1 Judge.
2 THE COURT: All right. I'll hear
3 argument.
4
5 (PAUSE.)
6
7 THE COURT: So the situation is that we
8 have some individuals that, according to the police
9 officers, are out by the fence. They are on the sidewalk
10 blocking access, to their belief. They are in the area of
11 a place where they know an individual lives and sometimes
12 allows individuals with one individual he named, Mr. Moore,
13 to come on the premises and other times not.
14 This defendant is one of the individuals
15 that was there on the sidewalk area, may or may not have
16 been next to or on a bike. While they are talking to one
17 other individual, he rides off on his bike. One officer
18 starts walking towards his direction and then starts to
19 run. The defendant allegedly keeps on going on his
20 bicycle, abandons the bicycle, runs, falls, and the
21 officers are upon him, and he says that he has a weapon.
22 So if those are the facts, the issue is
23 whether or not there has been probable cause or the basis
24 for the stop for them to take off, because he says that --
25 The officers testified that he was told that he could not

1 -- was not told that he could not leave or that he had to
2 stay, and basically when he takes off on his bike or is
3 running, they want to know why he is on his bike and wonder
4 why he is running and where he is going.
5 One officer says that during the
6 process, he sees him clinging to the right waistband of his
7 jacket, and he says, later in cross, that he thought it
8 could have been a firearm. The other officer, Officer
9 Lindsey, says that he didn't see any of that. He
10 approaches the individual, comes on the individual, and he
11 tells him: I've got a firearm.
12 So it seems the issues are under the
13 factual circumstances here that bring the officers there
14 and asking individuals questions, whether or not drugs or
15 the firearm can be appropriately admitted into evidence in
16 light of the probable cause that existed or didn't exist at
17 that time.
18 All right. I have listened to a lot of
19 testimony, so I want you all to really narrow it down and
20 get right in there.
21 MR. JOHNSON: Well, Judge--and I
22 appreciate the Court's basis on the subject--I will point
23 to a few cases which both go to reasonable articulable
24 suspicion. And I know the Court has very well understood
25 the issue of probable cause.

1 Officer Gilbert, by his admission, at
2 the time that they were arresting him, didn't know what
3 they were arresting him for. He was placed in full
4 handcuffs. Officer Gilbert's testimony was that he went
5 down to the ground at the time. I will state that, of
6 course, that's a seizure for purposes of reasonable
7 articulable suspicion. I will also state that it rises to
8 the level of a full custodial arrest.
9 Pointing to some of the case law that I
10 believe is appropriate here, Judge, in Hayes v.
11 Commonwealth the Court has said that even somebody putting
12 something in their pocket in a high crime area doesn't rise
13 to the level -- When the police officers observed someone
14 putting something into their pocket--
15 THE COURT: What about just running
16 after the police encountered a group of individuals and
17 started to making inquiry with regards to what may be
18 trespassing? Somebody takes off on a bike, walking or
19 running, and the police try to stop the individual, and
20 then everything comes after that.
21 MR. JOHNSON: Well, Judge, at the point
22 that he left, there was no attempt to stop the individual.
23 And neither one of the officers, prior to his departure,
24 they were not in the process of apprehending him or even
25 detaining him.

1 THE COURT: It seemed to me that, you
2 know, it only became apparent to them at some point after
3 that this individual had left, and they saw him leave.
4 MR. JOHNSON: Within a minute and a
5 minute-and-a-half of arriving on there. I mean, I think in
6 light of the fact that the police officer gets up, Officer
7 Lindsey goes to the car, the defendant gets on his bicycle
8 and rides off. Not an unreasonable amount of time to
9 leave, because there hadn't been any seizure at that time.
10 Both Officer Gilbert and Lindsey testified that they told
11 him that he wasn't free to leave at that time. And on the
12 other end of that-- [sic]
13 THE COURT: --that they didn't tell him
14 that he wasn't free to leave. [sic]
15 MR. JOHNSON: --that they didn't tell
16 him he wasn't free to leave, either. [sic]
17 I say that flight alone, the unprovoked
18 flight is not enough alone--citing Washington v.
19 Commonwealth--is not enough given these circumstances for
20 them to even rise to reasonable articulable suspicion. And
21 what we have on the back end here is an arrest. Not even
22 reasonable articulable suspicion is necessary.
23 If being in a high crime area -- What
24 they've pointed to, and what I hear as the facts that the
25 Judge -- that means that the police officers have testified

1 to, and the Commonwealth has attempted to elicit, are high
2 crime area and the fact that he left. Then we can get into
3 the bulge. But even I would suspect that given Hayes v.
4 Commonwealth and some other rulings, even if that rises
5 to--
6 THE COURT: Well, the officer that
7 cuffed him and got there first says that he didn't see him
8 holding on to anything--
9 MR. JOHNSON: He didn't.
10 THE COURT: --and he basically put him
11 under arrest--
12 MR. JOHNSON: And that's the person that
13 arrested him--
14 THE COURT: --because he didn't --
15 because he was running, and he wanted to know why he was
16 running.
17 MR. JOHNSON: What facts are they
18 pointing to to give them the suspicion about that?
19 As Officer Gilbert testified to with the
20 bulge, I think what is here, Judge, is general suspicion.
21 THE COURT: And then you have a second
22 officer who says he saw him holding on to a part of the
23 jacket at the waistband, and he thought that it could have
24 been a gun, but he didn't know why the individual was being
25 arrested, even with the knowledge he says he had while the

1 person was running.
2 MR. JOHNSON: And no communication
3 between them to articulate at the time what that
4 circumstance was.
5 THE COURT: So do you have cases on
6 point that -- You said you had Washington--
7 MR. JOHNSON: Judge, I have Smith,
8 Washington, and I have these two cases. Smith and
9 Washington. And I also believe that Riley -- I also have
10 some other citations.
11 May I approach, Judge.
12 THE COURT: Yes.
13 Are these flight cases?
14 MR. JOHNSON: The Washington case is a
15 flight case, Judge. The Smith case goes to an
16 investigatory stop on the grounds -- I believe -- I
17 apologize.
18 I believe, Judge, it is a case similar
19 to these. That's actually the case where the defendant was
20 on the playground, the officer approached, and he was in a
21 marked car.
22 I do have some other -- The location,
23 Judge, is Riley v. Commonwealth, flight. But I believe
24 even under any Terry standard or the necessary probable
25 cause standard, I haven't heard anything which would

1 justify this arrest. Nothing individual to particularize--
2 THE COURT: All right. I'll hear from
3 the Commonwealth.
4 MR. JAGELS: Judge, there's been a lot
5 of language thrown around. I think that the Court and
6 counsel are calling this an arrest. We would characterize
7 it as an investigative detention when he is handcuffed.
8 And both Officer Lindsey and Gilbert indicated that he
9 wasn't under arrest at that point, that he was placed in
10 investigatory detention to determine why he was running and
11 what, if anything, he had in his pocket.
12 And I think that with the circumstances
13 -- looking at the totality of the circumstances, the
14 circumstances are they approached these individuals, they
15 are in a high crime, high drug area where they have made
16 multiple arrests, that he starts to run--
17 THE COURT: The officer said that he has
18 absolutely no basis to believe that any crime was being
19 committed.
20 MR. JAGELS: Initially.
21 THE COURT: At least one of them said
22 that.
23 MR. JAGELS: Initially, yes. Initially.
24 And he starts to run, though, before
25 officers are doing anything, before officers even pursue

1 him. He drops the bike, starts to run in this high crime
2 area. And it's at that point that they are chasing him to
3 detain him to determine why he is running in this high
4 crime area.
5 In addition, while Officer Lindsey can't
6 see it, certainly Officer Young and Officer Gilbert saw
7 that he is running while carrying what appeared to be a
8 heavy object or an object that he doesn't want to fall out
9 of his pocket, holding that while he is running the entire
10 time.
11 Officer Gilbert and Officer Lindsey, I
12 think the testimony was, that they got there almost
13 simultaneously and that Officer Gilbert assisted Officer
14 Lindsey in placing the handcuffs on Mr. Whitaker in order
15 to detain him to determine why he is running from the
16 officers. And at that point certainly they were entitled
17 to do a pat down of his person that would have revealed the
18 weapon.
19 And our argument is that it was an
20 investigative detention that led to the arrest that led to
21 the finding of the drugs and the gun.
22 We have two cases. We have Whitfield v.
23 Commonwealth, which is a Virginia Supreme Court case that
24 talks about nervous, evasive behavior is a pertinent factor
25 of determining reasonable suspicion, which I think is the

1 standard that we're looking at here. It indicates further
2 that headlong flight, whenever it occurs, is the consummate
3 act of evasion suggestive of wrong doing.
4 And I'll also provide Illinois v.
5 Wardlow, which is the U.S. Supreme Court case that talks
6 about sudden flight in a high crime area justifying a Terry
7 stop. I can give those cases to counsel and the Court.
8 THE COURT: I am looking at the Smith
9 case. Grounds for a stop on investigatory reasonableness.
10 Reasonable upon suspicion. Before making an investigatory
11 stop, police officers must have suspicion of criminal
12 activity based on more than just a guess or a hunch.
13 And I'll tell you, I don't see it as any
14 more than a guess or a hunch here. And they told me they
15 did not -- no observable criminal activity. And what we
16 usually don't have in these cases with regards to trespass
17 is an officer who is familiar with the person inside and
18 acknowledge that sometimes individuals, in addition to one
19 other person, are allowed to go in. It is not obvious that
20 it's trespass or could be.
21
22 (PAUSE.)
23
24 THE COURT: I am looking at the
25 Whitfield case right now.

1 (PAUSE.)
2
3 MR. JOHNSON: Judge, may I respond to
4 the Whitfield case?
5 THE COURT: One second. I am still
6 reading.
7
8 (PAUSE.)
9
10 THE COURT: I will hear your response.
11 MR. JOHNSON: Judge, I think in the
12 Court's ruling in Whitfield, understanding it is the
13 totality of the circumstances, the first notice is about
14 3:30 a.m. And that was not the circumstance here. The
15 defendant was apparently trespassing on private property;
16 not the circumstance here as by the evidence. Near an
17 abandoned building; they had testimony that they visited
18 the houses, this is a residence; not the circumstance here.
19 All we have is the testimony as to the high crime area.
20 Additionally, as this case notes, when
21 the officer aims the spotlight, and it is a marked police
22 car toward the defendant, he began to run away; not the
23 situation here. The facts are police approach, get out,
24 nothing unremarkable for the first 90 seconds. As Officer
25 Lindsey goes to the door and back, Mr. Whitaker gets on his

1 bike, which is there, and rides off to around the corner.
2 Not an immediate sprint. He rides off on his bike that was
3 there and then turned the corner. It's not immediate. It
4 is distinguishable. The facts here, and examining the
5 totality, do not match up. And I would distinguish it from
6 that way, Judge. I think the Court had as correct earlier,
7 when it seems like a hundred. This is a hairs on the back
8 of the neck situation, and that is not what the law
9 requires.
10 MR. JAGELS: Judge, may I just make a
11 couple of brief comments with respect Illinois v. Wardlow?
12 THE COURT: Yes.
13 MR. JAGELS: I wish the Court would
14 examine that case--
15 THE COURT: I read that, too.
16 MR. JAGELS: --in particular page three
17 and four. In that case it's almost identical to this case.
18 The police in an eight or a four car caravan arriving up
19 into a high drug area. They see him. There is immediate
20 flight, and they pursue him and then detain him, and later
21 realize that he has a weapon.
22 And in that case the Supreme Court says
23 that just being in the area of high crime is not enough to
24 support a reasonable particularized suspicion that a person
25 is--

1 THE COURT: I'll tell you what my
2 problem is here. See, I read those cases, and I understand
3 what you're saying. But's it is hard for your evidence to
4 rise above what the testimony was. I didn't hear anybody
5 say that they were suspicious that criminal activity may be
6 afoot or that a crime -- I thought that all they said was
7 they wanted to know why he was running.
8 Is that good enough?
9 I understand what you're saying. They
10 see him running. It's a headlong flight. And that may in
11 and of itself in that area trigger the appropriate basis
12 for an investigatory stop.
13 Is that enough?
14 They didn't say they had a hunch. They
15 didn't say that they suspected that there was criminal
16 activity. He is running, though, and so they are thinking
17 that maybe there is something to this.
18 MR. JAGELS: I don't know if the initial
19 -- when they initially approach on someone whether or not
20 that has to -- whether or not they immediately have to have
21 a reasonable articulable suspicion that a crime is afoot.
22 I think that once -- They're in that high drug area,
23 because they're trying to investigate why these guys are
24 hanging out on the corner and whether or not they are doing
25 something illegal or not. And as soon as they start to

1 investigate, within 90 seconds he is bolting. He starts to
2 ride his bike and then he runs. And so I think it is well
3 within the officers right to pursue him.
4 THE COURT: Well, I understand what
5 you're saying. And I can see how you could say, well, you
6 know, it's not the suspicion of criminal activity while he
7 was in flight, but it was the suspicion with their initial
8 approach of the individuals there, and then he takes off at
9 some point after that.
10 Except for one of the officers said that
11 he didn't have any reason to believe that there was any
12 criminal activity taking place.
13 MR. JAGELS: Was that Officer Lindsey?
14 THE COURT: Was it the last officer?
15 Not when they stopped the individuals. I can't remember if
16 it was the third officer, but I thought one officer said
17 that, you know, we didn't see -- But there was one officer
18 -- It could have been the officer that says he was familiar
19 with the lady and sometimes the lady did not want folks to
20 stay inside the fence, and sometimes it was okay. Nothing
21 else going on, that he didn't suspect that there was any
22 criminal activity in that first instance.
23 MR. JAGELS: I think it is the same in
24 Illinois v. Wardlow. They ride up. They don't know that
25 he's -- They don't suspect initially that he is involved in

1 drug dealing. They are going to see if anyone is out
2 there, whether it be lookouts or drug dealers. And the
3 crime that they suspect is afoot occurs after he takes off
4 in this high crime area.
5 And I think it is a similar situation
6 here. That they are investigating why this guy is running
7 in a high crime high drug area after they -- after
8 essentially he sees the police. And I think it's the being
9 in that area along with the flight that triggers their
10 suspicion, and that's when they suspect that a crime is
11 afoot. And that gives them a right to conduct a Terry stop
12 and place him in investigative detention because they think
13 he may be armed.
14 THE COURT: Well, Officer Lindsey says
15 if -- Is it Officer Lindsey that says that any time he does
16 an investigatory stop, just because of where the area is,
17 he pats them down, just because of where the area is?
18 MR. JOHNSON: That was the testimony I
19 recall, Judge. I believe that was Officer Lindsey when
20 they were describing the high crime area. I don't believe
21 he described anything about a pat down, but it created
22 suspicion, and I would argue general suspicion of being in
23 a high crime area.
24 Judge, with all due respect to
25 Mr. Jagels, Wardlow still does say--it reads between 123

1 and 124--the officer--quoting Terry--the officer must be
2 able to articulate more than a particularized suspicion or
3 a hunch of criminal activity. *(Reading.)*
4 By the logic of Mr. Jagels, at the time
5 that they approached and got out and when he got on the
6 bike, by Mr. Jagels' logic, he was not free to leave.
7 They're allowed to detain him then by being in a high crime
8 area, because there creates the suspicion by him leaving.
9 All right. So he is relying on the fact that it is just a
10 high crime area. They have a right to find out if they are
11 doing legal or illegal things, by Mr. Jagels' argument, at
12 that time, so they're allowed to detain them, because if
13 they leave, then that gives them the right to detain them.
14 And at the time that Mr. Whitaker
15 initially left, he got on the transportation that was
16 available to him, got on his bike and left. And Officer
17 Lindsey testified he was already either walking or
18 running--one officer said he gave chase--at the time that
19 he got on his bike.
20 And where is he going? That was the
21 question that was illustrated by the two officers,
22 illustrating they already thought that he couldn't leave.
23 And certainly at that point, by their own testimony, there
24 was no indication that any criminal activity was afoot at
25 that time. But then when he leaves, that's got to be

1 something. That's basically what the officers' testimony
2 was. That's got to be something. Well, that's not enough.
3 It's not particularized and a particularized reasonable
4 articulable suspicion.
5 And what happened on the back wasn't a
6 detention. It was an arrest. He was down on the ground.
7 Officer Gilbert's testimony was as a result of the
8 apprehension, they were down on the ground.
9 What have we heard from the officers
10 today prior to that apprehension as evidence of a
11 particularized criminal activity by this defendant? They
12 all testified that his behavior, before he left, was no
13 different from the other people. They all testified that
14 they weren't or felt like they were in any danger at the
15 time. And they have not pointed anything to provide either
16 reasonable articulable suspicion or probable cause, rather
17 than third person facts. High crime area and the fact
18 there was unprovoked flight, what they're calling
19 unprovoked flight. You've got to have more than a hunch.
20 MR. JAGELS: Judge, just briefly in
21 response, and this will be the last time I speak.
22 It's not my logic. It's the Supreme
23 Court's logic in Illinois v. Wardlow. And--
24 THE COURT: I understand.
25 MR. JAGELS: And it's headlong flight.

1 It's not just walking away. It's the headlong flight that
2 I think raises or raise the level of suspicion for the
3 Illinois officers, and I think raise the level of suspicion
4 for these officers, as well.
5
6 (PAUSE.)
7
8 THE COURT: I understand.
9 MR. JAGELS: Judge, may the officers
10 come in?
11 THE COURT: No.
12 I am looking at Wardlow again, the
13 Supreme Court talking about reasonable suspicion as being a
14 less demanding standard than probable cause, that there
15 must be at least a minimal level of objective
16 justification. High crime area by itself is not enough and
17 then going on to discuss the unprovoked flight.
18 And in this case, you have the police
19 officers initial engagement of an individual with other
20 individuals on that public sidewalk because of belief that
21 there may be an issue of trespass and because they were
22 obstructing the public walkway. And an individual leaves,
23 and that leaving turns into, using the language of the
24 Supreme Court, unprovoked headlong flight. And it appears
25 that looking at this decision, together with Whitfield,

1 that that would be enough to create reasonable suspicion to
2 justify the stop.
3 So the Court will deny the motion to
4 suppress because the officers may still be called upon,
5 even though counsel said that they would adopt certain
6 evidence, the Court didn't want the officers back in here.
7 The Court will note counsel's exception
8 to the Court's ruling.
9 MR. JOHNSON: Please do, Your Honor.
10 THE COURT: Where are we?
11 MR. JAGELS: Judge, at this point the
12 Commonwealth would move to introduce a conviction and
13 sentencing order for Mr. Whitaker.
14 THE COURT: Well, I don't know if that
15 is appropriate at this time. I ruled against defense on a
16 motion to suppress. This defendant has not been arraigned.
17 MR. JAGELS: Yes, sir. I guess it
18 depends on whether or not we are going to adopt the
19 evidence--
20 THE COURT: But he has to be arraigned
21 at any rate, whether we adopt the evidence or not. And
22 then once we are there, then whatever other evidence would
23 need to be introduced because of the nature of the
24 indictments, the possession of a firearm as a felon and
25 possession, would come after that.