COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk County
SJC-13794

Commonwealth of Massachusetts,
Plaintiff/Appellee

v.

Cheri M. Dobson,
Defendant/Appellant

ON APPEAL FROM A JUDGMENT OF THE
SUFFOLK SUPERIOR COURT
DENYING THE DEFENDANT'S MOTION TO SUPPRESS

BRIEF OF APPELLANT,
Cheri M. Dobson

Cheri M. Dobson,
By her attorney:

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CASES

ISSUE PRESENTED

Whether the motion judge erroneously denied Ms. Dobson's motion to suppress where she was in police custody when she was handcuffed, and police violated her dignity subjecting her to multiple intrusive and demeaning public frisks, nearly a strip search, all the while failing to give her Miranda warnings while questioning her for incriminating evidence.

STATEMENT OF THE CASE

On March 27, 2023, Ms. Dobson was indicted for (1) possession of a firearm without a license in violation of G.L. c. 269, § 10(a); (2) possession of ammunition in violation of G.L. c. 269, § 10(h); (3) carrying a loaded firearm in violation of G.L. c. 269, § 10(n); possession of a large capacity feeding device in violation of G.L. c. 269, § 10(m); (5) possession of a firearm while in the commission of a felony in violation of G.L. c. 265, § 18B; (6) possession of a class B substance with intent to distribute in violation of G.L. c. 94C, § 32A(b); and (7) Trafficking in Cocaine (36-100 Grams) in violation of G.L. c. 94C, § 32E(b)(2). (R.A. 6-12).[1] She pled not guilty to these charges. (R.A. 16). On June 26, 2023, Ms. Dobson filed a motion to suppress evidence "from the illegal warrantless stop, search, and seizure of her and her vehicle, subsequent

[1] The Record Appendix is reproduced separately and is cited by page as "(R.A. __)." The addendum is reproduced post and is citing by page as "(Add. __)." The transcripts of the proceedings in Ms. Dobson's case consist of two volumes and are cited by volume and page as (Tr. __/ __)."

custodial interrogation of her person." (R.A. 22-33). An evidentiary hearing occurred before Judge Sarah Ellis on October 24, 2023, and November 27, 2023. (R.A. 9). On January 10, 2024, Judge Ellis denied the motion in a written decision. (R.A. 42).

Ms. Dobson filed a timely notice of appeal and application for leave to pursue an interlocutory appeal. (R.A. 11, 28). On March 4, 2024, a single justice of the Supreme Judicial Court (Kafker, J.) allowed it and directed the appeal to proceed in the Appeals Court. (R.A. 20).

INTRODUCTION TO THE STATEMENT OF FACTS

This incident occurred when Officer Ryan Fullam and Officer Christopher Hegerich stopped a vehicle driven by Ms. Dobson and occupied by Khalil Carpenter in the passenger seat. Later, to assist in further searching Ms. Dobson, Officer Anna Depina and Officer Astrid Gonzalez arrived. The Commonwealth introduced body camera footage from Officer Fullam, Officer Hegerich and Officer Gonzalez into evidence at the motion to suppress hearing. This footage forms the basis for many of the following facts.[2]

[2] The quotations and time notations from the body camera footage are based are based on undersigned counsel's review and transcription. The exhibits have been included on USB in the record appendix, and a thorough review of them is necessary.

STATEMENT OF FACTS

Facts drawn from Motion Testimony and Review of Body Camera Footage

On August 29, 2022, Officer Fullam was patrolling Nubian Square with his partner Officer Hegerich. (Tr. I/33, 35). At around 8:00 p.m., they noticed a vehicle with "window tints [that] were too dark" so they proceeded to stop it. (Tr. I/46, II/7). When Officer Fullam approached the car, he saw the passenger tuck "his body over" and "reach down at … the console, glove box area … with what seemed to be some force." (Tr. II/10). "[I]t seemed as if he was placing or pushing something down at his feet" which caused the officer "concern." (Tr. II/11). Officer Fullam ordered the passenger, Mr. Carpenter, out of the car and told him, "I'm going to put you in handcuffs and detain you for now. Detain, okay? Just because there two of us and two of you." (Exhibit 3, Fullam body-camera at 1:53-1:57). Officer Hegerich also ordered Ms. Dobson out of the car, frisked her and discovered nothing of note. (Exhibit 4, Hegerich body-camera at 3:05-3:35).

When Officer Hegerich "pat frisk[ed]" the car he "found the glove box to be locked." (Tr. II/15, 40). As a result, he asked Ms. Dobson for the keys. (Tr. II/15). In response, "she began to clench her fist and … resist our commands and even bladed her stance." (Tr. II/16). Officer Fullam testified that "we need to put her in handcuffs and try to find the keys." (Tr. II/16). As part of placing

her in handcuffs, Officer Fullam told her, "You're going down" and "I'm going to spray you." (Exhibit 3 at 5:00). While Officer Fullam had noticed her keys in hand prior to her being handcuffed he "did not know if she still had" them. (Tr. II/52).

After placing Ms. Dobson in handcuffs, Officer Fullam commanded the passenger, "Sit the fuck down now. You sit down" and commanded Ms. Dobson, "you're sitting down now too. Sit down." (Exhibit 3 at 5:50-6:00). Seconds later, Officer Fullam approaches Ms. Dobson and asks "Where are your fucking keys? Why are you starting this? The whole city is coming because of this." (Exhibit 3 at 6:08-6:15). While Officer Hegerich was already searching her at this point, Officer Fullam joins in frisking her pocket. (Exhibit 3 at 6:13). Officer Fullam testified that he used profanity to establish his control, "clearly, the nice guy trying to give commands was not working, that I had to show that I was serious. ... I used some bad words to show that, you know, the games are over and we're in charge here." (Tr. II/56). Officer Fullam and Hegerich continue to search Ms. Dobson multiple times, including Officer Fullam frisking her buttocks. (Exhibit 3 at 6:55-7:15, 7:55).

While Ms. Dobson is handcuffed, the police speak to her. Officer Fullam asks Ms. Dobson "where are the keys?" and commands Mr. Carpenter to "stand up." (Exhibit 3 at 6:27-6:32). Ms. Dobson and Mr. Carpenter are now standing

next to each other. (Id.) Multiple police sirens can be heard approaching. (Exhibit 4 at 6:40). While standing next to Ms. Dobson, Officer Hegerich tells another Officer "She's coming with us anyway." (Exhibit 4 at 7:55). Mr. Carpenter later attempts to ask another question, and Officer Hegerich tells him "Just keep your mouth shut, you're detained for right now." (Exhibit 4 at 9:25). Officer Fullam informs the passenger, still standing beside Ms. Dobson, that "you're not free to go, if that's your question." (Exhibit 3 at 10:32). Officer Fullam tells Mr. Carpenter, still standing next to Ms. Dobson, "I'll search you five times if I've got to, six times. I will, yeah" while searching him. (Exhibit 3 at 11:00-11:06). Officer Hegerich cuts off the passenger's attempted inquiry, "Sir, if I'm detained" by stating, "how many times do I have to say the same thing to you, you're involved in the same situation she's involved with." (Exhibit Four at 10:05).

Officer Astrid Gonzalez along with her partner Officer Anna Depina arrived at the scene because they received a call for a female officer to "search or pat frisk a female who may have drugs or guns or contraband or anything on her person." (Tr. I/10). Around the time they arrived, there were at least eleven police officers on the scene. (Exhibit 3 at 10:35). Officer Depina frisks Ms. Dobson and discovers nothing. (Exhibit 1, Officer Gonzalez body-camera at 2:15). While Ms. Dobson was handcuffed, Officer Gonzalez walked her to the vehicle in an attempt to ascertain if the keys were on her person. (Exhibit 1 at

3:30-4:30). At one point, Ms. Dobson asks for her phone, and Officer Depina declines to give it to her. (Exhibit 1 at 5:50-5:55).

After Officer Depina's search turned up nothing, Officers Hegerich and Fullam met with Officer Gonzalez and ask her to search Ms. Dobson for her keys, "deep as you can go." (Exhibit 3 at 18:42). Officer Gonzalez replies, "I'm just going to see if I can get her to tell me; just to give me the keys." (Exhibit 3 at 8:15-8:40). The following is a selection of Officer Gonzalez and Officer Depina's interactions with Ms. Dobson: "So, what did you do with your car key?" "Listen, if you have the car keys just give the car keys. … If you guys are saying they don't have no reason to stop you, or whatever the case was, just give the car keys. Don't make it something that needs to be bigger. And this is coming from two females of color. If you have them, just give them;" "You're only going to make the situation worse, because if they decide to break your vehicle because the dog said there is something, even if there isn't, they're just going to ransack your vehicle;" "[i]f you have them on you, just tell me and I'll grab them;" "What are you going to have them break your car for?" "Just give us your car keys, it's not worth it in the long run." (Exhibit One at 8:00, 8:54-9:20, 9:25-9:31, 9:40, 9:45, 10:25-10:40).

When Ms. Dobson is silent in response to this, Officer Depina again searches her. (Exhibit 1 at 11:30-12:30). While Officer Depina is searching,

Officer Gonzalez continues to implore Ms. Dobson to give up the keys. (Id.). After Officer Depina searches Ms. Dobson, Officer Gonzalez again searches her, discovering nothing. (Exhibit 1 at 13:00). Officer Depina and Officer Gonzalez continue to question Ms. Dobson after their final search, asking "is there a reason you don't want to give the keys? Is it because of him?" referring to Mr. Carpenter. (Exhibit 1 at 13:35)

All of these interactions have occurred in public with pedestrians walking by, as well as vehicular traffic. (Exhibit 3 at 7:13). A public bus is visible driving by at one point. (Id.). Meanwhile, police also used a k-9 unit to investigate. The dog "had a positive hit in the glove box for [...] ballistic evidence." (Tr. II/18). When the dog smelled "ballistic odor, especially gun order, he would get aggressive." "[H]e immediately bit the glove box." (Tr. II/73).

Officer Fullam then approaches Ms. Dobson:

> Officer Fullam: This is where we're at, okay? The dog hit on your glove box for a firearm. So, what's going to happen unless you give us the keys is we're going to get a search warrant on the car, that we have probable cause at this point. We're going to tow your car; we're going to get a search warrant. So, you can tell us where the keys are now and avoid not having a car for a few days [...]. We're going to get a search warrant[.]
>
> Ms. Dobson: That's fine and everything, but I still want to know why you wanted my keys.
>
> Officer Fullam: We can talk about that in court, but we're getting a search warrant.

> Officer Hegerich: If we get a search warrant and we don't have the keys, we're going to pry the car open and whatever's in there you're going to be charged with.
>
> Ms. Dobson: Okay.
>
> Officer Fullam: So, you want to go that route? Or do you want to just give us the keys?
>
> Officer Hegerich: We're going to tow the car right now, the car is going to get towed without the keys, which usually does damage to the car anyway.
>
> Officer Fullam: Or you could just cooperate, and give us the keys and you could avoid that process, it's completely up to you.
>
> Officer Gonzelez: Just give the keys up, it's not worth it. Just give the keys up.
>
> Officer Fullam: I'll let you think about it for a few minutes, and when you want to give a decision, you can tell us where the keys are, and we can get this over with now.

(Exhibit 1 at 13:52-14:47).

Officer Gonzalez and Depina continue to question Ms. Dobson after this, asking "[w]here are the keys? It's not worth it;" "Does he have the keys? Or do you have them? Do you have them on you? Where?" (Exhibit 1 at 15:18-15:28). Officer Fullam then returns and asks her: "I'm going to call for the tow, so you've got to make that decision. Call for the tow or are you going to tell us where the keys are?" (Exhibit 1 at 15:40-15:48). Ms. Dobson does not respond. Officer Depina asks one more question, "is your keys on you?" coupled

with sticking her hand out.[3] (Exhibit 1 at 16:03-16:06). Ms. Dobson then surrenders her keys. (Exhibit 1 at 16:07). Police discover a firearm in the glove box. (Tr. II/23).

Officer Gonzalez provided testimony regarding her thought process behind her questioning of Ms. Dobson. (Tr. I/27-28). First, she testified that her "understanding" was that Ms. Dobson "was under arrest" prior to frisking her. (Tr. I/23). She adopted testimony that this was an investigative search "for car keys[.]" (Tr. I/26).

> Q: You asked Ms. Dobson a lot of questions during this interaction that was offered as Exhibit 1, correct?[4]
>
> A: Yes, sir.
>
> Q: Some of it is conversational right?
>
> A: Yes, sir.
>
> Q: But some of it is questions?
>
> A: Yes, sir.
>
> Q: Where are the keys?
>
> A: Yes, sir.
>
> Q: Is it worth it?
>
> A: Yes, sir.

[3] This final question is difficult to hear over Mr. Carpenter arguing with police.
[4] Exhibit 1 is Officer Gonzelez's body camera footage.

Q: At the time you're asking these questions it's clear that Ms. Dobson is in handcuffs, right?

A: Yes, sir.

Q: She's in custody?

A: Yes, sir.

Q: You're asking your questions while she's in custody?

A: Yes, sir.

Q: You didn't give any Miranda warnings before asking those questions?

A: No, sir.

Q: She was the sole focus of the investigation at the time on the scene, correct?

A: Yes, sir.

Q: And the answers that she could have given and in fact did give led to keys and led to other incriminating evidence, right?

A: Yes, sir.

Q: You didn't give a Miranda warning before asking those questions?

A: No, sir.

(Tr. I/27-28).

SUMMARY OF THE ARGUMENT

On appeal, Ms. Dobson challenges the trial court's denial of her motion to suppress. See *infra*, 17-37. First, Ms. Dobson argues that the motion judge correctly found that she was subject to multiple unconstitutional police frisks. See *infra*, 19-22. These searches were unconstitutional because they went well beyond a frisk to discover if Ms. Dobson might have a weapon on her, and instead were focused on obtaining physical evidence, her car keys. See *infra*, 19-22.

Second, Ms. Dobson argues that police subjected her to a custodial interrogation without the benefit of Miranda warnings. See *infra*, 22-38. Specifically, Ms. Dobson was handcuffed and police restricted her freedom of moment as if she was in the police station. See *infra*, 22–28. They specifically asked questions that they knew could, and did, lead to incriminating evidence. See *infra*, 22–28.

Third, Ms. Dobson did not voluntarily consent to a search of her car while subject to these unconstitutional searches and an unmirandized custodial interrogation. See *infra*, 28-37. Moreover, the police used threatening language, such as that police would "ransack" and "break" her car if she did not surrender her keys which also led abrogated Ms. Dobson's ability to consent. See *infra*, 28-37. Police also continued to try to get her to surrender her keys,

even after she indicated that she was okay with them obtaining a search warrant, further overriding her will. See *infra*, 28-37.

ARGUMENT

I.

THE MOTION JUDGE ERRONEOUSLY DENIED THE MOTION TO SUPPRESS WHERE MS. DOBSON WAS IN POLICE CUSTODY WHEN SHE WAS HANDCUFFED, AND POLICE VIOLATED HER DIGNITY SUBJECTING HER TO MULTIPLE INTRUSIVE AND DEMEANING PUBLIC FRISKS, NEARLY A STRIP SEARCH, ALL THE WHILE FAILING TO GIVE HER MIRANDA WARNINGS WHILE QUESTIONING HER FOR INCRIMINATING EVIDENCE.

This Court should reverse the trial court's denial of Ms. Dobson's motion to suppress because Officer Gonzalez's recovery of the car keys was the fruit of the poisonous tree of a coercive un-mirandized and demeaning police interrogation and multiple unconstitutional police searches. See Fourth and Fourteenth Amendments to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. (R.A. 15-20). The motion judge erroneously held that Ms. Dobson voluntarily surrendered the car keys: such a voluntary act was not possible in this unmirandized, police dominated environment. See Commonwealth v. Rodrigues, 104 Mass. App. Ct. 410 (2024).

It is possible to begin and end the analysis with Officer Gonzalez's testimony:

> Q: At the time you're asking these questions it's clear that Ms. Dobson is in handcuffs, right?

A: Yes, sir.

Q: She's in custody?

A: Yes, sir.

Q: You're asking your questions while she's in custody?

A: Yes, sir.

Q: You didn't give any Miranda warnings before asking those questions?

A: No, sir.

Q: She was the sole focus of the investigation at the time on the scene, correct?

A: Yes, sir.

Q: And the answers that she could have given and in fact did give led to keys and led to other incriminating evidence, right?

A: Yes, sir

Q: You didn't give a Miranda warning before asking those questions?

A: No, sir.

(Tr. I/28). With this testimony combined with the objective circumstances of the interrogation where Ms. Dobson was in handcuffs and subject to multiple invasive unconstitutional searches, "[t]here is no serious question that the officer's request for [the keys], and the defendant's acquiescence in that request, were a product of the unwarned custodial interrogation." See

Rodrigues, 104 Mass. App. Ct. at 416. Because this physical evidence is the "fruit of an unwarned custodial interrogation of the defendant, the denial of the defendant's motion to suppress ... was in error." Id.

A full analysis of the issue is nevertheless warranted. Where, as here, the defendant challenges the propriety of the trial court's order denying his motion to suppress evidence, this Court should "accept the [motion] judge's subsidiary findings of fact absent clear error, but conduct an independent review of the judge's ultimate findings and conclusions of law." Commonwealth v. Washington, 449 Mass. 476, 480 (2007). This Court's "duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996); Commonwealth v. Haas, 373 Mass. 545, 550 (1997) ("where the ultimate findings and rulings bear on issues of constitutional dimension, they are open for review").

A. AS A PRELIMINARY MATTER, THE MOTION JUDGE CORRECTLY FOUND THAT POLICE ENGAGED IN REPEATED INTRUSIVE AND DEMEANING UNCONSTITUTIONAL POLICE SEARCHES OF MS. DOBSON THAT WERE NEARLY A STRIP SEARCH.

The motion judge correctly held that "[o]nce the police requested the defendant's car key, and she refused to provide it, the repeated pat frisks of the defendant for her car keys were improper." (R.A. 56). Nevertheless, an analysis of the aggressive, "intrusive and demeaning" police conduct is insightful on

exactly how police dominated this environment was. "Where an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest." Commonwealth v. Amado, 474 Mass. 147, 152 (2016), citing Terry v. Ohio, 392 U.S. 1, 25-26 (1968). A protective search is "confined to what is minimally necessary to, learn whether the suspect is armed and to disarm him once the weapon is discovered." Id. at 152; citing Commonwealth v. Almeida, 373 Mass. 266, 272 (1977). "In most instances the search must be confined to a pat-down of the outer clothing of the suspect." Id. at 152-153; citing Commonwealth v. Silva, 366 Mass. 402, 408 (1974). "However, under the 'plain feel' doctrine, an officer may seize contraband discovered during a *Terry-type* frisk if the officer feels an object whose contour or mass makes its identity immediately known." Id. at 153 (citations omitted).

In the instant case, Officer Hegerich frisked Ms. Dobson following an exit order, and discovered no weapons or contraband. (Exhibit 4 at 3:05-3:35). The body camera footage makes it clear that in their subsequent searches, the sole purpose of the police was to obtain Ms. Dobson's keys. Officer Fullam directly testified to this: "we need to put her in handcuffs and try to find the keys." (Tr. II/16). Officer Fullam showed no understanding that he was flagrantly violating constitutional rights by conducting multiple frisks, telling Mr. Carpenter "I'll

search you five times if I've got to, six times. I will, yeah" while frisking him. (Exhibit 3 at 11:00-11:06). Additionally, the motion judge found "by the time the officers were demanding the defendant's car key, she was secured in handcuffs and in police custody on the sidewalk , away from the car. ... The officers wanted the car key to open the door to the locked glove compartment. There was no concern at that time that either the defendant or Mr. Carpenter could reenter the car before the glove compartment had been reopened." (R.A. 58).

Lastly, the trial judge was correct to view these repeated searches, particularly Officer Gonzalez's final search "as deep as [she] could go" as "certainly intrusive, ... demeaning" and "close" to a strip search. (R.A. 59). Supporting this, she correctly noted that they were "performed on a public sidewalk with Mr. Carpenter present and multiple male officers. The defendant's underwear and bare stomach were visible during the final frisk by Officer Depina. There was no attempt made by officers to mitigate public exposure." (R.A. 59). The fact that police improperly engaged in multiple public, intrusive and demeaning searches of a handcuffed individual is quite relevant to whether Ms. Dobson was subject to custodial interrogation. See *infra*, 22-28. It is also relevant to whether she voluntarily surrendered her keys following such extreme and unprofessional police conduct. See *infra*, 28-37.

B. WHILE ENDURING THESE DEMEANING SEARCHES, POLICE ALSO SUBJECTED MS. DOBSON TO AN UNMIRANDIZED CUSTODIAL INTERROGATION WITH THE EXPLICIT AIM OF RECOVERING INCRIMINATING EVIDENCE.

The trial judge errored in failing to find that the police violated Ms. Dobson's Miranda rights by questioning her, despite finding that she was in police custody: "by the time the officers were demanding the defendant's car key, **she was secured in handcuffs and in police custody** on the sidewalk, away from the car." (R.A. 58) (emphasis supplied). This is supported by Officer Gonzalez's admission at the motion to suppress hearing that she engaged in a custodial interrogation of Ms. Dobson. (Tr. I/27-28). This issue was also squarely raised in Ms. Dobson's motion to suppress. (R.A. 22-23).

In determining whether the defendant was in custody for Miranda purposes, this Court should consider:

> (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest.

Commonwealth v. Groome, 435 Mass. 201, 211-212 (2001). However, "[t]he Groome factors merely provide a framework for assessing the ultimate question: whether the defendant was subjected to a formal arrest or restraint of freedom

of movement of the degree associated with a formal arrest" (quotations and citation omitted). Commonwealth v. Earl, 102 Mass. App. Ct. 664, 671 (2023). "Placing a suspect in handcuffs is usually considered a physical restraint on freedom tantamount to arrest." Id. at 675

Rodrigues is directly on point with Ms. Dobson's case with regard to custodial interrogation. See Rodrigues, 104 Mass. App. Ct. at 413-415. In Rodrigues, the police were on patrol when they noticed someone "lying on the sidewalk" with "blood on his face." Id. at 411. After a short investigation, they located the defendant. Id. The "defendant ... refused to stop arguing, [so] the officers told the defendant to 'shut up,' pushed him aside, and then handcuffed" him. Id. at 412. After further investigation, the police spoke with the defendant for "another ten to fifteen minutes." Id. A short time later, police spoke to the defendant again "and asked him more questions." Id. The police officer

> stated that he did not believe the defendant's story about the sneakers, the defendant responded, "I know what you're thinking but that's my blood, not his blood." [The officer] said, "I don't believe your story. Give me your sneakers, then. If you're telling me, it's not your blood — if it's your blood and nobody else's blood, then give me your sneakers." The defendant responded, "If you don't believe me, take the sneakers." The defendant then kicked the sneakers off his feet, and [the officer] took them.

Id. This Court held that both the defendant's statements as well as the physical evidence of the shoes should have been suppressed as product of "unwarned statements where Miranda warnings would have been required by Federal law."

Id. at 416. As the defendant was handcuffed and surrounded by police, his freedom of movement was curtailed to the extent associated with a formal arrest and there was no danger to officers or public safety that might excuse the failure to give Miranda warnings. Id. at 414. Additionally, supporting that he was in police custody, they had approached the defendant with tasers, ordered him to shut up, pushed him aside and handcuffed him. Id. The "pointed questions conveyed that [the police] suspected the defendant of wrongdoing" and their "focus on gathering physical evidence from the defendant [indicated] that his inquiry exceeded general investigatory questioning." Id. at 414-415. Though the questioning occurred on a public street, "[f]rom the defendant's point of view, the officers' actions objectively created a coercive and police-dominated environment, even if it was not in a police station." Id. at 414. The defendant "was clearly not free to end the interview and leave" and "it is obvious that a reasonable person in the defendant's position would have experienced the interaction as coercive." Id.

In the instant case the nature of the interrogation was aggressive, and no reasonable person would have felt free to leave. Id. Ms. Dobson was handcuffed and backed into a closed store front, surrounded by at least eleven police officers. Id. Their interaction with her was entirely police dominated, including Officer Fullam asking her "where are your fucking keys?" and letting her know

that the entirety of the police force was coming to the scene. (Exhibit 3 at 6:08-6:15). Officer Fullam specifically testified that this was to show that police were "in charge here." (Tr. II/56). Police also commanded Mr. Carpenter, standing right next to her, to "[s]it the fuck down now. You sit down" while commanding Ms. Dobson "you're sitting down now too. Sit down." (Exhibit 3 at 5:50-6:00). This is an overwhelming show of police force, and done explicitly to show Ms. Dobson that police were in charge. (Tr. II/56). Moreover, further establishing their dominance, Ms. Dobson was subject to multiple public "intrusive and demeaning" searches of her body. (R.A. 59). These searches were as close as police could get to strip searching her, without actually crossing that line. (R.A. 59).

Further supporting the fact that she was not free to leave was that police had her in handcuffs and her freedom of movement was entirely restricted. Earl, 102 Mass. App. Ct. at 675. Police decided when and where she would move, including walking her to her car and back. (Exhibit 1 at 3:30-4:30). Police denied Ms. Dobson the use of her phone. (Exhibit 1 at 5:50-5:55). Despite being on a public street, this level of police control is no different than walking her to lockup in a police station. See Rodrigues, 104 Mass. App. Ct. at 414. Surrounded by police in handcuffs and forcibly walked to her car, "the defendant was clearly not free to end the interview and leave[.]" Id. at 415. Ms. Dobson's "freedom of

movement was curtailed to the extent associated with a formal arrest." See Earl, 102 Mass. App. Ct. at 671; See also Commonwealth v. Tantillo, 103 Mass. App. Ct. 20, 25 (2023) (questioning not coercive where it was "general," "never became aggressive" "officers never conveyed to the defendant that they believed she had committed a crime," and officers never communicated they would use police power to coerce the defendant to stay).

The police explicitly conveyed to Ms. Dobson that they suspected her of wrongdoing. See Rodrigues, 104 Mass. App. Ct. at 416. Within her ear shot, they stated, "she's coming with us" and let her passenger know that he's "not going anywhere." (Exhibit 4 at 7:55). They explicitly told Mr. Carpenter, again within earshot of Ms. Dobson, "you're not free to go." Officer Fullam let her know that they "would talk about it in court" when she asked why police needed her keys. (Exhibit 1 at 13:52-14:47).

The police focus on gathering physical evidence, specifically her keys, also "indicates that [their] inquiry exceeded general investigatory questioning." See Rodrigues, 104 Mass. App. Ct. at 415. Officer Depina and Officer Gonzalez were unrelenting in their attempts to "see if I can get her to tell me; just to give me the keys." (Exhibit 1 at 8:00-14:00, Exhibit 3 at 8:15-8:40). of Ms. Dobson asking her multiple times about where they might be. (Exhibit One at 8:00-14:00). They spoke with, and continued to question her even after Officer Fullam's ultimatum.

(Exhibit 1 at 13:35). They threatened her with police ransacking her car if she did not hand the keys over. (Exhibit 1 at 9:25-9:45). This was entirely designed to elicit incriminating responses and obtain physical evidence. See Rodrigues, 104 Mass. App. Ct. at 415.

The fact that police interrogated Ms. Dobson while she was in police custody was also confirmed by Officer Gonzalez. Officer Gonzalez arrived after the initial confrontation and neither Officer Fullam nor Hegerich gave her much background on the situation, just asking her to search for car keys. (Tr. I/10). Her point of view was that of a neutral police officer, and she testified that her impression from the circumstances was that Ms. Dobson was under arrest. (Tr. I/23). She also explicitly testified that Ms. Dobson was in police custody, her questions were aimed at obtaining incriminating information, and that she did not give her any Miranda warnings. (Tr. I/27-28). No officer gave these warnings prior to Ms. Dobson surrendering her keys.

Lastly, there was no suggestion that there was any exigency that would excuse the lack of Miranda warnings. See Earl, 102 Mass. App. Ct. at 676. This is explicitly noted by the motion judge who found that Ms. Dobson was "secured in handcuffs and in police custody[.] ... There was no concern at that time that either the defendant or Mr. Carpenter could reenter the car before the glove compartment had been opened." (R.A. 58). Moreover, it is unlikely that police

would have walked Ms. Dobson mere inches from the driver's door of her vehicle, much closer to a suspected firearm, if they had any safety concern at that point. See Earl, 102 Mass. App. Ct. at 676; citing Commonwealth v. Pinney, 97 Mass. App. Ct. 392, 397 (2020) ("the evidence did not suggest, nor did the judge find, that the officers were in any danger or that the defendant presented a threat to public safety that might excuse the failure to give Miranda warnings").

Accordingly, the police violated Ms. Dobson's rights by engaging in a custodial interrogation absent any Miranda warning.

C. MS. DOBSON DID NOT VOLUNTARILY CONSENT TO A SEARCH OF HER CAR AS SHE WAS IN THE MIDDLE OF AN ONGOING UNRELENTING POLICE INTERROGATION IN HANDCUFFS, ABSENT ANY MIRANDA WARNINGS, AFTER MULTIPLE UNCONSTITUTIONAL SEARCHES, MINUTES AFTER BEING NEARLY PUBLICLY STRIP SEARCHED.

The trial judge erroneously found that Ms. Dobson, "did not surrender the car keys as a result of the illegal pat frisks but, rather to avoid damage to her vehicle and the inconvenience of waiting for a search warrant to issue and be executed." (R.A. 62-63).

> At that time, police determined that if the defendant did not surrender the keys, the vehicle would be towed and a search warrant would be obtained to open the glove compartment. The police informed the defendant of this intended course of events. The police further informed the defendant that, if her vehicle were towed without the keys, damage may be caused to the car and that, if the key to the glove compartment were not provided, the glove

> compartment would ultimately be opened with force after a search warrant was obtained, potentially resulting in damage.

(R.A. 61-62). This is erroneous as police actually threatened to "ransack" her car if she did not surrender her keys, and asked why Ms. Dobson was going to "make" the police "break" her vehicle. (Exhibit 1 at 9:25-9:31). Moreover, whatever time police gave Ms. Dobson to consider their ultimatum was not enough to mitigate the taint from the multiple improper searches and being nearly publicly strip searched. See Commonwealth v. Kipp, 57 Mass. App. Ct. 629, 634 (2003). However, the judge's finding also omits reference to the fact that Ms. Dobson was in custody, subject to a continuous police interrogation, and not advised of her Miranda rights. (Tr. II/27-28). This Miranda violation was ongoing at the time Officer Fullam gave Ms. Dobson his ultimatum and she surrendered her keys. See *supra*, 22-28. "Because the [car keys] were fruit of an unwarned custodial interrogation of the defendant, the denial of the defendant's motion to suppress their admission in evidence at trial was error." See Rodrigues, 104 Mass. App Ct. at 416.

Physical evidence, "if derived from unwarned statements where Miranda warnings would have been required by Federal law in order for them to be admissible, is presumptively excludable from evidence at trial as 'fruit' of the improper failure to provide such warnings." Id. at 416, citing Commonwealth v. Martin, 444 Mass. 213, 215 (2005). "When consent to search is given close

in time to prior unlawful police conduct, that consent is not regarded as freely given." Commonwealth v. Midi, 46 Mass. App. Ct. 591, 595 (1999). "The voluntariness of an individual's consent to a warrantless entry is an issue of fact, and must be examined in light of the totality of the circumstances of the case." Commonwealth v. Rogers, 444 Mass. 234, 238 (2005). "When the police rely on consent to justify a warrantless [search], under both the Fourth Amendment [to the United States Constitution] and art. 14 [of the Massachusetts Declaration of Rights], the prosecution 'has the burden of proving that the consent was, in fact, freely and voluntarily given.'" Id. at 237.

The Rodrigues case is again dispositive. After an unmirandized custodial interrogation, "the defendant's act of kicking off his sneakers in response to the officer's request that the defendant give the sneakers to him" did not constitute consent. See Rodrigues, 104 Mass. App. Ct. at 415.

> In the present case there is no serious question that the officer's request for the sneakers, and the defendant's acquiescence in that request, were a product of the unwarned custodial interrogation. Indeed, the defendant's surrender of the sneakers was the culmination of an increasingly skeptical and confrontational turn in the officer's questioning of him.

Id. at 416. In these circumstances, the physical evidence was the "fruit of an unwarned custodial interrogation of the defendant[.]" Id.

The Kipp case, relied on by the trial judge, provides a contrasting example where the taint of an improper search was attenuated following more than two

hours and proper Miranda warnings. See Commonwealth v. Kipp, 57 Mass. App. Ct. 629, 634 (2003). The Appeals Court, assuming that the initial police sweep of the defendant's apartment was unlawful, went on to analyze the voluntariness of his later consent to search the same apartment. Id. at 630. Specifically, after "[m]ore than two hours had passed since the unlawful sweep" the defendant had been arrested, brought to the police station and properly mirandized. Id. at 634. Police told the defendant that they "would apply for a search warrant; if they searched pursuant to a warrant, they would damage the apartment; if, however, the defendant consented to a search, the police would show a little courtesy and not be destructive;" and if police discovered drugs in the apartment, the defendant's wife could also be arrested. Id. at 631. After all this, the defendant consented to the second police search of the apartment. Id. This Court held that this consent was validly obtained because "[a]ttenuation can occur by reason of lapse of time, intervening circumstances or a disconnection between the prior illegality and the person giving consent." Id. at 633-634. Specifically, after finding that the defendant was given, and understood Miranda rights, the "evidence justifies the judge's finding that this consent was freely given because the defendant 'knew that there were no drugs in his home and he wished to remove the cloud of suspicion over his wife as expeditiously as possible.'" Id. at 634-635. That the "defendant understood his rights is

demonstrated further by his initial refusal to consent." Id. at 634. However, the despite the valid consent, the police "threat that execution of a search warrant could be very disruptive to the couple's personal belongings was highly improper. Under other circumstances, a prediction of police lawlessness could be sufficiently overbearing to render a consent involuntary." Id. at 636; citing Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 202 (1993). "[H]owever, the evidence strongly suggests that the defendant's consent was not motivated by a desire to protect the apartment and the judge's finding that this consideration did not cause the defendant to consent was warranted." Kipp, 57 Mass. App. Ct. at 636.

Overarching the duration of Ms. Dobson's encounter with police was an ongoing Miranda violation. See *supra*, 22-28. Again, this is supported by the trial judge, who found that "by the time the officers were demanding the defendant's car key, **she was secured in handcuffs and in police custody** on the sidewalk[.]" (R.A. 58). No Miranda warnings were ever given to Ms. Dobson. This interrogation was not cured by any intervening act because it continued even after the dog "hit" on the glove compartment, Officer Fullam offered his ultimatum, and informed Ms. Dobson that police "have probable cause at this point." (Exhibit 1). Rodrigues, 104 Mass. App. Ct. at 416. This is supported by Officer Gonzalez's testimony that she knew she was questioning someone in

police custody, that she thought was under arrest, and she knew that she had not given them any Miranda warning. (Tr. I/27-28). The police persisted in questioning Ms. Dobson following Officer Fullam's ultimatum, asking "[w]here are the keys? It's not worth it;" "Does he have the keys? Or do you have them? Do you have them on you? Where?" (Exhibit 1 at 15:18-15:28). This violation of Ms. Dobson's Miranda rights is more flagrant as it occurs after Officer Fullam had informed Ms. Dobson, "we have probable cause at this point. We're going to tow your car; we're going to get a search warrant." (Exhibit 1). "In the present case there is no serious question that the officer's request for [the keys] and the defendant's acquiescence in that request, were the product of the unwarned custodial interrogation." See Rodrigues, 104 Mass. App. Ct. at 416.

The taint of the prior unconstitutional searches was not sufficiently attenuated and thus Ms. Dobson did not voluntarily consent to the search. Contrast Kipp, 57 Mass. App. Ct. at 636. The trial judge erroneously characterized Officer Fullam's ultimatum as a dispassionate statement of fact "that damage would likely result to her vehicle if she did not provide the keys." (R.A. 62). This ultimatum is not removed from the prior unconstitutional searches by any appreciable time or intervening circumstance, as it occurred only 20 seconds after police nearly strip-searched Ms. Dobson. (See Exhibit 1 at 13:00-14:00). Moreover, the judge whitewashes the threatening nature of what

the police actually told her about damaging her car. What Officer Depina had previously told Ms. Dobson was that "[y]ou're only going to make the situation worse, because if they decide to break your vehicle because the dog said there is something, even if there isn't, they're just going to ransack your vehicle." (Exhibit 1 at 9:25-9:31). The police continued with the theme of breaking the car, seconds later asking "why are you going to make them break your car?" (Exhibit 1 at 9:40). Telling Ms. Dobson that police would "ransack" or "break" a car unless she complied is "a threat that execution of a search warrant could be very disruptive to [her] personal belongings" and "was highly improper." See Kipp, 57 Mass. App. Ct. at 636. Unlike Kipp, the trial judge did not find that Ms. Dobson had any independent reason, aside from avoiding damage, for consenting to the police search. Id. at 635. Moreover, the sheer number of times that police referenced damage to Ms. Dobson's vehicle highlights the subtext: police simply were not going to try to avoid damaging the vehicle. This subtext is consistent with the demeaning and intrusive tone of the remainder of their interactions with Ms. Dobson that day. (R.A. 59). Officer Fullam's behavior was such that he apologized to the motion judge for his use of language. (Tr. II/57).

Officers Fullam, Hegerich and Gonzalez literally overbore Ms. Dobson's will.

> Officer Fullam: This is where we're at, okay? The dog hit on your glove box for a firearm. So, what's going to happen unless you give

> us the keys is we're going to get a search warrant on the car, that we have probable cause at this point. We're going to tow your car; we're going to get a search warrant. So, you can tell us where the keys are now and avoid not having a car for a few days [...]. We're going to get a search warrant[.]
>
> Ms. Dobson: That's fine and everything, but I still want to know why you wanted my keys.
>
> Officer Fullam: We can talk about that in court, but we're getting a search warrant.
>
> Officer Hegerich: If we get a search warrant and we don't have the keys, we're going to pry the car open and whatever's in there you're going to be charged with.
>
> Ms. Dobson: Okay.

(Exhibit 1). Despite Ms. Dobson indicating that she was "fine" with police obtaining a search warrant, and that she was "okay" with police prying the car open, they did not accept this. (Id.). Officer Fullam continued:

> Officer Fullam: So, you want to go that route? Or do you want to just give us the keys?
>
> Officer Hegerich: We're going to tow the car right now, the car is going to get towed without the keys, which usually does damage to the car anyway.
>
> Officer Fullam: Or you could just cooperate, and give us the keys and you could avoid that process, it's completely up to you.
>
> Officer Gonzelez: Just give the keys up, it's not worth it. Just give the keys up.
>
> Officer Fullam: I'll let you think about it for a few minutes, and when you want to give a decision, you can tell us where the keys are, and we can get this over with now.

Id. Ms. Dobson agreed to have them tow the car, but police simply did not accept this. Id. Moreover, the language that Officer Fullam left Ms. Dobson with did not offer a choice: "when you want to give a decision you can tell us where the keys are, and we can get this over with[.]" Id. This was yet another extension of an already interminable custodial interrogation that would only end when she gave up her keys. See *supra*, 22-28. The sheer number of times one officer or another presented Ms. Dobson with some form of this ultimatum also supports that police were going to overbear her will: over the course of the stop, different officers told Ms. Dobson that if she did not give up her keys, they were going to break into her car at least seven different times. (Exhibit 1, Exhibit 3).

Lastly, the trial judge further supported her findings by highlighting that "the defendant waited several more minutes before ultimately producing the car keys, demonstrating that she thought about and weighed the potential consequences of surrendering her keys before doing so." (R.A. 58-59). However, omits the critical fact that Ms. Dobson was never left alone by police: she was handcuffed and Officer Gonzalez and Officer Depina continued to question her right until she surrendered the keys. See Commonwealth v. Yehudi Y., 56 Mass. App. Ct. 812, 818 (2002) ("the fact that there was no break in the nexus between the illegal entry and the request for consent leads us to conclude that the Commonwealth has not met its burden of establishing that the parents'

consent was sufficiently attenuated from the improper entry"); Contrast Commonwealth v. Costa, 65 Mass. App. Ct. 227, 231-232 (2005) (Miranda warnings not required prior to obtaining consent to search home where police sought consent immediately after arrest and there were no other indications of coercion).

Accordingly, this Court should find that Ms. Dobson did not voluntarily consent to a search of her car because of both the ongoing unmirandized custodial interrogation and the multiple unconstitutional searches of her body.

Conclusion

WHEREFORE, for the foregoing reasons, this Court should reverse the trial court's order denying Ms. Dobson's motion to suppress evidence.

Respectfully Submitted,
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By Her Attorney,

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_____
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Dated: 2/7/25

Addendum Table of Contents

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
DOCKET NO. 2384CR152

COMMONWEALTH

v.

CHERI DOBSON

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

The parties are before the court on the defendant's motion to suppress evidence recovered from a motor vehicle after a traffic stop of the defendant. The court held an evidentiary hearing over two days, on October 24, 2023 and November 27, 2023. Boston Police Officer Astrid Gonzalez, Boston Police Officer Ryan Fullam, and Boston Police Officer Frank Femino testified and were subject to cross examination. Eleven exhibits were entered into evidence.

Upon consideration of the pleadings filed, the arguments advance, the credible evidence presented, and the appropriate legal standards as discussed herein, the defendant's Motion to Suppress is hereby **DENIED**.

FINDINGS OF FACT

Upon consideration of the credible evidence, I find the following:

On the evening of August 29, 2022, Boston Police Officer Ryan Fullam and Boston Police Officer Christopher Hegerich were partnered, working as members of the Boston Police Youth Violence Strike Force (YVSF) on a directed patrol in Nubian Square, in the lower Roxbury area of Boston. They were assigned to an unmarked police cruiser, which had lights, police antenna, a front push bar, and a mobile data terminal (MDT).

At that time, Officer Fullam was patrolling the Nubian Square area daily. Nubian Square is also known as the Dudley Triangle, because Dudley Street, Washington Street, and Warren Avenue form a triangle around Nubian Station, a bus station operated by the Massachusetts Bay Transportation Authority (MBTA). The area is known to the Boston Police as a high crime area, characterized at that time by an open-air drug market. Violent crime was prevalent, as were the illegal sale of drugs, the illegal use of drugs, and a significant population of people suffering from substance use disorders.

Officers Fullam and Hegerich had been directed to patrol the Nubian Square area due to an uptick in gun violence near the Nubian MBTA Station in the summer of 2022. On May 21, 2022, a person had been shot on Greenville Street, approximately two city blocks from Nubian Station. On July 9, 2022, officers with the YVSF had recovered two firearms from known Mount Pleasant gang members at 45 Mount Pleasant Avenue. On July 11, 2022, a person was stabbed at 2100 Washington Street. Later that same evening, the City of Boston ShotSpotter[1] technology detected gun shots at 2300 Washington Street, approximately one block away from Nubian Station. On July 12, 2022, shots were reported fired at Ruggles Street, approximately a quarter mile from Nubian Station. Later in the evening on July 12, 2022, several people were shot at 39 Warren Street, at the corner of Warren Street and Nubian Station. On July 30, 2022, Boston Police arrested someone for illegal possession of a firearm on Washington Street, less than one block away from Nubian Station. On August 23, 2022, two blocks away from Nubian Station on Roxbury Street, the Boston Police arrested someone for illegal possession of a

[1] "ShotSpotter uses sensors to detect a possible gunshot and approximates its location." *Commonwealth* v. *Watson*, 487 Mass. 156, 157 n.2 (2021).

firearm. On August 25, 2022, multiple police officers in the YVSF were physically attacked by known Mount Pleasant gang members. This attack led to a firearm-related arrest.

At around 8 p.m. on August 29, 2022, Officer Hegerich was driving on Washington Street traveling toward Melnea Cass Boulevard, away from Nubian Station. Officer Fullam sat in the front passenger seat. They were headed to the area of Massachusetts Avenue and Melnea Cass Boulevard, another high crime area featuring an open-air drug market.

Officer Fullam observed a white sedan (car) traveling in the opposite direction on Washington Street toward Nubian Square. The car's dark window tint caught Officer Fullam's attention. It was apparent to Officer Fullam based on his training and experience that the window tint of the car did not allow for the requisite 35% of light to penetrate the windows into the vehicle. It was night-time and dark outside, and Officer Fullam was unable to see the occupant or occupants of the car.

Officer Hegerich pulled a U-turn on Washington Street until the unmarked cruiser was behind the car. The officers ran the car's registration through the MDT. The officers decided to initiate a motor vehicle stop for a civil infraction based on illegal window tint.

Officer Fullam has stopped "hundreds" of vehicles in the past on suspicion of illegal window tint. Illegal window tint was a trend identified city-wide by the YVSF. Statements made in past traffic stops by operators of vehicles with illegal window tint had led Officer Fullam to believe that often window tint is used to prevent opposing gang members from identifying people within their territory. Within the three months preceding the August 29, 2022 stop, Officer Fullam had recovered firearms four times as a result of illegal tint traffic stops.

Officer Fullam and Officer Hegerich were each wearing a Boston Police Department issued body camera. The officers initiated a stop of the car, and the car pulled over within fifty to one hundred yards. Traffic on the street was minimal, and it took the car eight seconds to come to a stop.

As Officer Fullam was approaching the car, he shined his flashlight through the rear windshield and could see a jerking movement. Officer Fullam watched the front seat passenger reach down toward the console or glove box area and, with what appeared to be some force, made a pushing motion. Officer Fullam alerted Officer Hegerich to his observations as they continued to approach the car.

Officer Fullam approached the passenger side, and Officer Hegerich approached the driver's side. Officer Fullam requested the car windows be lowered. Officer Hegerich requested the driver's license and registration from the driver. Officer Hegerich repeatedly asked the driver to shut the car off, and the driver eventually complied. The driver was identified as the defendant, Cheri Dobson. Officer Fullam recognized the defendant as an Orchard Park gang member.

Officer Fullam asked the passenger, who was later identified as Khalil Carpenter, "what did you just stuff in the console, man?" Mr. Carpenter replied, "What?," and Officer Fullam again asked, "What did you just stuff in the console?" Mr. Carpenter protested, "What are you talking about?," and Officer Fullam said, "I just saw you stuff something in the console." Mr. Carpenter asked, "Where's the probable cause?," and Officer Fullam told Mr. Carpenter, "The window tints." Officer Fullam again told Mr. Carpenter, "I saw you reach down, very quickly, toward the console, so that heightens me a little bit." During this time, the defendant raised her

hands, keeping them visible to the officers, and admonished Mr. Carpenter not to argue with the police.

The officers decided to issue an exit order for Mr. Carpenter. The officers told Mr. Carpenter, "You're going to step out, sir. And we're going to cuff you." Mr. Carpenter protested, and Officer Fullam said, "I don't like the way that you reached down like that when we were trying to pull you over." Officer Fullam explained, "You're going to step out, and I'm going to put you in handcuffs to detain you for now. Detain." Officer Fullam explained they were considering safety and that there were two officers and two occupants.

Mr. Carpenter exited the car. Officer Fullam frisked him and asked if he had anything on him that could hurt the officers. Mr. Carpenter had something hard in his hand, and he explained they were keys. He said, "That's what I was trying to take out." Mr. Carpenter refused to sit on the sidewalk and continued to question the officers. The defendant said to Mr. Carpenter from inside the car, "Please stop arguing with them." The defendant asked permission to put her COVID mask on while she sat in the driver's seat, which the officers permitted. Officer Fullam again told Mr. Carpenter that he was being detained because of the sudden movement, and Mr. Carpenter continued to question the officers. Again, the defendant told Mr. Carpenter to stop arguing with the police officers.

Officer Hegerich issued an exit order to the defendant, and she complied. Officer Hegerich conducted a pat frisk of the defendant and pulled a bag with small bundles of marijuana from her shorts pocket. Officer Hegerich asked her, "Just weed?" and returned the bag to her pocket. Officer Hegerich told the defendant she was being pulled over for the illegal window tints. Officer Hegerich asked the defendant if there were any weapons in the car; she did not answer.

While Officer Fullam brought Mr. Carpenter to the sidewalk and continued to explain to him the basis for the stop, the defendant exited the car and joined Mr. Carpenter on the sidewalk. The defendant was not handcuffed. Eventually, in response to Mr. Carpenter's repeated statements to the officers, Officer Fullam told Mr. Carpenter, "We don't have to argue," as the defendant said to Mr. Carpenter, "I don't know why you keep arguing." The defendant said, "I just want my ticket, and that's it."

Officer Hegerich proceeded to pat frisk of the car for weapons. He observed that the glove box compartment was locked. Officer Hegerich approached the defendant on the sidewalk and asked if she had the car keys. This was at 8:24:00 p.m. Officer Hegerich had seen the defendant holding the car key, but, upon the officer's question about the key, the defendant put her hand in her pocket. She asked Officer Hegerich why they needed the car key. Officer Hegerich responded, "I just need the key." The defendant repeated this question while keeping her hand in her pocket. Officer Hegerich directed the defendant to take her hand out of her pocket. Officer Hegerich removed the defendant's hand from her pocket, and she protested, "You just asked me for my keys." The defendant again questioned why the officers needed the keys.

Officer Hegerich told the defendant he was going to put her into handcuffs. Officer Hegerich began to take an object out of the defendant's hand that had been in her pocket, which appeared to be a car key. The defendant jerked her hand away, asking "For what?" The defendant appeared to outweigh Officer Fullam and Officer Hegerich. The defendant pushed back against Officer Hegerich as he took her hands and demanded to know why. Officer Hegerich explained he would tell her once he had her in handcuffs. The defendant turned her body away from Officer Hegerich and pushed back as he attempted to place her into handcuffs.

As officers directed the defendant to sit down on the sidewalk, she yanked her arm away from Officer Hegerich. The officers directed her again to sit down and attempted to gain control of her. The defendant said, "I'm not going to fight you. I'm going to sit down." She continued, however, to push against the officers and refuse to put her hands behind her back.

The two officers attempted to place the defendant into handcuffs as she maneuvered her body away from them. The officers successfully backed the defendant into the entrance to a closed store, where the passenger stood as well. Officer Hegerich held the defendant from the front and directed Officer Fullam to radio for assistance. Officer Fullam radioed for back up while he continued to attempt to place the defendant in handcuffs. The defendant continued to ask the officers what they needed her keys for.

After several moments of struggling with the defendant to handcuff her, Officer Hegerich told her, "I'm going spray you." The defendant asked why, and the officers again directed the defendant to place her hands behind her back. The officers were able to handcuff the defendant at 8:25:21 p.m. The officers directed the defendant and the passenger to sit on the sidewalk, using forceful language. Officer Fullam sent an updated radio communication asking for a back-up car and advising both parties were detained.

Officer Fullam, frustrated, approached the defendant again and asked, "Where are your fucking keys? Why are you starting this?" Officer Fullam told the defendant, "The whole city's coming because of this," in reference to the police calls for backup. As multiple police cruisers approached with sirens, Officer Fullam issued a radio broadcast asking for only one or two extra police cars. He again asked the defendant for her keys and frisked the pocket of her shorts. The defendant did not respond. Officer Hegerich frisked the defendant's pockets, and Officer Fullam advised him that female officers had been called to the scene.

Officer Fullam explained to the other responding officers that the defendant had been holding the car keys and "we lost them during the fight." Officer Hegerich indicated the keys could be on the defendant, and Officer Fullam explained they did not know what the defendant did with the keys. The responding officers and Officer Hegerich continued to look on the ground in the area for the car keys. At 8:29:25 p.m. Officer Fullam stated, "Worst case scenario, we get a dog and a search warrant."

A call was then made for a K-9 police officer to respond to the scene.

Boston Police Officers Astrid Gonzales and Ana Depina were working the first half shift when they received a radio call requesting a female officer to assist with a traffic stop. They responded and arrived at the scene at 8:29:48 p.m. The officers were wearing body cameras and Boston Police uniforms. The officers observed the defendant to be standing on the sidewalk outside of a store formerly called Expressions, and now called Snipes, on Washington Street. The defendant was handcuffed behind her back, and other officers were present. Officers Gonzalez and Depina spoke with Officer Fullam, who requested they search the defendant for car keys.

Officer Depina commenced a pat frisk of the defendant, outside of her clothing. Nothing was recovered.

Officer Gonzalez then engaged in a conversation with the defendant. She instructed the defendant, in a quiet, conversational voice, to turn over the car keys. She said to the defendant, "If you have them on you, just tell me and I'll grab them." She explained to the defendant that if the defendant did not turn over the car keys, the other officers were going to have to break into

the car. She told the defendant, "They're not going to break it if you give them the car keys," and, "It's not worth it in the long run."

Officer Depina also encouraged the defendant to turn over the car key. Officer Depina said to the defendant, "Listen, just give me the keys. I'm trying to say it in a respectful way. Where are they?" The defendant did not produce the car keys. Meanwhile, Officer Fullam and responding officers continued to search the ground for the car key.

At 8:33:20 p.m., the supervising Sergeant arrived on the scene, and Officer Fullam updated him on the stop and the missing car key. Officer Fullam told the Sergeant they suspected the defendant had thrown the car key during the struggle to place her in handcuffs. Officer Fullam indicated they were looking for the key to get into the glove box. He also told the Sergeant that no one was hurt.

At 8:38:10 p.m., Officer Hegerich and Officer Fullam had a conversation with Officer Gonzalez. Officer Gonzalez confirmed that they had not found a key in their frisk of the defendant. Officer Hegerich instructed her to "go as deep as you can go," and he explained he had seen the keys in the defendant's hands.

Officer Depina then began a second search of the defendant. This time, Officer Depina searched underneath the defendant's shirt, asking if the defendant was wearing a sports bra. Officer Gonzalez then pat-frisked the back of the defendant's shorts and the defendant's crotch area outside of her shorts and pulled out her waistband and felt the waistband of the shorts for keys. Nothing was recovered.

While Officer Depina searched the defendant, at 8:38:30 p.m., the K-9 Officer, Boston Police Officer Frank Femino arrived with K-9 Tyson. Officer Femino has been assigned to the

K-9 unit for the past six years and is currently assigned to train other K-9 officers throughout the region. On August 22, 2022, Officer Femino was on street duty accompanied by K-9 Tyson. Officer Femino had been working with K-9 Tyson for the past five years. The dog was "dual purpose," trained to detect explosives and firearms. Officer Femino and K-9 Tyson had completed a ten-week Boston Police academy and a five-hundred-and-sixty-hour explosives course, and they held numerous certifications, including from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

Officer Femino deployed K-9 Tyson around the outside of the white car, with the doors and windows closed, working the seams of the car where odor can escape. K-9 Tyson gave alerts for the passenger side. The passenger door was opened, and K-9 Tyson bit the glove compartment. This action qualified as an "alert" to firearm evidence. Officer Femino advised the other officers that K-9 Tyson had alerted on the glove compartment.

At 8:43:40 p.m., Officer Fullam approached the defendant, who remained standing and handcuffed on the sidewalk. Officer Fullam explained to the defendant, "Here's where we're at: the dog hit on your glove box for a firearm. So, what's going to happen once you give us the keys is that we're going to get a search warrant on the car that we have probable cause at this point. We're going to tow your car. We're going to get a search warrant. So, you can tell us where the keys are now and avoid not having a car for a few days, and deal with it now, or you know what I'm saying. . . essentially that glove box is going to be opened whether it's a few days or now. Right now, you're detained. We're going to apply for a search warrant." The defendant responded, "That's fine and everything, but I still want to know why you wanted my keys." Officer Fullam responded, "We can talk about that in court, but we're getting a search warrant."

Officer Hegerich explained, "If we get a search warrant, and we don't have the keys, we pry the car open and whatever in there is charged to (inaudible)." The defendant replied, "Okay." Officer Fullam asked, "Do you want to go that route or . . ." Officer Hegerich stated, "If we tow the car without the keys, it usually does damage to the car." Officer Fullam said, "Or you could just cooperate, give us the keys, and avoid that process. It's completely up to you." Officer Gonzalez told the defendant, "Just give the keys up. It's not worth it." Officer Fullam told the defendant he would give her time to make a decision about whether "we're going to get this over with now."

Officer Gonzalez continued to encourage the defendant to give up the car keys, to no avail, for approximately two additional minutes. Then Officer Fullam told the defendant, "I'm going to call the tow now, so you have to make that decision."

The defendant then placed her cuffed hands into the rear of her pants and produced car keys to Officer Gonzalez.

Officer Gonzalez gave the car key to Officer Fullam. Officer Fullam opened the passenger side of the car and used the car key to unlock the glove box. Officer Fullam saw a firearm inside the glove box. He pulled it out and placed it on the passenger seat. Officer Fullam advised the other officers, "We've got one." A male officer approached the defendant and demanded her license to carry (LTC) firearms. Officer Gonzalez explained that Officer Fullam was looking for a LTC. The defendant said, "I don't have no license."

Officer Fullam read the defendant her Miranda warnings from a card. Officer Fullam told the defendant she had the right to remain silent, any statements she made could be used

against her, and her right to counsel. He asked her if the firearm and pills in the glove box were hers, but the defendant did not make a statement.

DISCUSSION

The Stop

Where officers witness a civil motor vehicle infraction, they may stop the vehicle without violating the Fourth Amendment to the United States Constitution or Article 14 of the Massachusetts Declaration of Rights. *Commonwealth* v. *Amado*, 474 Mass. 147, 151 (2016). "[T]he standard to be used in determining the legality of a stop based on a suspected violation of [G. L.] c. 90, § 9D, is whether the officer reasonably suspected, based on his visual observations, that the tinting of the windows exceeded the permissible limits of §9D." *Commonwealth v. Baez*, 47 Mass. App. Ct. 115, 118 (1999).

Here, Officer Fullam and Officer Hegerich were legally justified in stopping the defendant's car based on what they observed to be illegally tinted windows, a civil motor vehicle infraction.

The Exit Order

"[A]n exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds." *Commonwealth* v. *Torres-Pagan*, 484 Mass. 34, 38 (2020).

To justify an exit order on the basis of safety concerns, an officer's fear must be grounded in "specific, articulable facts and reasonable inferences" in light of the officer's experience (citation omitted). *Commonwealth* v. *Silvelo*, 486 Mass. 13, 16 (2020). See *Commonwealth* v. *Silva*, 366 Mass. 402, 406 (1974). The test is an objective one

that is based on the "totality of the circumstances" (citation omitted). *Commonwealth* v. *Gonsalves*, 429 Mass. 658, 665 (1999); *Commonwealth v. Monell*, 99 Mass. App. Ct. 487 (2021).

"[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." *Gonsalves*, 429 Mass. at 664. "The Constitution does not require officers to gamble with their personal safety" (quotation and citation omitted). *Commonwealth* v. *Haskell*, 438 Mass. 790, 794 (2003); *Monell*, 99 Mass. App. Ct. at 490.

Once Officer Fullam observed the front seat passenger make a sudden movement, forcefully stuffing something in the area of the glove box or center console, the police officers had reasonable suspicion to issue an exit order. See *Torres-Pagan*, 484 Mass. at 41, citing *Commonwealth v. Stampley*, 437 Mass. 323, 327 (2002) (collecting cases recognizing that "gestures . . . suggestive of the occupant's retrieving or concealing an object . . . raise legitimate safety concerns to an officer conducting a traffic stop). Mr. Carpenter's evasive and argumentative responses to Officer Fullam's inquiry about his movements toward the console or glove box further heightened the officers' suspicions.

The exit order of both Mr. Carpenter and the defendant was legally justified for officer safety based on the reasonable suspicion that Mr. Carpenter had secreted a weapon in the glove box or center console of the car.

Pat Frisk

A police officer may pat frisk a suspect following an exit order only when he has a reasonable suspicion that the suspect is armed and dangerous. *Torres-Pagan*, 484 Mass. at 38-39.

Here, the furtive gesture of the passenger that justified the exit order also justified a pat frisk of the defendant. "Generally, the acts of a suspect's companions are not enough to establish a reasonable suspicion without more, but they may be considered in assessing whether a reasonably prudent person would be warranted in concluding that a suspect may be armed and dangerous." *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 750 (2021), citing *Commonwealth v. Douglas*, 472 Mass. 439, 443 (2015). Here, the police had knowledge of a high volume of very recent firearm arrests and gun violence in the area tied to gang activity. They recognized the defendant to be a member of the Orchard Park gang. There were two police officers and two occupants in the stopped car. Significantly, the nature of Mr. Carpenter's furtive gesture, his argumentative nature with the police, and his on-going refusal to cooperate with their requests heightened concerns for police safety. These facts together created a reasonable concern that both Mr. Carpenter and the defendant had access to a gun.

The defendant was subject to an initial pat frisk at the driver's side door, which did not yield any weapons. The quantity of what appeared to be marijuana that Officer Hegerich felt in the defendant's shorts pocket was returned to her.

The Request for the Car Key and Additional Pat Frisks for Car Key

Once the police requested the defendant's car key and she refused to provide it, the repeated pat frisks of the defendant for her car keys were improper. The Commonwealth bears the burden of demonstrating that the actions of the police officers were within constitutional limits (quotations and citations omitted) during a warrantless search of the defendant. *Commonwealth v. Sertyl*, 101 Mass. App. Ct. 836, 839 (2022), citing *Commonwealth* v. *Meneus*, 476 Mass. 231, 234 (2017).

"Where an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest." *Commonwealth v. Amado*, 474 Mass. 147, 152 (2016), citing *Terry* v. *Ohio*, 392 U.S. at 25-26. Such protective searches are reasonable if "confined to what is minimally necessary to learn whether the suspect is armed and to disarm him once the weapon is discovered." *Id.* at 152, citing *Commonwealth v. Almeida*, 373 Mass. 266, 272 (1977). See *Silva*, 366 Mass. at 407-408. "In most instances the search must be confined to a pat-down of the outer clothing of the suspect." *Id.* at 152-153, citing Silva, 366 Mass. at 408. However, under the "plain feel" doctrine, an officer may seize contraband discovered during a *Terry*-type frisk if the officer feels an object whose contour or mass makes its identity immediately known. *Id.* at 153, citing *Wilson*, *supra* at 396-397, citing *Minnesota v. Dickerson*, 508 U.S. 366, 373, 375-377 (1993).

The repeated pat frisks of the defendant for her car key did not fall within the scope of a pat frisk for weapons or contraband based on officer safety concerns. Officer Fullam performed an initial pat frisk of the defendant by the driver's side of the car and found no weapons. At that point, the safety exigency justifying a search of the defendant's person ended. See *Amado*, 474 Mass. at 153 (safety exigency justifying search of defendant's person ended as no suspicion that the defendant possessed a weapon remained).

There is no question the officers were frisking the defendant to find the defendant's car key. Officers Fullam and Officer Hegerich told her they needed her car key, and, when she refused to turn it over, they called in female officers and directed them to frisk the defendant for the car key. Frisking the defendant for something other than a weapon or contraband is not justified as a pat frisk for officer safety. "Only after the pat-down gives indication that a weapon is present do the police have the privilege to search further." *Silva*, 366 Mass. at 408. See

Commonwealth v. Blevines, 438 Mass. 604, 608 (2003) (officer justified in retrieving "hard object" felt during pat frisk to dispel concern it was a weapon).

There is a limited line of cases in which police were justified in demanding car keys from a defendant. These relate to instances in which there was a concern about flight or the police were outnumbered by occupants of a vehicle and the request for the car keys was tied directly to officer safety. See *Commonwealth v. Moses*, 408 Mass. 136, 141 (1990) (when officer ordered defendant to turn off ignition and surrender keys, he acted as a reasonably prudent police officer and his actions were similar to and consistent with protective measures sanctioned in *Terry* and *Silva)*.

These cases do not apply to the instant case because, by the time the officers were demanding the defendant's car key, she was secured in handcuffs and in police custody on the sidewalk, away from the car. Mr. Carpenter was also detained in handcuffs on the sidewalk, away from the car. The officers wanted the car key to open the locked glove compartment. There was no concern at that time that either the defendant or Mr. Carpenter could reenter the car before the glove compartment had been opened. In fact, the officers told the defendant that, if she did not provide her car key, they would tow the car and seek a search warrant for the locked glove box.

The scope of the frisks of the defendant for her car key also went beyond the scope of a standard pat frisk. Officer Hegerich told Officer Gonzalez to "go as deep as you can go." The body camera evidence shows that Officer Depina felt beneath the defendant's shirt, over her bra, and inside the waistband of her pants.

"[A] strip search occurs 'when a detainee remains partially clothed, but in circumstances during which a last layer of clothing is moved (and not necessarily removed) in such a manner

whereby an intimate area of the detainee is viewed, exposed, or displayed.'" *Amado*, 474 Mass. at 153 (strip search where officers opened waistband of defendant's underwear, exposed his bare skin, directed flashlight on area, and retrieved object, both viewing and exposing defendant's private area), citing *Morales*, 462 Mass. at 342.

Under the Fourth Amendment and art. 14, "probable cause is the appropriate standard that must be met for a strip or visual body cavity search to be constitutionally permissible." *Id.* at 154, quoting *Commonwealth* v. *Prophete*, 443 Mass. 548, 553 (2005), citing *Commonwealth v. Thomas*, 429 Mass. 403, 407-408 (1999). This is so because strip searches "by their very nature are humiliating, demeaning, and terrifying experiences that, without question, constitute a substantial intrusion on one' personal privacy rights." *Id.* at 154, citing *Morales*, 462 Mass. at 339-340, quoting *Prophete*, supra. "Such searches may precede formal arrest as long as probable cause existed at the time the search was made, independent of the results of the search." *Id.* at 154, citing *Commonwealth v. Clermy*, 421 Mass. 325, 330 (1995).

The frisks of the defendant by Officer Depina came close but were not a strip search. The defendant's inner-most layer of clothing remained in place. The frisks, however, were certainly intrusive and demeaning. They were performed on a public sidewalk with Mr. Carpenter present and multiple male police officers. The defendant's underwear and bare stomach were visible during the final frisk by Officer Depina. There was no attempt made by officers to mitigate public exposure.

Consent to Search

The car key was not recovered, however, because of the pat frisks by Officer Depina. Instead, when faced later with the choice of a police tow of her car or turning over the car key, the defendant elected to turn over the car key. The defendant argues that her decision to provide

the car key to police was not a voluntary act but was, instead, tainted by the duress of the repeated, intrusive, and legally unjustified pat frisks. The Commonwealth argues that the defendant's decision to provide the car key to the police was a knowing and voluntary decision based on her desire not to lose access to her car for the duration of time necessary for the police to obtain a search warrant.

Where the Commonwealth relies on consent to justify the lawfulness of a warrantless search, it must prove that the consent was "freely and voluntarily" given. *Commonwealth* v. *Burgess*, 434 Mass. 307, 310 (2001), quoting *Commonwealth* v. *Krisco Corp.*, 421 Mass. 37, 46 (1995). The Commonwealth bears the burden of showing "consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority." *Commonwealth* v. *Sanna*, 424 Mass. 92, 97 (1997). "The voluntariness of an individual's consent to a warrantless entry is an issue of fact, and must be examined in light of the totality of the circumstances of the case." *Commonwealth* v. *Rogers*, 444 Mass. 234, 238 (2005). A defendant's consent to search need only be free and voluntary, not knowing and intelligent. See *Commonwealth* v. *Colon*, 482 Mass. 162, 185 (2019).

A number of factors may be considered in making the determination whether consent is voluntary under the circumstances. They include but are not limited to: where the defendant is intoxicated or under the influence of drugs; the defendant's lack of a prior arrest record; the defendant's mental or emotional state; the defendant's physical state; whether the defendant was "strong-minded and intelligent"; and whether the defendant was alone when consent was given. See *Commonwealth* v. *Angivoni*, 383 Mass. 30, 34-35 (1981) (consent involuntary where defendant injured, in pain, intoxicated, and incoherent); *Commonwealth* v. *Harmond*, 376 Mass. 557, 562 (1978) (consent not voluntary where defendant in custody, unaware of right to refuse

consent, under influence of alcohol, and of limited intelligence); *Commonwealth* v. *Heath*, 12 Mass. App. Ct. 677, 684-685 (1981) (consent not voluntary where young defendant had no prior arrest record, had been smoking marijuana, had been left alone by her companion, and was under arrest); *Commonwealth* v. *Egan*, 12 Mass. App. Ct. 658, 663 (1981) (consent voluntary where defendant police officer "strong-minded and intelligent").

When consent to search is given close in time to prior unlawful police conduct, that consent is not regarded as freely given. *Commonwealth* v. *Midi*, 46 Mass. App. Ct. 591, 595 (1999). See *Commonwealth* v. *Loughlin*, 385 Mass. 60, 63 (1982) (consent involuntary on heels of illegal detention of driver and passenger and illegal pat frisk of passenger). Here, the defendant had been subjected to unlawful conduct – the repeated pat frisks in search of her car keys – prior to her surrendering her car keys and thereby consenting to a search of the glove compartment. If there is attenuation between the prior illegality and the consent, though, "the consent is cleansed of the effect of the prior illegality and is deemed valid." *Commonwealth* v. *Kipp*, 57 Mass. App. Ct. 629, 633 (2003). Cf. *Commonwealth* v. *Arias*, 81 Mass. App. Ct. 342, 350-351 (2012) (failure to establish dissipation of taint of prior unlawful stop and frisk rendered subsequent consent involuntary). This is the case when it can "rationally be determined that [the consent] did not come about by virtue of the prior illegality, but rather was given for reasons independent of the earlier unlawful act or event." Kipp, 57 Mass. App. Ct. at 633 (consent to search voluntarily given after illegal protective sweep where taint of unlawful entry dissipated by break in nexus and independent reason for granting consent).

While the defendant was pat frisked for the car keys, Officer Femino and K-9 Tyson arrived on scene and performed a search of the vehicle. During that search, K-9 Tyson alerted to the presence of a firearm in the glove compartment. At that time, police determined that, if the

defendant did not surrender the keys, the vehicle would be towed and a search warrant would be obtained to open the glove compartment. The police informed the defendant of this intended course of events. The police further informed the defendant that, if her vehicle were towed without the keys, damage may be caused to the car and that, if the key to the glove compartment were not provided, the glove compartment would ultimately be opened with force after a search warrant was obtained, potentially resulting in damage. The police also pointed out that it would take time to obtain a search warrant and the defendant would be without her vehicle while the search warrant was pending and executed.

The police's statement of their intention to seek a search warrant if consent to search is not given is not conclusive on the question of voluntariness. *Harmond*, 376 Mass. at 561; *Commonwealth* v. *Farnsworth*, 76 Mass. App. Ct. 87, 93 (2010) (mention of possibility of obtaining search warrant in lieu of obtaining consent insufficient to render consent involuntary). However, "a prediction of police lawlessness could be sufficiently overbearing to render a consent involuntary." *Kipp*, 57 Mass. App. Ct. at 635 (threat that search warrant execution could be very disruptive to personal belongings highly improper). An accurate statement of the possible consequences of failing to give consent, however, does not render consent involuntarily given. *Id.* at 636. While the police indicated to the defendant that damage would likely result to her vehicle if she did not provide the keys to the car, such statement was not a threat of unlawful behavior on the part of the police. Instead, it was an accurate statement that, without the keys to the car, towing the vehicle would be more difficult and the glove compartment would need to be forced open.

The totality of the circumstances leads to the conclusion that the defendant did not surrender the car keys as a result of the illegal pat frisks but, rather, to avoid damage to her

vehicle and the inconvenience of waiting for a search warrant to issue and be executed. This conclusion is bolstered by the fact that the defendant did not immediately surrender the keys after the police informed her the car would be towed and a search warrant obtained. Rather, the defendant waited several more minutes before ultimately producing the car keys, demonstrating that she thought about and weighed the potential consequences of surrendering her keys before doing so. Consequently, it cannot be said that her will was overborne; rather, the defendant voluntarily consented to the search of the glove compartment by surrendering her keys to officers after being apprised of the potential consequences of failing to do so. See *Kipp*, 57 Mass. App. Ct. at 633.

ORDER

For the foregoing reasons, the defendant's motion to suppress is **DENIED**.

Sarah Weyland Ellis
Justice of the Superior Court

Dated: January 10, 2024

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
DOCKET NO. 2384CR152

COMMONWEALTH

v.

CHERI DOBSON

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

The parties are before the court on the defendant's motion to suppress evidence recovered from a motor vehicle after a traffic stop of the defendant. The court held an evidentiary hearing over two days, on October 24, 2023 and November 27, 2023. Boston Police Officer Astrid Gonzalez, Boston Police Officer Ryan Fullam, and Boston Police Officer Frank Femino testified and were subject to cross examination. Eleven exhibits were entered into evidence.

Upon consideration of the pleadings filed, the arguments advance, the credible evidence presented, and the appropriate legal standards as discussed herein, the defendant's Motion to Suppress is hereby **DENIED**.

FINDINGS OF FACT

Upon consideration of the credible evidence, I find the following:

On the evening of August 29, 2022, Boston Police Officer Ryan Fullam and Boston Police Officer Christopher Hegerich were partnered, working as members of the Boston Police Youth Violence Strike Force (YVSF) on a directed patrol in Nubian Square, in the lower Roxbury area of Boston. They were assigned to an unmarked police cruiser, which had lights, police antenna, a front push bar, and a mobile data terminal (MDT).

At that time, Officer Fullam was patrolling the Nubian Square area daily. Nubian Square is also known as the Dudley Triangle, because Dudley Street, Washington Street, and Warren Avenue form a triangle around Nubian Station, a bus station operated by the Massachusetts Bay Transportation Authority (MBTA). The area is known to the Boston Police as a high crime area, characterized at that time by an open-air drug market. Violent crime was prevalent, as were the illegal sale of drugs, the illegal use of drugs, and a significant population of people suffering from substance use disorders.

Officers Fullam and Hegerich had been directed to patrol the Nubian Square area due to an uptick in gun violence near the Nubian MBTA Station in the summer of 2022. On May 21, 2022, a person had been shot on Greenville Street, approximately two city blocks from Nubian Station. On July 9, 2022, officers with the YVSF had recovered two firearms from known Mount Pleasant gang members at 45 Mount Pleasant Avenue. On July 11, 2022, a person was stabbed at 2100 Washington Street. Later that same evening, the City of Boston ShotSpotter[1] technology detected gun shots at 2300 Washington Street, approximately one block away from Nubian Station. On July 12, 2022, shots were reported fired at Ruggles Street, approximately a quarter mile from Nubian Station. Later in the evening on July 12, 2022, several people were shot at 39 Warren Street, at the corner of Warren Street and Nubian Station. On July 30, 2022, Boston Police arrested someone for illegal possession of a firearm on Washington Street, less than one block away from Nubian Station. On August 23, 2022, two blocks away from Nubian Station on Roxbury Street, the Boston Police arrested someone for illegal possession of a

[1] "ShotSpotter uses sensors to detect a possible gunshot and approximates its location." *Commonwealth* v. *Watson*, 487 Mass. 156, 157 n.2 (2021).

firearm. On August 25, 2022, multiple police officers in the YVSF were physically attacked by known Mount Pleasant gang members. This attack led to a firearm-related arrest.

At around 8 p.m. on August 29, 2022, Officer Hegerich was driving on Washington Street traveling toward Melnea Cass Boulevard, away from Nubian Station. Officer Fullam sat in the front passenger seat. They were headed to the area of Massachusetts Avenue and Melnea Cass Boulevard, another high crime area featuring an open-air drug market.

Officer Fullam observed a white sedan (car) traveling in the opposite direction on Washington Street toward Nubian Square. The car's dark window tint caught Officer Fullam's attention. It was apparent to Officer Fullam based on his training and experience that the window tint of the car did not allow for the requisite 35% of light to penetrate the windows into the vehicle. It was night-time and dark outside, and Officer Fullam was unable to see the occupant or occupants of the car.

Officer Hegerich pulled a U-turn on Washington Street until the unmarked cruiser was behind the car. The officers ran the car's registration through the MDT. The officers decided to initiate a motor vehicle stop for a civil infraction based on illegal window tint.

Officer Fullam has stopped "hundreds" of vehicles in the past on suspicion of illegal window tint. Illegal window tint was a trend identified city-wide by the YVSF. Statements made in past traffic stops by operators of vehicles with illegal window tint had led Officer Fullam to believe that often window tint is used to prevent opposing gang members from identifying people within their territory. Within the three months preceding the August 29, 2022 stop, Officer Fullam had recovered firearms four times as a result of illegal tint traffic stops.

Officer Fullam and Officer Hegerich were each wearing a Boston Police Department issued body camera. The officers initiated a stop of the car, and the car pulled over within fifty to one hundred yards. Traffic on the street was minimal, and it took the car eight seconds to come to a stop.

As Officer Fullam was approaching the car, he shined his flashlight through the rear windshield and could see a jerking movement. Officer Fullam watched the front seat passenger reach down toward the console or glove box area and, with what appeared to be some force, made a pushing motion. Officer Fullam alerted Officer Hegerich to his observations as they continued to approach the car.

Officer Fullam approached the passenger side, and Officer Hegerich approached the driver's side. Officer Fullam requested the car windows be lowered. Officer Hegerich requested the driver's license and registration from the driver. Officer Hegerich repeatedly asked the driver to shut the car off, and the driver eventually complied. The driver was identified as the defendant, Cheri Dobson. Officer Fullam recognized the defendant as an Orchard Park gang member.

Officer Fullam asked the passenger, who was later identified as Khalil Carpenter, "what did you just stuff in the console, man?" Mr. Carpenter replied, "What?," and Officer Fullam again asked, "What did you just stuff in the console?" Mr. Carpenter protested, "What are you talking about?," and Officer Fullam said, "I just saw you stuff something in the console." Mr. Carpenter asked, "Where's the probable cause?," and Officer Fullam told Mr. Carpenter, "The window tints." Officer Fullam again told Mr. Carpenter, "I saw you reach down, very quickly, toward the console, so that heightens me a little bit." During this time, the defendant raised her

hands, keeping them visible to the officers, and admonished Mr. Carpenter not to argue with the police.

The officers decided to issue an exit order for Mr. Carpenter. The officers told Mr. Carpenter, "You're going to step out, sir. And we're going to cuff you." Mr. Carpenter protested, and Officer Fullam said, "I don't like the way that you reached down like that when we were trying to pull you over." Officer Fullam explained, "You're going to step out, and I'm going to put you in handcuffs to detain you for now. Detain." Officer Fullam explained they were considering safety and that there were two officers and two occupants.

Mr. Carpenter exited the car. Officer Fullam frisked him and asked if he had anything on him that could hurt the officers. Mr. Carpenter had something hard in his hand, and he explained they were keys. He said, "That's what I was trying to take out." Mr. Carpenter refused to sit on the sidewalk and continued to question the officers. The defendant said to Mr. Carpenter from inside the car, "Please stop arguing with them." The defendant asked permission to put her COVID mask on while she sat in the driver's seat, which the officers permitted. Officer Fullam again told Mr. Carpenter that he was being detained because of the sudden movement, and Mr. Carpenter continued to question the officers. Again, the defendant told Mr. Carpenter to stop arguing with the police officers.

Officer Hegerich issued an exit order to the defendant, and she complied. Officer Hegerich conducted a pat frisk of the defendant and pulled a bag with small bundles of marijuana from her shorts pocket. Officer Hegerich asked her, "Just weed?" and returned the bag to her pocket. Officer Hegerich told the defendant she was being pulled over for the illegal window tints. Officer Hegerich asked the defendant if there were any weapons in the car; she did not answer.

While Officer Fullam brought Mr. Carpenter to the sidewalk and continued to explain to him the basis for the stop, the defendant exited the car and joined Mr. Carpenter on the sidewalk. The defendant was not handcuffed. Eventually, in response to Mr. Carpenter's repeated statements to the officers, Officer Fullam told Mr. Carpenter, "We don't have to argue," as the defendant said to Mr. Carpenter, "I don't know why you keep arguing." The defendant said, "I just want my ticket, and that's it."

Officer Hegerich proceeded to pat frisk of the car for weapons. He observed that the glove box compartment was locked. Officer Hegerich approached the defendant on the sidewalk and asked if she had the car keys. This was at 8:24:00 p.m. Officer Hegerich had seen the defendant holding the car key, but, upon the officer's question about the key, the defendant put her hand in her pocket. She asked Officer Hegerich why they needed the car key. Officer Hegerich responded, "I just need the key." The defendant repeated this question while keeping her hand in her pocket. Officer Hegerich directed the defendant to take her hand out of her pocket. Officer Hegerich removed the defendant's hand from her pocket, and she protested, "You just asked me for my keys." The defendant again questioned why the officers needed the keys.

Officer Hegerich told the defendant he was going to put her into handcuffs. Officer Hegerich began to take an object out of the defendant's hand that had been in her pocket, which appeared to be a car key. The defendant jerked her hand away, asking "For what?" The defendant appeared to outweigh Officer Fullam and Officer Hegerich. The defendant pushed back against Officer Hegerich as he took her hands and demanded to know why. Officer Hegerich explained he would tell her once he had her in handcuffs. The defendant turned her body away from Officer Hegerich and pushed back as he attempted to place her into handcuffs.

As officers directed the defendant to sit down on the sidewalk, she yanked her arm away from Officer Hegerich. The officers directed her again to sit down and attempted to gain control of her. The defendant said, "I'm not going to fight you. I'm going to sit down." She continued, however, to push against the officers and refuse to put her hands behind her back.

The two officers attempted to place the defendant into handcuffs as she maneuvered her body away from them. The officers successfully backed the defendant into the entrance to a closed store, where the passenger stood as well. Officer Hegerich held the defendant from the front and directed Officer Fullam to radio for assistance. Officer Fullam radioed for back up while he continued to attempt to place the defendant in handcuffs. The defendant continued to ask the officers what they needed her keys for.

After several moments of struggling with the defendant to handcuff her, Officer Hegerich told her, "I'm going spray you." The defendant asked why, and the officers again directed the defendant to place her hands behind her back. The officers were able to handcuff the defendant at 8:25:21 p.m. The officers directed the defendant and the passenger to sit on the sidewalk, using forceful language. Officer Fullam sent an updated radio communication asking for a back-up car and advising both parties were detained.

Officer Fullam, frustrated, approached the defendant again and asked, "Where are your fucking keys? Why are you starting this?" Officer Fullam told the defendant, "The whole city's coming because of this," in reference to the police calls for backup. As multiple police cruisers approached with sirens, Officer Fullam issued a radio broadcast asking for only one or two extra police cars. He again asked the defendant for her keys and frisked the pocket of her shorts. The defendant did not respond. Officer Hegerich frisked the defendant's pockets, and Officer Fullam advised him that female officers had been called to the scene.

Officer Fullam explained to the other responding officers that the defendant had been holding the car keys and "we lost them during the fight." Officer Hegerich indicated the keys could be on the defendant, and Officer Fullam explained they did not know what the defendant did with the keys. The responding officers and Officer Hegerich continued to look on the ground in the area for the car keys. At 8:29:25 p.m. Officer Fullam stated, "Worst case scenario, we get a dog and a search warrant."

A call was then made for a K-9 police officer to respond to the scene.

Boston Police Officers Astrid Gonzales and Ana Depina were working the first half shift when they received a radio call requesting a female officer to assist with a traffic stop. They responded and arrived at the scene at 8:29:48 p.m. The officers were wearing body cameras and Boston Police uniforms. The officers observed the defendant to be standing on the sidewalk outside of a store formerly called Expressions, and now called Snipes, on Washington Street. The defendant was handcuffed behind her back, and other officers were present. Officers Gonzalez and Depina spoke with Officer Fullam, who requested they search the defendant for car keys.

Officer Depina commenced a pat frisk of the defendant, outside of her clothing. Nothing was recovered.

Officer Gonzalez then engaged in a conversation with the defendant. She instructed the defendant, in a quiet, conversational voice, to turn over the car keys. She said to the defendant, "If you have them on you, just tell me and I'll grab them." She explained to the defendant that if the defendant did not turn over the car keys, the other officers were going to have to break into

the car. She told the defendant, "They're not going to break it if you give them the car keys," and, "It's not worth it in the long run."

Officer Depina also encouraged the defendant to turn over the car key. Officer Depina said to the defendant, "Listen, just give me the keys. I'm trying to say it in a respectful way. Where are they?" The defendant did not produce the car keys. Meanwhile, Officer Fullam and responding officers continued to search the ground for the car key.

At 8:33:20 p.m., the supervising Sergeant arrived on the scene, and Officer Fullam updated him on the stop and the missing car key. Officer Fullam told the Sergeant they suspected the defendant had thrown the car key during the struggle to place her in handcuffs. Officer Fullam indicated they were looking for the key to get into the glove box. He also told the Sergeant that no one was hurt.

At 8:38:10 p.m., Officer Hegerich and Officer Fullam had a conversation with Officer Gonzalez. Officer Gonzalez confirmed that they had not found a key in their frisk of the defendant. Officer Hegerich instructed her to "go as deep as you can go," and he explained he had seen the keys in the defendant's hands.

Officer Depina then began a second search of the defendant. This time, Officer Depina searched underneath the defendant's shirt, asking if the defendant was wearing a sports bra. Officer Gonzalez then pat-frisked the back of the defendant's shorts and the defendant's crotch area outside of her shorts and pulled out her waistband and felt the waistband of the shorts for keys. Nothing was recovered.

While Officer Depina searched the defendant, at 8:38:30 p.m., the K-9 Officer, Boston Police Officer Frank Femino arrived with K-9 Tyson. Officer Femino has been assigned to the

K-9 unit for the past six years and is currently assigned to train other K-9 officers throughout the region. On August 22, 2022, Officer Femino was on street duty accompanied by K-9 Tyson. Officer Femino had been working with K-9 Tyson for the past five years. The dog was "dual purpose," trained to detect explosives and firearms. Officer Femino and K-9 Tyson had completed a ten-week Boston Police academy and a five-hundred-and-sixty-hour explosives course, and they held numerous certifications, including from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).

Officer Femino deployed K-9 Tyson around the outside of the white car, with the doors and windows closed, working the seams of the car where odor can escape. K-9 Tyson gave alerts for the passenger side. The passenger door was opened, and K-9 Tyson bit the glove compartment. This action qualified as an "alert" to firearm evidence. Officer Femino advised the other officers that K-9 Tyson had alerted on the glove compartment.

At 8:43:40 p.m., Officer Fullam approached the defendant, who remained standing and handcuffed on the sidewalk. Officer Fullam explained to the defendant, "Here's where we're at: the dog hit on your glove box for a firearm. So, what's going to happen once you give us the keys is that we're going to get a search warrant on the car that we have probable cause at this point. We're going to tow your car. We're going to get a search warrant. So, you can tell us where the keys are now and avoid not having a car for a few days, and deal with it now, or you know what I'm saying. . . essentially that glove box is going to be opened whether it's a few days or now. Right now, you're detained. We're going to apply for a search warrant." The defendant responded, "That's fine and everything, but I still want to know why you wanted my keys." Officer Fullam responded, "We can talk about that in court, but we're getting a search warrant."

Officer Hegerich explained, "If we get a search warrant, and we don't have the keys, we pry the car open and whatever in there is charged to (inaudible)." The defendant replied, "Okay." Officer Fullam asked, "Do you want to go that route or . . ." Officer Hegerich stated, "If we tow the car without the keys, it usually does damage to the car." Officer Fullam said, "Or you could just cooperate, give us the keys, and avoid that process. It's completely up to you." Officer Gonzalez told the defendant, "Just give the keys up. It's not worth it." Officer Fullam told the defendant he would give her time to make a decision about whether "we're going to get this over with now."

Officer Gonzalez continued to encourage the defendant to give up the car keys, to no avail, for approximately two additional minutes. Then Officer Fullam told the defendant, "I'm going to call the tow now, so you have to make that decision."

The defendant then placed her cuffed hands into the rear of her pants and produced car keys to Officer Gonzalez.

Officer Gonzalez gave the car key to Officer Fullam. Officer Fullam opened the passenger side of the car and used the car key to unlock the glove box. Officer Fullam saw a firearm inside the glove box. He pulled it out and placed it on the passenger seat. Officer Fullam advised the other officers, "We've got one." A male officer approached the defendant and demanded her license to carry (LTC) firearms. Officer Gonzalez explained that Officer Fullam was looking for a LTC. The defendant said, "I don't have no license."

Officer Fullam read the defendant her Miranda warnings from a card. Officer Fullam told the defendant she had the right to remain silent, any statements she made could be used

against her, and her right to counsel. He asked her if the firearm and pills in the glove box were hers, but the defendant did not make a statement.

DISCUSSION

The Stop

Where officers witness a civil motor vehicle infraction, they may stop the vehicle without violating the Fourth Amendment to the United States Constitution or Article 14 of the Massachusetts Declaration of Rights. *Commonwealth* v. *Amado*, 474 Mass. 147, 151 (2016). "[T]he standard to be used in determining the legality of a stop based on a suspected violation of [G. L.] c. 90, § 9D, is whether the officer reasonably suspected, based on his visual observations, that the tinting of the windows exceeded the permissible limits of §9D." *Commonwealth v. Baez*, 47 Mass. App. Ct. 115, 118 (1999).

Here, Officer Fullam and Officer Hegerich were legally justified in stopping the defendant's car based on what they observed to be illegally tinted windows, a civil motor vehicle infraction.

The Exit Order

"[A]n exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds." *Commonwealth* v. *Torres-Pagan*, 484 Mass. 34, 38 (2020).

To justify an exit order on the basis of safety concerns, an officer's fear must be grounded in "specific, articulable facts and reasonable inferences" in light of the officer's experience (citation omitted). *Commonwealth* v. *Silvelo*, 486 Mass. 13, 16 (2020). See *Commonwealth* v. *Silva*, 366 Mass. 402, 406 (1974). The test is an objective one

that is based on the "totality of the circumstances" (citation omitted). *Commonwealth* v. *Gonsalves*, 429 Mass. 658, 665 (1999); *Commonwealth v. Monell*, 99 Mass. App. Ct. 487 (2021).

"[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." *Gonsalves*, 429 Mass. at 664. "The Constitution does not require officers to gamble with their personal safety" (quotation and citation omitted). *Commonwealth* v. *Haskell*, 438 Mass. 790, 794 (2003); *Monell*, 99 Mass. App. Ct. at 490.

Once Officer Fullam observed the front seat passenger make a sudden movement, forcefully stuffing something in the area of the glove box or center console, the police officers had reasonable suspicion to issue an exit order. See *Torres-Pagan*, 484 Mass. at 41, citing *Commonwealth v. Stampley*, 437 Mass. 323, 327 (2002) (collecting cases recognizing that "gestures . . . suggestive of the occupant's retrieving or concealing an object . . . raise legitimate safety concerns to an officer conducting a traffic stop). Mr. Carpenter's evasive and argumentative responses to Officer Fullam's inquiry about his movements toward the console or glove box further heightened the officers' suspicions.

The exit order of both Mr. Carpenter and the defendant was legally justified for officer safety based on the reasonable suspicion that Mr. Carpenter had secreted a weapon in the glove box or center console of the car.

Pat Frisk

A police officer may pat frisk a suspect following an exit order only when he has a reasonable suspicion that the suspect is armed and dangerous. *Torres-Pagan*, 484 Mass. at 38-39.

Here, the furtive gesture of the passenger that justified the exit order also justified a pat frisk of the defendant. "Generally, the acts of a suspect's companions are not enough to establish a reasonable suspicion without more, but they may be considered in assessing whether a reasonably prudent person would be warranted in concluding that a suspect may be armed and dangerous." *Commonwealth v. Sweeting-Bailey*, 488 Mass. 741, 750 (2021), citing *Commonwealth v. Douglas*, 472 Mass. 439, 443 (2015). Here, the police had knowledge of a high volume of very recent firearm arrests and gun violence in the area tied to gang activity. They recognized the defendant to be a member of the Orchard Park gang. There were two police officers and two occupants in the stopped car. Significantly, the nature of Mr. Carpenter's furtive gesture, his argumentative nature with the police, and his on-going refusal to cooperate with their requests heightened concerns for police safety. These facts together created a reasonable concern that both Mr. Carpenter and the defendant had access to a gun.

The defendant was subject to an initial pat frisk at the driver's side door, which did not yield any weapons. The quantity of what appeared to be marijuana that Officer Hegerich felt in the defendant's shorts pocket was returned to her.

The Request for the Car Key and Additional Pat Frisks for Car Key

Once the police requested the defendant's car key and she refused to provide it, the repeated pat frisks of the defendant for her car keys were improper. The Commonwealth bears the burden of demonstrating that the actions of the police officers were within constitutional limits (quotations and citations omitted) during a warrantless search of the defendant. *Commonwealth v. Sertyl*, 101 Mass. App. Ct. 836, 839 (2022), citing *Commonwealth* v. *Meneus*, 476 Mass. 231, 234 (2017).

"Where an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest." *Commonwealth v. Amado*, 474 Mass. 147, 152 (2016), citing *Terry* v. *Ohio*, 392 U.S. at 25-26. Such protective searches are reasonable if "confined to what is minimally necessary to learn whether the suspect is armed and to disarm him once the weapon is discovered." *Id.* at 152, citing *Commonwealth v. Almeida*, 373 Mass. 266, 272 (1977). See *Silva*, 366 Mass. at 407-408. "In most instances the search must be confined to a pat-down of the outer clothing of the suspect." *Id.* at 152-153, citing Silva, 366 Mass. at 408. However, under the "plain feel" doctrine, an officer may seize contraband discovered during a *Terry*-type frisk if the officer feels an object whose contour or mass makes its identity immediately known. *Id.* at 153, citing *Wilson*, *supra* at 396-397, citing *Minnesota v. Dickerson*, 508 U.S. 366, 373, 375-377 (1993).

The repeated pat frisks of the defendant for her car key did not fall within the scope of a pat frisk for weapons or contraband based on officer safety concerns. Officer Fullam performed an initial pat frisk of the defendant by the driver's side of the car and found no weapons. At that point, the safety exigency justifying a search of the defendant's person ended. See *Amado*, 474 Mass. at 153 (safety exigency justifying search of defendant's person ended as no suspicion that the defendant possessed a weapon remained).

There is no question the officers were frisking the defendant to find the defendant's car key. Officers Fullam and Officer Hegerich told her they needed her car key, and, when she refused to turn it over, they called in female officers and directed them to frisk the defendant for the car key. Frisking the defendant for something other than a weapon or contraband is not justified as a pat frisk for officer safety. "Only after the pat-down gives indication that a weapon is present do the police have the privilege to search further." *Silva*, 366 Mass. at 408. See

Commonwealth v. Blevines, 438 Mass. 604, 608 (2003) (officer justified in retrieving "hard object" felt during pat frisk to dispel concern it was a weapon).

There is a limited line of cases in which police were justified in demanding car keys from a defendant. These relate to instances in which there was a concern about flight or the police were outnumbered by occupants of a vehicle and the request for the car keys was tied directly to officer safety. See *Commonwealth v. Moses*, 408 Mass. 136, 141 (1990) (when officer ordered defendant to turn off ignition and surrender keys, he acted as a reasonably prudent police officer and his actions were similar to and consistent with protective measures sanctioned in *Terry* and *Silva)*.

These cases do not apply to the instant case because, by the time the officers were demanding the defendant's car key, she was secured in handcuffs and in police custody on the sidewalk, away from the car. Mr. Carpenter was also detained in handcuffs on the sidewalk, away from the car. The officers wanted the car key to open the locked glove compartment. There was no concern at that time that either the defendant or Mr. Carpenter could reenter the car before the glove compartment had been opened. In fact, the officers told the defendant that, if she did not provide her car key, they would tow the car and seek a search warrant for the locked glove box.

The scope of the frisks of the defendant for her car key also went beyond the scope of a standard pat frisk. Officer Hegerich told Officer Gonzalez to "go as deep as you can go." The body camera evidence shows that Officer Depina felt beneath the defendant's shirt, over her bra, and inside the waistband of her pants.

"[A] strip search occurs 'when a detainee remains partially clothed, but in circumstances during which a last layer of clothing is moved (and not necessarily removed) in such a manner

whereby an intimate area of the detainee is viewed, exposed, or displayed.'" *Amado*, 474 Mass. at 153 (strip search where officers opened waistband of defendant's underwear, exposed his bare skin, directed flashlight on area, and retrieved object, both viewing and exposing defendant's private area), citing *Morales*, 462 Mass. at 342.

Under the Fourth Amendment and art. 14, "probable cause is the appropriate standard that must be met for a strip or visual body cavity search to be constitutionally permissible." *Id.* at 154, quoting *Commonwealth* v. *Prophete*, 443 Mass. 548, 553 (2005), citing *Commonwealth v. Thomas*, 429 Mass. 403, 407-408 (1999). This is so because strip searches "by their very nature are humiliating, demeaning, and terrifying experiences that, without question, constitute a substantial intrusion on one' personal privacy rights." *Id.* at 154, citing *Morales*, 462 Mass. at 339-340, quoting *Prophete*, supra. "Such searches may precede formal arrest as long as probable cause existed at the time the search was made, independent of the results of the search." *Id.* at 154, citing *Commonwealth v. Clermy*, 421 Mass. 325, 330 (1995).

The frisks of the defendant by Officer Depina came close but were not a strip search. The defendant's inner-most layer of clothing remained in place. The frisks, however, were certainly intrusive and demeaning. They were performed on a public sidewalk with Mr. Carpenter present and multiple male police officers. The defendant's underwear and bare stomach were visible during the final frisk by Officer Depina. There was no attempt made by officers to mitigate public exposure.

Consent to Search

The car key was not recovered, however, because of the pat frisks by Officer Depina. Instead, when faced later with the choice of a police tow of her car or turning over the car key, the defendant elected to turn over the car key. The defendant argues that her decision to provide

the car key to police was not a voluntary act but was, instead, tainted by the duress of the repeated, intrusive, and legally unjustified pat frisks. The Commonwealth argues that the defendant's decision to provide the car key to the police was a knowing and voluntary decision based on her desire not to lose access to her car for the duration of time necessary for the police to obtain a search warrant.

Where the Commonwealth relies on consent to justify the lawfulness of a warrantless search, it must prove that the consent was "freely and voluntarily" given. *Commonwealth* v. *Burgess*, 434 Mass. 307, 310 (2001), quoting *Commonwealth* v. *Krisco Corp.*, 421 Mass. 37, 46 (1995). The Commonwealth bears the burden of showing "consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority." *Commonwealth* v. *Sanna*, 424 Mass. 92, 97 (1997). "The voluntariness of an individual's consent to a warrantless entry is an issue of fact, and must be examined in light of the totality of the circumstances of the case." *Commonwealth* v. *Rogers*, 444 Mass. 234, 238 (2005). A defendant's consent to search need only be free and voluntary, not knowing and intelligent. See *Commonwealth* v. *Colon*, 482 Mass. 162, 185 (2019).

A number of factors may be considered in making the determination whether consent is voluntary under the circumstances. They include but are not limited to: where the defendant is intoxicated or under the influence of drugs; the defendant's lack of a prior arrest record; the defendant's mental or emotional state; the defendant's physical state; whether the defendant was "strong-minded and intelligent"; and whether the defendant was alone when consent was given. See *Commonwealth* v. *Angivoni*, 383 Mass. 30, 34-35 (1981) (consent involuntary where defendant injured, in pain, intoxicated, and incoherent); *Commonwealth* v. *Harmond*, 376 Mass. 557, 562 (1978) (consent not voluntary where defendant in custody, unaware of right to refuse

consent, under influence of alcohol, and of limited intelligence); *Commonwealth* v. *Heath*, 12 Mass. App. Ct. 677, 684-685 (1981) (consent not voluntary where young defendant had no prior arrest record, had been smoking marijuana, had been left alone by her companion, and was under arrest); *Commonwealth* v. *Egan*, 12 Mass. App. Ct. 658, 663 (1981) (consent voluntary where defendant police officer "strong-minded and intelligent").

When consent to search is given close in time to prior unlawful police conduct, that consent is not regarded as freely given. *Commonwealth* v. *Midi*, 46 Mass. App. Ct. 591, 595 (1999). See *Commonwealth* v. *Loughlin*, 385 Mass. 60, 63 (1982) (consent involuntary on heels of illegal detention of driver and passenger and illegal pat frisk of passenger). Here, the defendant had been subjected to unlawful conduct – the repeated pat frisks in search of her car keys – prior to her surrendering her car keys and thereby consenting to a search of the glove compartment. If there is attenuation between the prior illegality and the consent, though, "the consent is cleansed of the effect of the prior illegality and is deemed valid." *Commonwealth* v. *Kipp*, 57 Mass. App. Ct. 629, 633 (2003). Cf. *Commonwealth* v. *Arias*, 81 Mass. App. Ct. 342, 350-351 (2012) (failure to establish dissipation of taint of prior unlawful stop and frisk rendered subsequent consent involuntary). This is the case when it can "rationally be determined that [the consent] did not come about by virtue of the prior illegality, but rather was given for reasons independent of the earlier unlawful act or event." Kipp, 57 Mass. App. Ct. at 633 (consent to search voluntarily given after illegal protective sweep where taint of unlawful entry dissipated by break in nexus and independent reason for granting consent).

While the defendant was pat frisked for the car keys, Officer Femino and K-9 Tyson arrived on scene and performed a search of the vehicle. During that search, K-9 Tyson alerted to the presence of a firearm in the glove compartment. At that time, police determined that, if the

defendant did not surrender the keys, the vehicle would be towed and a search warrant would be obtained to open the glove compartment. The police informed the defendant of this intended course of events. The police further informed the defendant that, if her vehicle were towed without the keys, damage may be caused to the car and that, if the key to the glove compartment were not provided, the glove compartment would ultimately be opened with force after a search warrant was obtained, potentially resulting in damage. The police also pointed out that it would take time to obtain a search warrant and the defendant would be without her vehicle while the search warrant was pending and executed.

The police's statement of their intention to seek a search warrant if consent to search is not given is not conclusive on the question of voluntariness. *Harmond*, 376 Mass. at 561; *Commonwealth* v. *Farnsworth*, 76 Mass. App. Ct. 87, 93 (2010) (mention of possibility of obtaining search warrant in lieu of obtaining consent insufficient to render consent involuntary). However, "a prediction of police lawlessness could be sufficiently overbearing to render a consent involuntary." *Kipp*, 57 Mass. App. Ct. at 635 (threat that search warrant execution could be very disruptive to personal belongings highly improper). An accurate statement of the possible consequences of failing to give consent, however, does not render consent involuntarily given. *Id.* at 636. While the police indicated to the defendant that damage would likely result to her vehicle if she did not provide the keys to the car, such statement was not a threat of unlawful behavior on the part of the police. Instead, it was an accurate statement that, without the keys to the car, towing the vehicle would be more difficult and the glove compartment would need to be forced open.

The totality of the circumstances leads to the conclusion that the defendant did not surrender the car keys as a result of the illegal pat frisks but, rather, to avoid damage to her

vehicle and the inconvenience of waiting for a search warrant to issue and be executed. This conclusion is bolstered by the fact that the defendant did not immediately surrender the keys after the police informed her the car would be towed and a search warrant obtained. Rather, the defendant waited several more minutes before ultimately producing the car keys, demonstrating that she thought about and weighed the potential consequences of surrendering her keys before doing so. Consequently, it cannot be said that her will was overborne; rather, the defendant voluntarily consented to the search of the glove compartment by surrendering her keys to officers after being apprised of the potential consequences of failing to do so. See *Kipp*, 57 Mass. App. Ct. at 633.

ORDER

For the foregoing reasons, the defendant's motion to suppress is **DENIED**.

Sarah Weyland Ellis
Justice of the Superior Court

Dated: January 10, 2024

G.L. c. 94C, § 32A(b)

(b) Any person convicted of violating this section after 1 or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section 31 under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not more than 10 years, by a term of imprisonment in the state prison for not more than 10 years and by a fine of not less than $2,500 and not more than $25,000, or by a fine of not more than $25,000.

G.L. c. 94C, § 32E(b)(2)

(b) Any person who trafficks in a controlled substance defined in clause (4) of paragraph (a), clause (2) of paragraph (c) or in clause (3) of paragraph (c) of Class B of section thirty-one by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of 18 grams or more of a controlled substance as so defined, or a net weight of 18 grams or more of any mixture containing a controlled substance as so defined shall, if the net weight of a controlled substance as so defined, or any mixture thereof is:

(2) Thirty-six grams or more, but less than 100 grams, be punished by a term of imprisonment in the state prison for not less than 31/2 nor more than 20 years. No sentence imposed under this clause shall be for less than a mandatory minimum term of imprisonment of 31/2 years, and a fine of not less than $5,000 nor more than $50,000 may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

G.L. c. 265, § 18B

Whoever, while in the commission of or the attempted commission of an offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than five years; provided, however, that if such firearm, rifle or shotgun is a large capacity weapon, as defined in section 121 of chapter 140, or if such person, while in the commission or attempted commission of such offense, has

in his possession or under his control a machine gun, as defined in said section 121, such person shall be punished by imprisonment in the state prison for not less than ten years. Whoever has committed an offense which may be punished by imprisonment in the state prison and had in his possession or under his control a firearm, rifle or shotgun including, but not limited to, a large capacity weapon or machine gun and who thereafter, while in the commission or the attempted commission of a second or subsequent offense which may be punished by imprisonment in the state prison, has in his possession or under his control a firearm, rifle or shotgun shall, in addition to the penalty for such offense, be punished by imprisonment in the state prison for not less than 20 years; provided, however, that if such firearm, rifle or shotgun is a large capacity semiautomatic weapon or if such person, while in the commission or attempted commission of such offense, has in his possession or under his control a machine gun, such person shall be punished by imprisonment in the state prison for not less than 25 years.

A sentence imposed under this section for a second or subsequent offense shall not be reduced nor suspended, nor shall any person convicted under this section be eligible for probation, parole, furlough or work release or receive any deduction from his sentence for good conduct until he shall have served the minimum term of such additional sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

G.L. c. 269, § 10(a);

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B;

shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for

probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.
The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

G.L. c. 269, § 10(h)

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 21/2 years or in state prison for not more than 5 years.

G.L. c. 269, § 10(m)

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States,

including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

G.L. c. 269, § 10(n)

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

Certificate of Compliance

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Mathew B. Zindroski, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportionally spaced font Eurostile at size 14 and contains 4,978 total non-excluded words as determined by Microsoft Word.

/s/ Mathew B. Zindroski
_____
Mathew B. Zindroski

Certificate of Service

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on July 22, 2025 I have made service of this Brief and Appendix upon the attorney of record by the Electronic Filing System of the Appeals Court on ADA Darcy A. Jordan.

/s/ Mathew B. Zindroski

_____

Mathew B. Zindroski