

Principles Governing Whether Trial Record Should Be Considered In Appellate Review Of A Ruling On A Pre-Trial Motion To Suppress. *United States v. Howell*, 958 F.3d 590 (7th Cir. 2020) (Scudder, J.).

Brief Summary/Why *Howell* Matters: This case arose from a stop and frisk in which police officers recovered a handgun from defendant, who subsequently was indicted for unlawfully possessing a firearm after having been convicted of a felony, based on both the handgun recovered during the stop and frisk and other firearms subsequently found in defendant's home. *Howell*, 958 F.3d at 592. After having been convicted on all counts, defendant appealed, challenging, *inter alia*, the district court's denial before trial of defendant's motion to suppress the handgun recovered from him during the stop and frisk. *Id.* "In evaluating [defendant's] position, [the Seventh Circuit] ... confront[ed] a question about the proper scope of the record on review ... [of a ruling pretrial suppression motion:] ... whether we limit our review to the pretrial record or expand our look to consider the arresting officer's trial testimony as well... [which] ... matters [here] because the facts in the pretrial record differed in a material way from those that emerged at trial, where the arresting officer testified that he decided to proceed with the pat down only after [defendant] ignored a directive to remove his hands from his pockets." *Id.*

After requesting and considering supplemental briefs, *id* at 595, the Seventh Circuit described as follows the principles governing whether to consider trial evidence when reviewing a ruling on a pretrial suppression motion:

Considered collectively our prior cases show that the question presented—when we may consider trial evidence in reviewing a pretrial motion to suppress—does not lend itself to bright-line answers. Rather, we approach the inquiry on a case-by-case basis, taking account of all available information regarding the proceedings below. We read our case law (and the principles underpinning it) to at least establish that we retain the discretion to consider trial evidence bearing on a district court's ruling on a motion to suppress where that evidence came into play in the district court's consideration of the motion—where the defendant renewed the motion and thereby invited the district court to

¹ Meyer & O'Connor, LLC, a trial and appellate firm focusing on complex commercial litigation, civil rights and employment litigation, tort and criminal defense, periodically publishes an *Update* addressing significant legal developments as an informational service for clients, friends and acquaintances and as attorney advertising. This *Update* does not constitute legal advice or create an attorney-client relationship with Meyer & O'Connor, LLC. Please direct questions or comments regarding this *Update* to Timothy P. O'Connor, Meyer & O'Connor, LLC, Suite 304, 19 S. LaSalle St., Chicago IL. 60603; (e) toconnor@meyeroconnor.com; (p) 312-346-9000

reevaluate its prior ruling in light of trial evidence or where the district court undertook such a reevaluation of its own accord.... The prior cases likewise counsel that one factor properly informing our exercise of discretion is whether considering the trial evidence would cause unfair prejudice to the defendant.

Id at 596 (citations omitted). The court further stated that “[t]he law does not compel us to consider trial evidence in reviewing a suppression ruling; it merely affords us discretion to do so.” *Id* at 597.

With respect to the case at bar, the Seventh Circuit “concluded that these principles tilt against consideration of the trial record...” *Id* at 596. “Foremost, the district court itself never considered [the] [o]fficer[’s] trial testimony – neither in denying ... [the] ... pretrial motion, nor in denying the later renewals of the same motion.” *Id* at 596-97. “So, too, is it clear that it would prejudice [defendant] to consider [the] [o]fficer[’s] trial testimony, as it contained a new, material representation – that [defendant] disregarded a clear direction from [the] [o]fficer ... to remove his hands from his pockets. At trial [defendant] had no reason to believe the district court would consider that testimony as part of revisiting its pretrial ruling ... [and] ... [e]ven more, defendant may have had sound strategic reasons, when cross-examining and attempting to impeach [the] [o]fficer..., not to draw attention to the new fact offered for the first time at trial” and “little incentive at trial to focus on factual details pertinent to a pretrial motion that the district court resolved before trial even began.” *Id* at 597. The court “found it equally noteworthy that neither party’s briefing on appeal even identified the difference between the pretrial and trial records.” *Id*.

Reviewing the district court’s ruling on the suppression motion without considering the officer’s trial testimony, the court held that the officer’s stop of defendant was proper but the frisk was not and therefore reversed the district court’s denial of the motion to suppress. *Id* at 598-602.