saw what looked like a knife pocket clip on Mr. Romero's hip and a bulge on Mr. Romero's arm that could have been a knife." *Romero*, 2018 WL 1896551, at *5. When the officer asked Romero whether he had a weapon, Romero responded, "No, I got a . . ."—while simultaneously reaching for his pocket where Officer Dollar had seen the knife clip. *Id.* Unsurprisingly, Officer Dollar "interpreted Mr. Romero's movement as a response to the question about weapons." *Id.*

Romero's response and actions certainly provided the officer reasonable suspicion Romero "was armed and thus posed a serious and present danger to the safety of the officer." *Mimms*, 434 U.S. at 112. As this court recently stated, "a visible and suspicious 'bulge' in a driver's pocket may *alone* 'permit[] the officer to conclude" a suspect is armed and dangerous. *United States v. Gurule*, 18-4309, __F.3d__, 2019 WL 4126533, at *6 (10th Cir. July 11, 2019) (quoting *Mimms*, 434 U.S. at 112) (emphasis added). This would undoubtedly extend to seeing a knife clip attached to a suspect's belt and a suspicious bulge on his arm that could have been an additional knife.

I would therefore conclude Officer Dollar had reasonable suspicion to perform a protective pat-down search of Romero's outer clothing.

II. Resisting Arrest

The majority also concludes Romero did not resist a peace officer within the meaning of N.M. Stat. § 30-22-1(D) because his conduct was insufficiently evasive. But the New Mexico Court of Appeals has defined the offense in broader terms than the majority concludes. *See Jimenez*, 392 P.3d at 668.

In *Jimenez*, the defendant resisted officer commands when he holed up in a club with a gun and told police he wanted them to shoot him. A SWAT team eventually apprehended Jimenez, and he was charged with "evading" an officer under § 30-22-1(B). *Id.* at 673–74. The court contrasted subsection (B) criminalizing "evading," under which Jimenez was charged, with subsection (D) prohibiting "resisting." The court noted that subsection (B) contained "language indicative of action" whereas subsection (D) contemplated occasions "when the subject is non-compliant." *Id.* at 678.

While the court was primarily interpreting subsection (B), it nonetheless concluded that resisting under subsection (D) "refers not only to a defendant's overt physical act, but also to the failure to act when refusing to obey lawful police commands." *Id.* at 682. In its final characterization of the subsection, the court concluded that "a defendant who is effectively 'cornered,' i.e., whose apprehension is imminent, but who nonetheless, chooses to *challenge* or *forestall* his arrest—either by physical battery, refusing to comply with orders, or verbally—violates Subsection (D)." *Id.* (emphasis added). This would certainly extend to a brief seizure for purposes of a pat-down, as subsection (D) does not

limit resisting to situations of arrest.

Our inquiry should therefore focus on whether Romero's failure to act when Officer Dollar ordered him to (1) put down his phone and water bottle, and (2) put his hands on the wall rises to the level of attempting "to challenge or forestall" his impending pat-down by "refusing to comply with orders." *See id.* After watching the body-camera footage, I conclude Officer Dollar had sufficient "facts and circumstances within [his] knowledge . . . to warrant the officer to believe" Romero had committed a crime. *See New Mexico v. Granillo-Macias*, 176 P.3d 1187, 189 (N.M. Ct. App. 2007) (setting out the probable cause standard for an arrest).[1]

Officer Dollar initiated the encounter in a friendly manner, but the situation quickly escalated. After the officer saw Romero's knife clip, he stated calmly, "Set that down," referring to the cell phone and water bottle Romero held, "Let me pat you down real quick." *Romero*, 2018 WL 1896551, at *2. Romero immediately protested, complaining "Oh, man. Why?" *id.*, while simultaneously turning his back on Officer

[1] The majority also relies on this court's decision in *Keylon v. City of Albuquerque*, 535 F.3d 1210 (10th Cir. 2008), where we held that a woman had not violated § 30-22-1(D) when she gave an officer evasive answers and did not immediately comply with all orders. The New Mexico Court of Appeals had not yet decided *Jimenez*, however, and this court cited only *New Mexico v. Wade*, 667 P.2d 459, 460 (N.M. Ct. App. 1983), which held that "[r]esisting, evading, or obstructing an officer primarily consists of physical acts of resistance." With only *Wade* on which to base our decision, it is unsurprising the court concluded Keylon did not violate the statute because she did not "engage[] in any physical act of resisting prior to her arrest." *Keylon*, 535 F.3d at 1216. But now that the New Mexico courts have further defined the scope of the statute, we must apply current state law.

Dollar and taking several steps away from him. Romero did not put down his phone or water bottle. The officer then quickly—and likely unnecessarily—escalated the situation, giving Romero an indirect command to comply with his earlier order: "Listen to me. This can go smoothly or it can go rough for you. I suggest that you go with what I'm asking you, alright, or I'll charge you with resisting, obstructing. It's your choice." *Id.*

Romero again protested, asking exasperatedly, "Are you going to give me a ticket or what?" *Id.* Officer Dollar subsequently issued his second indirect command, noting "I'm going to put you in handcuffs and take you to jail." *Id.* Romero then remarked, "I don't want to go to jail"—at which point Officer Dollar pulled out his taser, aimed it at Romero, and stated, "or we can go this route." *Id.* The officer then issued his second direct command, ordering Romero to "Put it down." *Id.* Only then did Romero comply with Officer Dollar's lawful command to put his items on the ground. Notably, *twenty-four* seconds elapsed—and four commands, two direct and two indirect—between when Officer Dollar first told Romero to put his things on the ground and submit to a pat-down and when Romero finally put his phone and water bottle on the ground.

And still Romero did not comply with Officer Dollar's order to submit to a protective pat-down. He continued to argue. When the officer ordered "Put your hands on the wall," Romero tried to take his backpack off. *Id.* When Officer Dollar told him not to "reach for anything," Romero protested while turning his back on the officer for a second time, "Ah, man. Why do you want to (unintelligible)?" *Id.* Another fifteen

seconds elapsed between when Officer Dollar told Romero to put his hands on the wall and when Romero got on the ground so the officer could perform the pat-down. Altogether, Romero forestalled his impending pat-down by around forty seconds by challenging Officer Dollar's orders. These actions—both unreasonably ignoring multiple direct and indirect commands and turning his back on the officer twice—gave Officer Dollar probable cause to conclude Romero had chosen "to challenge or forestall" the pat-down search by "refusing to comply with orders." *Jimenez*, 392 P.3d at 682.

We cannot choose which test to apply when we have a published opinion from the New Mexico courts interpreting New Mexico law. And Romero's actions prove sufficient under the test set forth in *Jimenez*.

* * *

I would affirm the district court on both issues. Officer Dollar was entitled to perform a protective pat-down of Romero's outer clothing when he spotted a knife clip at Romero's hip. And he had probable cause to arrest Romero for resisting an officer under New Mexico law when Romero chose to challenge the officer's decision to pat him down and refused to comply with multiple direct and indirect orders.

I therefore dissent.