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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN CANADA,

Defendant - Appellant.

No. 21-3202

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:20-CR-10053-EFM-1)

Daniel T. Hansmeier, Appellate Chief (Melody Brannon, Federal Public Defender with him on the brief), Kansas City, Kansas for Defendant-Appellant.

Molly M. Gordon, Assistant United States Attorney (Duston J. Slinkard, United States Attorney with her on the brief), Wichita, Kansas for Plaintiff-Appellee.

Before **MATHESON**, **CARSON**, and **ROSSMAN**, Circuit Judges.

CARSON, Circuit Judge.

When law enforcement executes a protective sweep of a vehicle, it must do so with reasonable suspicion that the defendant is both dangerous and may gain immediate access to a weapon. Michigan v. Long, 463 U.S. 1032, 1050–51 (1983). Here, after police officers pulled over Defendant John Canada for failing to engage

his turn signal, one officer saw Defendant—hips arched—reaching behind his seat. Officers also believed Defendant delayed bringing his vehicle to a stop, which caused them concern. Defendant claims the officers lacked reasonable suspicion to engage in a protective sweep. We disagree. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm the judgment of the district court.

I.

On a rainy Wednesday night around 9:00 p.m., Wichita Police Department officers Zachary Jensen and Trevor Sanders were conducting a proactive patrol in a high-crime area. They engaged their emergency lights after watching an automobile—driven by Defendant—fail to signal a right-hand turn. After the emergency lights came on, Defendant took about fourteen seconds to come to a stop. When Officer Jensen exited the patrol car, he commented that the stop appeared to be "a little bit of a slow roll here." The officers later testified that the stop did not take "an absurd amount of time," but it was "a little bit longer than usual." Officer Jensen also testified that a "slow roll" may suggest that the driver "is attempting to hide or retrieve something inside the vehicle, maybe trying to come up with an exit plan or strategy, decide if they want to stop or don't stop."

The officers approached from both the driver and passenger sides of the vehicle. On the passenger side, Officer Jensen saw Defendant strenuously arching his hips, reaching his right arm under the rear of his seat with his head "facing kind of off his shoulder." Defendant possessed his wallet and identification. But his furtive movement caused Officer Jensen—without hesitation—to order him to show

his hands. Officer Sanders then removed him from the vehicle. Defendant fully cooperated. The officers frisked him, found nothing, and moved him towards the trunk of his vehicle.

Officer Jensen then conducted a protective sweep under the driver's seat. He discovered a loaded .38 Special. The officers then ran a records check and discovered Defendant was prohibited from possessing a firearm and had a revoked license. The officers then arrested him. Less than forty seconds elapsed from the time that Officer Sanders removed Defendant from the vehicle to arrest. The government indicted Defendant and charged him with one count of possession of a firearm by a felon. He moved to suppress the firearm from evidence. And after a hearing, the district court denied his motion. He then entered a conditional guilty plea, reserving the right to appeal the district court's denial.

Defendant takes no issue with the initial stop. Rather, he claims that the warrantless protective sweep—which uncovered the firearm—was unconstitutional. He argues reasonable suspicion cannot arise from furtive movements alone; the Fourth Amendment required the officers to know something more.

II.

"We look at the totality of the circumstances in reviewing the denial of the motion to suppress." United States v. Dennison, 410 F.3d 1203, 1207 (10th Cir. 2005) (citing United States v. Gay, 240 F.3d 1222, 1225 (10th Cir. 2001)). "When reviewing the denial of a motion to suppress, we view the evidence in the light most favorable to the government, accept the district court's finding of fact unless clearly

erroneous, and review de novo the ultimate determination of reasonableness under the Fourth Amendment." United States v. Windom, 863 F.3d 1322, 1326 (10th Cir. 2017) (quoting United States v. Mosley, 743 F.3d 1317, 1322 (10th Cir. 2014)). "A finding of fact is clearly erroneous if it is without factual support in the record or if, after reviewing all of the evidence, we are left with the definite and firm conviction that a mistake has been made." United States v. Hernandez, 847 F.3d 1257, 1263 (10th Cir. 2017) (quoting In re Vaughn, 765 F.3d 1174, 1180 (10th Cir. 2014)). "Reviewing courts must also defer to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions." Dennison, 410 F.3d at 1207 (internal quotation marks omitted) (quoting United States v. Santos, 403 F.3d 1120, 1124 (10th Cir. 2005)).

III.

The Fourth Amendment protects against unreasonable searches of "persons, houses, papers, and effects." U.S. Const. amend. IV. The Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. Mapp v. Ohio, 367 U.S. 643, 650 (1961). And a vehicle is an "effect" protected by the Fourth Amendment. Byrd v. United States, 138 S. Ct. 1518, 1526 (2018). While we generally require officers to have a warrant to search, a warrantless search is reasonable in some situations—including certain protective sweeps of vehicles. Long, 463 U.S. at 1050–51; Dennison, 410 F.3d at 1210 (10th Cir. 2005). Because the exception for protective sweeps exists for officer safety, we limit them "to those areas in which a weapon may be placed or hidden." Long, 463 U.S. at 1049–51. We

do not require law enforcement officers to take unnecessary risks. United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993). Law enforcement officers thus may take steps "reasonably necessary to protect their personal safety." Id. (quoting United States v. Hensley, 469 U.S. 221, 235 (1985)). The sweep should not only protect officers during a stop, but also should protect officers once they release a defendant back to his vehicle. See Arizona v. Gant, 556 U.S. 332, 352 (2009) (Scalia, J., concurring).

To lawfully conduct a protective sweep, an officer must have reasonable suspicion that a suspect poses a danger and may gain immediate access to a weapon. Long, 463 U.S. at 1050–51. Reasonable suspicion demands less than probable cause. Dennison, 410 F.3d at 1207. It "requires the officer to act on 'something more than an inchoate and unparticularized suspicion or hunch.'" United States v. Hauk, 412 F.3d 1179, 1186 (10th Cir. 2005) (quoting United States v. Sokolow, 490 U.S. 1, 7 (1989)). But "[t]he officer need not be absolutely certain that the individual is armed." Terry v. Ohio, 392 U.S. 1, 27 (1968). To clear the first element, the government must show that a reasonable officer would believe the suspect to be "presently dangerous." Long, 463 U.S. at 1047. The second requires the officer to have had "reason to believe that weapons may be found" in the vehicle. Dennison, 410 F.3d at 1212.

A.

Defendant argues that officers relied only on his furtive movements to justify their protective sweep of his vehicle. And, he claims, furtive movements alone cannot create reasonable suspicion allowing officers to conduct a protective sweep. For this reason, Defendant posits, we must reverse the district court's order denying his motion to suppress. We have never addressed in a published opinion whether a furtive gesture, standing alone, can provide reasonable suspicion sufficient to justify a protective sweep.[1] And we need not answer this question today because we have an additional fact to consider: the "slow roll."

From siren to stop, the Defendant took about fourteen seconds to pull his car over. The officers did not believe that it was "an absurd amount of time," rather it was just "a little bit longer than usual." But it piqued their concern. When Officer Jensen exited the patrol car, he commented that the stop appeared to be "a little bit of a slow roll here." The comment, which the dashcam recorded, was a contemporaneous observation from a trained officer. And the circumstances under which he made it leave little room to believe the officer offered his opinion that Defendant engaged in a "slow roll" as a post

[1] In unpublished dicta, we have suggested that furtive gestures "standing alone" are inadequate to justify a protective sweep. United States v. Ridley, No. 97-3319, 1998 WL 778381, at *3 (10th Cir. Nov. 2, 1998) (unpublished). But we have never adopted this broad proposition in a published decision. And our decision in United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969), offers no answer as to whether furtive gestures alone may be enough for reasonable suspicion. There, we concluded that the "allegedly 'furtive' movements" under the circumstances in that case did not give rise to reasonable suspicion. Id. at 1059. We did not opine that furtive gestures alone may never give rise to reasonable suspicion.

hoc rationalization for the protective sweep. Moreover, we "defer to the 'ability of a trained law enforcement officer to distinguish between innocent and suspicious actions.'" Dennison, 410 F.3d at 1207 (quoting Santos, 403 F.3d at 1124).

In prior cases, we have relied on similar actions—such as a slow approach to a checkpoint or a jerking motion while stopping—as contributing to reasonable suspicion. United States v. Marquez, 603 F. App'x 685, 686 (10th Cir. 2015); Ridley, 1998 WL 778381, at *2; see also United States v. Fryer, 974 F.2d 813, 818–19 (7th Cir. 1992) (considering two blocks to stop after officers engaged their emergency lights in the reasonable suspicion analysis). The officer recognized the slow roll in this case as suspicious. Under our body of authority, the recognition of a slow roll by a trained officer, although not dispositive of this case, contributes to the totality of the circumstances.

B.

Now we must decide whether the furtive gesture when combined with the slow roll was enough to establish reasonable suspicion to conduct the protective sweep in this case. Defendant argues the totality of circumstances were insufficient to justify the sweep in this case. We disagree.

The furtive movement and slow roll together amount to "something more than an inchoate and unparticularized suspicion or hunch." Hauk, 412 F.3d at 1186 (quoting Sokolow, 490 U.S. at 7). The Seventh Circuit's decision in Fryer is persuasive on this point. In Fryer, officers observed, after they engaged their emergency lights, a brief two-block delay of a vehicle in stopping. Fryer, 974 F.2d at 818. During the delay, "the

officer observed furtive movements between the driver and the passenger, as if they were passing something between them." Id. at 819. The defendant argued that the delayed stop and the furtive movements did not give the officers reasonable suspicion to conduct a protective sweep. The Seventh Circuit disagreed, holding that "[t]hese are clearly the kind of specific, articulable facts that the standard contemplates and which warrant a search." Id.

The two-block delay in Fryer is analogous to the fourteen-second stop here. Neither stop was "an absurd amount of time." But they both caused the officers concern. As Officer Jensen testified, a "slow roll" may suggest that the driver "is attempting to hide or retrieve something inside the vehicle." That something may include a weapon. Thus, the slow roll was the first action that raised concern that Defendant might have access to a firearm and the will to use it.

Moreover, the Defendant's reach back here raises just as much concern, if not more, as the furtive movements in Fryer. Here, Defendant reached behind his seat as the officers approached the vehicle. The reach was clearly concerning to the officers: hips lifted from the seat, arm extended, head turned back. The actions in Fryer were neither as immediate to the officers' physical presence nor as clear. But nonetheless, both the actions here and in Fryer may evoke a reasonable reaction from officers to protect themselves by sweeping a defendant's vehicle. And such sweeps exist for officer safety; we do not require officers to take unnecessary risks. Perdue, 8 F.3d at 1462.

But Defendant contends that certain facts mitigate any reason for suspicion. He had his license ready and cooperated with the officers. Compliance, however, has not

precluded protective sweeps in other cases. See, e.g., Dennison, 410 F.3d at 1212. The compliance and a ready-at-hand license provide little sanctuary when compared to the suggestive nature of the furtive movement and slow roll.

The officers here could not have been sure that Defendant was dangerous or had a weapon present. But the furtive movement and slow roll provided enough for the officers to reasonably suspect that Defendant was both dangerous and had access to a weapon.

C.

Lastly, Defendant argues that—at the time of the sweep—the officers did not know if they would arrest him. And until officers decide they will release a suspect, he contends, the availability of a protective sweep cannot exist. We disagree.

A suspect's exit from the vehicle does not invariably preclude satisfaction of the test. In Long, the Supreme Court provided three situations in which the test may be satisfied: if (1) the suspect could "break away from police control and retrieve a weapon from his automobile"; (2) "the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside"; and (3) "the suspect may be permitted to reenter the vehicle before the . . . investigation is over, and again, may have access to weapons." Long, 463 U.S. at 1051–52. Regarding the first situation, we have held a protective sweep constitutional when the suspect was sitting in the patrol car with an officer and when a suspect stood handcuffed behind his vehicle with an officer. Dennison, 410 F.3d at 1206, 1213; United States v. Palmer, 360 F.3d 1243, 1247–48 (10th Cir. 2004). And the Seventh Circuit has held that the government meets the third situation's burden so long as officers—at the time of the search—had

reason to believe they would not detain a suspect further. United States v. Vaccaro, 915 F.3d 431, 437–38 (7th Cir. 2019).[2]

The Fourth Amendment did not preclude the sweep in this case. We resolve this question under both the first and third scenarios. Defendant could have broken away from the officers with greater ease here than in the circumstances of Dennison and Palmer. He stood at the trunk of his vehicle. The officers had neither handcuffed him nor contained him in the police cruiser. So he could have broken away. The officers were also unsure whether they would arrest him at the time of the sweep. They reacted quickly—forty seconds in total—to what could have been a dangerous situation. They had not yet run a records check, which subsequently revealed that he was a prohibited possessor with a revoked license. Thus, at the time of the sweep, the officers had reason to believe they would not detain Defendant after the investigation. Considering that Defendant could have broken away and the officers believed they may not detain him, the situation here afforded the officers reasonable suspicion. And the Fourth Amendment permits protective sweeps under such conditions.

AFFIRMED.

[2] In a recent unpublished order and judgment, we relied on Vaccaro for the same proposition. See United States v. Alexander, No. 20-3238, 2022 WL 414341, at *5 (10th Cir. Feb. 11, 2022), cert. denied, No. 21-7876, 2022 WL 4652608 (U.S. Oct. 3, 2022).

United States v. *Canada*, No. 21-3202

ROSSMAN, J., dissenting

When a police officer stops a driver and searches their vehicle without reasonable suspicion, that search violates the Fourth Amendment. U.S. Const. amend. IV. On this we all agree. *See* Maj. Op. at 4-5. It is in the *application* of that well-settled principle where I diverge from the majority opinion. Because I believe the court's decision today departs from our Fourth Amendment caselaw and permits an unconstitutional warrantless search, I respectfully dissent.

The Constitution tolerates "brief investigatory" vehicle stops, *United States* v. *Cortez*, 449 U.S. 411, 417 (1981), on "facts that do not constitute probable cause," *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881 (1975). To justify a so-called "protective sweep," our law instead requires a "reasonable suspicion . . . that criminal activity 'may be afoot.'" *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989)). Under *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983), an officer must have reasonable suspicion a subject is both "dangerous" and has ready access to a weapon. This reasonable suspicion must spring from "articulable facts" and "rational inferences from those facts," *Maryland* v. *Buie*, 494 U.S. 325, 334 (1990), not "[i]nchoate suspicions" and "unparticularized hunches," *United States* v. *Simpson*, 609 F.3d 1140, 1147 (10th Cir. 2010) (citation omitted). It

is the government's burden to show reasonable suspicion. *United States* v. *Frazier*, 30 F.4th 1165, 1174 (10th Cir. 2022). And courts review the presence—or absence—of reasonable suspicion by looking at the "totality of the circumstances," *Cortez*, 449 U.S. at 417-18, "from the standpoint of an objectively reasonable police officer," *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996).

Sometimes, as here, the totality of circumstances on which the government relies looks a little thin. Indeed, the majority opinion acknowledges the stop at issue here turns on a totality of two facts: a purportedly "furtive gesture" and an alleged "slow roll." *See* Maj. Op. at 6-7.[1] Nevertheless, the conclusion reached is we can "reasonably suspect that [Mr. Canada] was both dangerous and had access to a weapon." *Id.* at 9.

I respectfully disagree. On *de novo* review of the ultimate finding of reasonable suspicion, I would find the "factors relied upon by the district court are insufficient to create reasonable suspicion under the circumstances of this case." *United States* v. *Fernandez*, 18 F.3d 874, 878 (10th Cir. 1994).

First, we have what officers called a "little bit of a slow roll," RIII.19—the fourteen-second stop of Mr. Canada's car which did not take "an absurd

[1] No one—not the majority opinion, not the district court, not the government—has identified a case that affirmed a finding of reasonable suspicion on so few allegedly suspicious circumstances.

amount of time" but was maybe "a little bit longer than usual." RIII.12-14. According to the majority opinion, because Officer Jensen "recognized the slow roll in this case as suspicious," and because "we defer to the ability of a trained law enforcement officer to distinguish between innocent and suspicious actions," we, like Officer Jensen, must find the manner in which Mr. Canada pulled over suspicious. Maj. Op. at 7 (internal quotation marks and citation omitted).

While we must give "due weight"[2] to the conclusions of officers "who view the facts through the lens of their experience and expertise," *Ornelas*, 517 U.S.

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[2] Mr. Canada correctly identifies a tension in our reasonable suspicion jurisprudence, specifically our two-part clear error/*de novo* standard of review. Appellant Br. at 19-20.

We have articulated (at least) three iterations of the clear error component. *See United States* v. *Valenzuela*, 365 F.3d 892, 896 (10th Cir. 2004) ("In reviewing a district court's order to suppress evidence, we review the district court's factual findings for clear error, considering the evidence in the *light most favorable to the district court's determination*.") (emphasis added); *United States* v. *Zamudio-Carrillo*, 499 F.3d 1206, 1209 (10th Cir. 2007) ("When reviewing a district court's denial of a motion to suppress, we review the district court's factual findings for clear error and consider the evidence in the *light most favorable to the Government*.") (emphasis added); *United States* v. *Salazar*, 609 F.3d 1059, 1063 (10th Cir. 2010) ("We review the district court's findings of fact on a motion to suppress for clear error, examining the evidence in the *light most favorable to the prevailing party*.") (emphasis added).

Our Circuit's "light most favorable" language appears to spring from *Sinclair* v. *Turner*, 447 F.2d 1158 (10th Cir. 1971). But *Sinclair* wasn't a Fourth Amendment case. It was a federal habeas appeal involving a state murder conviction—one of the very limited circumstances in which the Supreme Court has instructed courts to view evidence with any sort of

at 699, whether an observed action is *actually* suspicious as a matter of law, and whether it rightly contributes to the legal conclusion of reasonable suspicion, are issues ultimately left to this court's judgment, not Officer Jensen's. *See, e.g.*, *Frazier*, 30 F.4th at 1174 (rejecting officer-identified bases for reasonable suspicion); *cf. United States* v. *Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) ("Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should

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favorable lens. *See, e.g.*, *Coleman* v. *Johnson*, 566 U.S. 650, 654 (2012) (citing *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979)). Nevertheless, this standard seems to have crept into our Fourth Amendment jurisprudence in *United States* v. *Miles*, 449 F.2d 1272, 1274 (10th Cir. 1971). *Miles*, citing *Sinclair*, announced "appellate court[s]" are "bound" to "[c]onstru[e] the evidence introduced in the trial court in the light most favorable to the government." *Id.*

Even after the Supreme Court in *Ornelas* directed clear error review of factual findings and *de novo* review of "the ultimate questions of reasonable suspicion," 517 U.S. at 691, 699, our court has used the light-most-favorable standard. *See United States* v. *Lacey*, 86 F.3d 956, 971 (10th Cir. 1996). The *Ornelas* Court explained an "appeals court should give *due weight*" to findings at the district court and to officers' reasonable inferences, 517 U.S. at 699-700 (emphasis added), but it nowhere adopted a light-most-favorable analysis. *See also Arvizu*, 534 U.S. at 275-77 (independently reviewing district court's reasonable suspicion analysis and according officer's inferences varying amounts of weight based on reasonability).

I am persuaded our Circuit's continued application of a light-most-favorable bias does not abide the standard formulation of clear error review and is incompatible with a principled *de novo* analysis. I remain unable to square our pre-*Ornelas* precedent with the Supreme Court's directives: "Independent review is . . . necessary if appellate courts are to maintain control of, and to clarify, the legal principles" underlying our Fourth Amendment jurisprudence. *Ornelas*, 517 U.S. at 697. *But see United States* v. *Torres*, 987 F.3d 893, 900-01 (10th Cir. 2021).

they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited." (citations omitted)).

Here, Mr. Canada persuasively explains why the district court erroneously concluded his particular "slow stop" helped "g[i]ve rise to the reasonable, articulable suspicion" he "may have posed a danger to the officers." RI.58-59. It was, he argues, entirely natural that it might take him "a little bit longer than usual" to pull over based on the circumstances of the stop. Appellant Br. at 31 (quoting RIII.14). It was raining. It was dark. He was traveling on a multilane road with other vehicles present. When the officers' lights were activated, he had to transition from merging left to pulling over to the right-side curb. *Id.* at 31. And the traffic offense committed—failure to signal a right-turn from a right-turn-only lane—was a "minor traffic infraction" for which "[i]t is not unreasonable to think that it would take Mr. Canada a few seconds to realize that the officers wanted him, and not someone else." *Id.* at 32.

The ordinariness of the slow roll here is emphasized by a closer examination of the cases on which the majority relies. In *United States* v. *Marquez*, 603 F. App'x 685, 686 (10th Cir. 2015) (unpublished) (citations omitted), the stop involved a driver who "made a 'sudden jerking motion' and moved to the right" because they were visibly "messing around in the cab of the vehicle." In *United States* v. *Ridley*, No. 97-3319, 1998 WL 778381, at *4

(10th Cir. Nov. 2, 1998) (unpublished), what the court found suspicious was the driver "immediately applied the brakes," then slowly proceeded, acting "as if he wasn't going to stop" at a police checkpoint. In *United States* v. *Fryer*, 974 F.2d 813, 817-18 (7th Cir. 1992), the Seventh Circuit credited the officers' account of "pursu[ing] the Buick for one and a half to two blocks," and their testimony that, *during* the pursuit, the driver and passenger were seen "attempting to conceal something before stopping their car."[3] The additional case invoked by the government is likewise unhelpful here. In *United States* v. *Palmer*, cited by the government for the proposition the "defendant tried to delay his encounter with police," Appellee Br. at 27, the driver

> looked back at the police car and pointed to himself, as if to ask "me?" [The officer] nodded and motioned for Defendant to pull over into a nearby Arby's parking lot. Rather than turn immediately, Defendant remained in his lane of traffic, made a left turn at the

[3] I note *Fryer* did not even factor in the delay in stopping when considering whether the circumstances satisfied *Long*:

> The district court determined that Officer Gonzalez's suspicions met the *Terry*/*Long* standard for conducting a search of Fryer's automobile. We see nothing in the record to suggest otherwise. The uncontroverted facts show that while patrolling a marginally safe neighborhood, in the wee hours of the morning, a veteran police officer observed a traffic violation. After signalling the car to pull over, the officer observed furtive movements between the driver and the passenger, as if they were passing something between them. The circumstances caused him to caution his less experienced partner, and to conduct searches of both the passenger area of the car and its occupants.

974 F.2d at 819.

> next light, and accelerated. When [the officer] reactivated his siren, Defendant promptly crossed a lane of traffic and pulled into a NAPA parking lot[,] . . . bypass[ed] approximately 25 empty parking spaces. . . . [and] eventually stopped on the far side of the lot.

360 F.3d 1243, 1245 (10th Cir. 2004). Those actions are unlike the short "seconds of slow-roll" here. Appellee Br. at 25.

I agree with my colleagues a "slow approach to a checkpoint" or "a jerking motion while stopping" could contribute to reasonable suspicion *in some cases*. Maj. Op. at 7; *see Arvizu*, 534 U.S. at 275-76 ("We think it quite reasonable that a driver's slowing down . . . might well be unremarkable in one instance . . . while quite unusual in another . . . ."). Here, though, I am persuaded "Mr. Canada pulled over promptly under the circumstances," and that the district court erred in crediting the "slow roll" at all.[4] Appellant Br. at 32. On the facts of *this* case, Mr. Canada's brief delay—if delay we may call it—does not contribute in any meaningful way to reasonable suspicion here: "Reasonable suspicion is a low bar, but it is not that low." *Frazier*, 30 F.4th at 1178.

I find myself, then, with a totality of one: the purportedly furtive gesture. The affirmance relies on the slow roll, so the majority opinion avoids the

[4] The district court itself expressed some skepticism of the slow roll during the suppression hearing. The "slow roll" was "not a very significant factor" and "maybe 5 percent" of the analysis. RIII.123. "[I]t really comes down to" the furtive gesture, the district court observed; "Absent that, [the government] would not be here defending a protective sweep." RIII.124.

"question" "whether a furtive gesture, standing alone, can provide reasonable suspicion sufficient to justify a protective sweep." Maj. Op. at 6. It does not acknowledge, however, our court has already answered this question. The majority observes what we held in *United States* v. *Ridley*—"[W]e do not believe a 'furtive' movement, standing alone, supports a *Terry* search . . . ," 1998 WL 778381, at *3—but dismisses this statement as "unpublished dicta." Maj. Op. at 6 n.1. But in *United States* v. *Humphrey*, 409 F.2d 1055, 1059 (10th Cir. 1969), we held: "'[F]urtive' movements alone establish nothing." Mr. Canada relied on *Humphrey*. The government has not argued it is bad law, though it briefly gestures toward an argument on this point: "Notably, [*Humphrey*] was decided over a decade before *Long* established the protective sweep doctrine for automobiles." Appellee Br. at 21 n.7. Why this matters is never explained, particularly since *Humphrey* was decided *after Terry*, which provided the framework for *Long*. As Mr. Canada persuasively summarizes, "The government never suggests this Court has overruled *Humphrey*"; nor has it contended "*Long* [is] a 'superseding contrary decision by the Supreme Court.'" Reply Br. at 12 (quoting *United States* v. *Springer*, 875 F.3d 968, 975 (10th Cir. 2017)). I agree, and I discern no reason to depart from *Humphrey*'s

holding here.[5] Without the slow roll, reasonable suspicion could rely only on the furtive gesture. Our law tells us this is not enough.[6]

Respectfully, I dissent.

[5] The majority opinion says *Humphrey* "offers no answer as to whether furtive gestures alone may be enough for reasonable suspicion." Maj. Op. at 6 n.1. I respectfully disagree. *Humphrey* offered a clear answer: "The [reasonable suspicion] balancing process is, as always, close and the *allegedly 'furtive' movements alone establish nothing*." 409 F.2d at 1059 (emphasis added). That answer may compel a conclusion the majority opinion resists, but it is an answer nonetheless—and one unchallenged by any of the caselaw the majority or government marshals against it.

[6] Because I would find the district court erred on *Long*'s first prong, and because this error would compel reversal, I do not reach *Long*'s second prong, requiring ready access to, or immediate control of, weapons. *Long*, 463 U.S. at 1051-52.