COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FAR NO.
Appeals Court NO. 2019-P-1069

COMMONWEALTH
Plaintiff – Appellant

v.

EARL B. GARNER
Defendant – Appellee

ON APPEAL FROM A JUDGEMENT of the APPEALS COURT

DEFENDANT APPELLEE'S APPLICATION FOR FURTHER APPELLATE REVIEW

Date: 1/19/2021

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Defendant-Appellee Earl Garner, respectfully requests that this Court grant further appellate review of the Appeals Court's unpublished opinion issued in this case on December 28, 2020, because if left to stand, it will change binding precedent allowing an Appellate Court to make findings of fact that conflict with the lower's courts findings and sharply curtail the recent decision of this Court, Commonwealth v. Torres-Pagan, 484 Mass. 34, 39 (2020), thus jeopardizing the rights of many citizens pursuant to the 4th Amendment right to be free from unreasonable searches and seizures, and permit the Appeals Court to ignore binding precedent. See Commonwealth v. Garner, 99 Mass. App. Ct. 1104 (2020).

II. STATEMENT OF PRIOR PROCEEDINGS

On September 21, 2017, the Bristol County Superior Court held an evidentiary hearing on Mr. Garner's Motion to Suppress Evidence. On March 7, 2018, the Court issued a decision allowing Mr. Garner's motion to suppress. The Commonwealth filed a

Motion to Reconsider the Court's decision on March 21, 2018. On June 11, 2018, the Court issued a decision on the Commonwealth's Motion for Reconsideration and again allowed Mr. Garner's Motion to Suppress.

The Commonwealth then filed its appeal on July 3, 2018, which the single justice (Kafker, J.) allowed and directed to the Appeals Court. Oral argument on the appeal was held December 4, 2020, and the Appeals Court (Meade, Blake & Lemire, JJ.) entered its decision on December 28, 2020, reversing the Bristol County Superior Court order allowing the motion to suppress.

III. STATEMENT OF FACTS

The following is the verbatim recitation of the facts issued by the Court in its original decision on the Motion to Suppress Evidence, dated March 7, 2018:

> On the evening of May 6, 2017, Trooper Paul Dunderdale, Trooper Keith Ledin and Sergeant Frank Walls, all of the State Police, were in a single, unmarked police cruiser in Taunton. They were wearing vests with the words "State Police" on the front and "Gang Unit" on the back. They were also wearing police badges. They were on patrol. There was little traffic on the streets.
> At about 10:30 p.m., they were on Oak Street when they saw a vehicle, driven by the defendant, make an abrupt right turn onto Maple Street. The windows on the vehicle were tinted. The police followed the vehicle

north on Maple Street. The police officers could not see inside the vehicle. Trooper Ledin began to check the status of the vehicle using a laptop computer but did not complete the task. The vehicle began to make a left turn onto Granite Street, which is a short, dead-end street. Part way through the turn, the defendant abruptly turned to the right. The police activated the blue lights of the cruiser. The vehicle stopped in the middle of Granite Street.

The three police officers approached the vehicle. Trooper Dunderdale approached the driver's side while Trooper Ledin approached the passenger side. As they approached, the defendant said, "Dunderdale. Dunderdale".

This was the fifth time that Trooper Dunderdale made a motor vehicle stop of the defendant. The first stop was in 2011. On that occasion, the defendant was charged with possession of a firearm, subsequent offense. He was convicted and sentenced to State prison. Trooper Dunderdale again stopped the defendant about a week after the defendant was released from prison. That stop was in approximately June of 2014 in Brockton. On that occasion, the defendant at first became angry and accused the trooper of being "out to get" him. Trooper Dunderdale charged the defendant with operating with a suspended license. On the way to the police station, the defendant changed his attitude and became friendly with the trooper.

Trooper Dunderdale's third and fourth stops of the defendant occurred in Brockton. During the third stop Trooper Dunderdale determined that the defendant was operating with a suspended license but did not charge him with that offense. Trooper Dunderdale also brought no charges against the defendant as a result of the fourth stop. During at least one of these stops, Trooper Dunderdale asked the defendant about

criminal activity taking place in Brockton and asked the defendant to let him know if he had any such information…"[1] During both the third and fourth motor vehicle stops, the defendant was friendly toward Trooper Dunderdale.

When Trooper Dunderdale approached the defendant during the fifth stop, he told the defendant he had stopped him because the windows of the vehicle were tinted and the defendant made an abrupt turn. The defendant appeared nervous. One of his legs was shaking. He was using his cell phone.

Trooper Dunderdale asked the defendant whether his license was valid. The defendant said that it was and added that he had straightened out his life. The defendant repeated, "Come on. Come on, Dunderdale." Trooper Dunderdale asked what the defendant was doing. The defendant said that he was in Taunton to buy marijuana from his friend. He explained that although he had been to his friend's house before, he got lost. The defendant continued to say, "Come on Dunderdale." The defendant did not make eye contact with the trooper.

Trooper Dunderdale asked the defendant if he "messed" with firearms anymore. The defendant replied, "No. I changed my life. Take a look if you want." Trooper Dunderdale asked, "You don't mind getting out?" The defendant said, "Nope." Trooper Dunderdale said, "Okay, get out." The defendant immediately exited his vehicle.

After he exited the vehicle, the defendant took a few steps backward[2] away from the

[1] It should be noted that this fact did not come from Trooper Dunderdale, it came from a witness presented by the defendant regarding one of the stops.

[2] "The defendant could not have taken more than two or three steps, at most, given the fact that he stopped his vehicle in the middle of Granite Street, without pulling over, and that Granite Street is narrow, as shown by the photograph introduced as Exhibit 3. No evidence was presented that the defendant left Granite Street."

> vehicle. Trooper Dunderdale said, "Whoa, Earl, come back to the car." Both Trooper Ledin and Sergeant Walls also instructed the defendant to move closer to the vehicle. The defendant yelled for someone to come out of the nearby house but no one came out. The defendant did not run. He did not reach for anything.
>
> Trooper Ledin took hold of the defendant and pat-frisked him. Trooper Ledin removed a handgun from the defendant's waistband and yelled, "Gun!" The defendant said that he had the gun for safety because his brother was charged with a homicide.

Addendum p. 25-31.

On June 11, 2018, the Bristol County Superior Court issued a decision on the Commonwealth's Motion for Reconsideration and made further findings. In particular the Court wrote: "The court credits the testimony of the troopers, except where they speculate about the defendant's thoughts" and further "The defendant consented to a search of his vehicle but not to the pat-frisk":

> The defendant was alone, surrounded by three, armed State troopers. The troopers were all "[w]ithin a few feet" of him." Motion Hearing, Tr. 50. Trooper Ledin positioned himself behind the defendant. Motion Hearing, Tr. 60. The defendant glanced backward but that was because Trooper Ledin said something to him to the effect of "Why don't you come over here towards the rear of the vehicle?" *Id*. The defendant did not run; nor did he reach for his waistband. Motion Hearing, Tr. 48 & 72.

> He called for someone to come out of a nearby house but no one came out.
>
> Both Troopers Dunderdale and Ledin testified that they have been trained to recognize signs that a suspect is in "flight or fight mode" and that they concluded that the defendant was thinking of fleeing from them. Motion Hearing, Tr. 29 & 68-69. This testimony adds nothing to the analysis since: (1) they thought the defendant might take "flight," not "fight;" and (2) they did not testify to any factual basis for that conclusion other than what has been described above.

And Lastly:

> The defendant had a "good rapport" with Trooper Dunderdale. He did everything the police asked, answered their questions and offered to allow a search of his vehicle. He made no furtive gestures. He was not confrontational or belligerent. He made no threats. He was alone and surrounded by three armed State troopers. These facts do not demonstrate that a police officer would "reasonably suspect that the person stopped is armed and dangerous.

Addendum p. 32-39.

IV. POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

A. The Appeals Court Decision Raises Significant Issues of Public Concern

When this Court decided Commonwealth v. Torres-Pagan, 484 Mass. 34 (2020), it sought to rectify confusion between previously conflicting language

regarding the necessary standard for a pat frisk as they related to exit orders. "Our articulation of the patfrisk standard has not always been clear. On occasion we have not been as precise with our language as we could have been, specifically when discussing the patfrisk standard as it relates to the standard for exit orders." Torres-Pagan, at 37. This was particularly important for the Court to clarify, because, according to the opinion of this Court, the standard required to perform a patfrisk was "conflated with the standard required for issuing an exit order." Id. at 38.

The Appeals Court's decision in this case, if permitted to stand, would allow an appellate court to issue findings of fact that contradict the lower court's opinion in order to reach a different conclusion. This case touches upon a significant public interest issue where here, Mr. Garner, who was a motorist on a public way - who notably was stopped by this same officer five times - cooperated fully with the officers.[3]

[3] There exists a strong public interest issue in this case as Mr. Garner, an African-American, who was stopped by the same officer five times and here was subjected to a search based in part on his stated nervousness.

When dealing with searches and seizures, the public's interest inherently implicated, in particular a "patfrisk," is a "carefully limited search of the outer clothing of [a] person[ ] ... to discover weapons" for safety purposes. Terry v. Ohio, 392 U.S. 1, 30(1968). It is a "serious intrusion on the sanctity of the person [that] is not to be undertaken lightly." Commonwealth v. Almeida, 373 Mass. 266, 270-271 (1977), S.C., 381 Mass. 420 (1980), citing Terry, supra at 17.

1. The Appeals Court, in reversing the lower court's opinion, found facts that plainly contradict the lower court's findings of fact.

After a hearing before the Bristol Superior Court, the motion judge issued factual findings that directly contradict those facts that were critical to the Appeals Court decision.

First, the lower court made a clear credibility determination(s) in the first opinion stating "[b]ased on the credible evidence and inferences drawn from such evidence, the court finds the following facts" and in the second opinion "[T]he court credits the

testimony of the troopers, except where they speculate about the defendant's thoughts." [4] Addendum p. 34

With respect to the "fight or flight" testimony that "caused alarm" by the officers the lower court found:

> Both Troopers Dunderdale and Ledin testified that they have been trained to recognize signs that a suspect is in "flight or fight mode" and that they concluded that the defendant was thinking of fleeing from them. Motion Hearing, Tr. 29 & 68-69. This testimony adds nothing to the analysis since: (1) they thought the defendant might take "flight," not "fight;" and (2) they did not testify to any factual basis for that conclusion other than what has, been described above

Addendum at page 38.

In addition, the lower court found that when Mr. Garner stepped out of the vehicle and began to walk backwards: "Given the location of his vehicle, the defendant could not have taken more than two or three steps away from the vehicle" and then in a footnote:

> The vehicle was stopped in the middle of Granite Street, at about the location of the arrow and orange barrel shown in Exhibit 3. Motion Hearing, Tr. 16-17 & 59. The defendant moved backward toward the houses depicted on the left side of the street

[4] These phrases have meaning as this Court has stated that similar language leaves "no room for supplementation." of facts by the appellate courts. ("the judge's decision included a detailed statement of facts, prefaced by a statement that the facts stated were based on the only testimony that the judge found credible. Such a statement leaves no room for supplementation of the judge's findings of fact. Commonwealth v. Jones-Pannell, 472 Mass. 429, 438 (2015)

> in Exhibit 3. Motion Hearing, Tr. 28. Given the narrowness of the area between the vehicle and the edge of the street, the defendant could not have moved very far.

Addendum p. 37

Despite these clear directives and findings, the Appeals Court made the following additional findings that were not found by the lower court and directly contradict the lower court's findings.

First, the Appeals Court wrote that when Mr. Garner invited the officers to search his vehicle "Dunderdale considered this offer insincere and described the defendant as nervous, 'not much eye contact. And it was just sudden.'" Garner, 99 Mass. App. Ct. 1104 (2020). Further, on in the opinion the Appeals Court again discusses the "insincere" way Mr. Garner invited the police into his car stating: "[T]his is evidence of the defendant's effort to redirect the trooper's attention to the car and away from him, as the defendant had a loaded firearm in his waistband". Id. This claim is not in either of the lower court's findings of fact.

Moreover, the statement is in direct conflict with the lower court's finding of facts where the court

wrote specifically that it did not credit the officer's "speculation" about what Mr. Garner was thinking.

In addition, the Appeals Court assigned a much greater credit to nervousness than the lower court, who in listening to the witnesses and viewing the evidence (photographs of the street) stated with respect to Mr. Garner's nervousness that his "shaking leg, possibly indicating nervousness, did not indicate that the troopers were in danger." Further that "nervousness in dealing with police" is "common" and "does not indicate a threat." Addendum p. 38.

But the Appeals Court opinion does more than just differ on how the lower court assigned weight to a particular fact, it added facts not mentioned by any person and contradicts many of the facts found below. For instance, the Appeals Court notes that Mr. Garner, having been stopped by the same officer five times, was "cooperative" on previous occasions, "[B]y contrast, on this day, was completely out of character." Garner, supra. This is flatly contradicted by the lower court's opinion where the lower court writes:

> He did everything the police asked, answered their questions and offered to allow a search of his vehicle. He made no furtive gestures. He was not confrontational or belligerent. He made no threats. He was alone and surrounded by three-armed State troopers. These facts do not demonstrate that a police officer would reasonably suspect that the person stopped is armed and dangerous.

Addendum p. 38.

Further the Appeals Court, wrote that Mr. Garner had "bladed" his body from the officers in an effort to shield the officers from his waist. Garner, supra. This contradicts the lower court findings of facts on how Mr. Garner exited the car where the court stated: "The defendant moved backward toward the houses depicted on the left side of the street in Exhibit 3. Motion Hearing, Tr. 28. Given the narrowness of the area between the vehicle and the edge of the street, the defendant could not have moved very far." Addendum p. 27.

As far as Mr. Garner's body positioning upon exiting the vehicle, the lower court made findings of fact that were relative to a photograph that was admitted of the roadway where Mr. Garner was standing:

> At first, the defendant had his back toward Trooper Dunderdale but he then took a few steps backward, away from the Trooper, so that he must have been facing the Trooper. Given the location of his vehicle, the

defendant could not have taken more than two or three steps away from the vehicle. Addendum at page 27.

The lower court made no mention of "blading" or shielding himself. According to the lower court there were officers on all sides of Mr. Garner as the court noted he was "surrounded" and the Troopers were within a "few feet of him."

In addition, the Appeals Court reached conclusions of fact regarding the call Mr. Garner made stating "the defendant called out to an unknown person in an area in which he said he was trying to buy marijuana. This suggested the possibility of others in the area who could be helpful to the defendant or who might pose a threat to the troopers." Garner, supra. The officers never testified as to a concern about this home, and in fact claimed that the house Mr. Garner was directing his voice toward appeared abandoned.

In support of these additional, but unsupported or contradictory factual findings, the Appeals Court relied on this Court's decision in Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007)("Appellate courts may supplement a judge's finding[s] of fact[] . . . where the judge explicitly or implicitly credited the witness's testimony").

However, the language as quoted above by the Appeals Court leaves out an essential portion, the full quote being:

> Appellate courts may supplement a judge's finding of facts *if the evidence is uncontroverted and undisputed* and where the judge explicitly or implicitly credited the witness's testimony. Id. at 337 (Emphasis added)

Ironically, in Isaiah, the Court remanded the case for further findings of fact to avoid what the Appeals Court did here, noting

> [B]ecause we conclude that the judge's factual findings are inadequate and would require us to add facts in an attempt to fill in gaps in the findings, we remand the case to the judge for further factual findings, reconsideration of legal conclusions in light of the further findings, and other proceedings consistent with this opinion.

Id. at 335

Thus, the Appeals Court here has cited a case for a proposition that is exactly the opposite of what occurred in the case it cited.

This Court has been clear that appellate "fact finding" is not appropriate in finding facts that are inconsistent with or at odds with the lower court's findings of fact. Commonwealth v. Butler, 423 Mass. 517, 526 n. 10 (1996)(appellate court considers

uncontroverted testimony that "in no way contradict[s] the motion judge's findings [but] merely fill[s] out the narrative").

The Appeals Court does more here than just "fill in a narrative" as the opinion adds facts that contradict the lower court's opinion in order to justify reversing the lower court. The finding of facts in this case were made based on the first-hand observations of the 3 witnesses who testified, and exhibits presented. Thus, the lower court judge in determining these facts was in the best position to weigh the credibility of the witnesses. ("'[t]he determination of the weight and credibility of the testimony is the function and responsibility of the [motion] judge who saw the witnesses, and not this court.'" Commonwealth v. Yesilciman, 406 Mass. 736, 743, (1990), quoting Commonwealth v. Moon, 380 Mass. 751, 756, (1980); Commonwealth v. Isaiah I., 448 Mass. 334, 337(2007)).

The Appeals Court has done here what this Court has specifically refused to do upon request of the Commonwealth, "to rely on testimony that was neither explicitly nor implicitly credited by the motion

judge, otherwise put, that we in essence make additional findings, and reach a different result, based on our own view of the evidence" Commonwealth v. Jones-Pannell, 472 Mass. 429, 432 (2015).

But even if the Appellate Court can find facts that support an alternate conclusion, it may not do so if those supplemental facts "detract from the judge's ultimate findings." Commonwealth v. Jessup, 471 Mass. 121, 127–128 (2015).

We submit that the Appeals Court decision commits this error of law and should be corrected by this court.

B. The Appeals Court Decision Raises Significant Issues Affecting the Interests of Justice

The efficient administration of justice requires that binding precedent be upheld by the Appeals Court. Further, adhering to precedent is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Shiel v. Rowell, 480 Mass.

106, 108 (2018) quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991).

1. The misapplication of the Commonwealth v. Torres-Pagan standard of review jeopardizes the rule of law effecting the proper administration of justice.

In Commonwealth v. Sweeting-Bailey, 98 Mass. App. Ct. 862 (2020)[5] the Appeals Court decided by a split panel that a defendant who was seated in a vehicle had somehow caused concern to officers that he was armed and dangerous thus justifying a lower court order denying Mr. Sweeting-Bailey's motion to suppress evidence.

Similar to Mr. Garner's case the Appeals Court relied on the notion that the driver, a man named Paris, who was searched with nothing to show, was acting differently here than in previous encounters with the police. ("In all the previous police encounters with Paris, he had been cooperative. Indeed, in a previous motor vehicle stop that had led to Paris's arrest for possession of a firearm found in the vehicle, Paris had gotten out of the car and started to walk away, but was cooperative when ordered

[5]Mr. Sweeting-Bailey has an application for Further Appellate Review pending before this court. FAR-28003.

back to the car. On this day, though, Paris got out of the vehicle, was combative, would not obey orders to return to the vehicle, behaved in a frenetic manner, and would not calm down." Commonwealth v. Sweeting-Bailey, 98 Mass. App. Ct. 862 (2020)

Also similar to Mr. Garner's case, the actions of Mr. Paris was considered a "ruse" in order to distract the police from something in the vehicle. Id.[6]

These two cases if permitted to stand allow the Appeals Court to function independent of the Supreme Judicial Court, allowing the Appeals Court to ignore the Supreme Judicial Court where it has clarified the law related to constitutional interpretation of the Fourth Amendment, in violation of long standing principles See Commonwealth v. Vasquez, 456 Mass. 350, 356 (2010) ("this court is the highest appellate authority in the Commonwealth, and our decisions on all questions of law are conclusive on all Massachusetts trial courts and the Appeals Court").

[6] The facts in this case are dissimilar in many respects in favor of Mr. Garner; Mr. Garner was never affiliated with any gang membership, he never acted erratically at any point in the conversation with the police and he was alone surrounded by 3 armed State Police Officers.

If allowed to stand the case against Mr. Garner gravitates facts, ignores lower court findings in what appears to be an end around this Court's clear directive in Torres-Pagan, 484 Mass. 34, 39 (2020), by watering down the standard to justify a pat frisk. ("The only legitimate reason for an officer to subject a suspect to a patfrisk is to determine whether he or she has concealed weapons on his or her person". See Commonwealth v. Silva, 366 Mass. 402, 407-408 (1974), quoting Terry, supra at 29, 88 S.Ct. 1868. "We therefore do not allow such an intrusion absent reasonable suspicion that the suspect is dangerous and has a weapon. Without a basis for such suspicion, there is no justification for the pat-frisk." Terry, supra at 27, 88 S.Ct. 1868.

If allowed to stand this decision serves as a greenlight for the Appeals Court to ignore the idea that an African-American man being pulled over at night by police officers might be nervous simply because he is black, but also possibly because this is the fifth time he has been pulled over by this same officer.

Here, as in Torres-Pagan, "the defendant's actions did not indicate that he was armed and dangerous. He made no furtive movements; he already had gotten out of his vehicle and could not use it as a weapon; his body was fully visible to the officers; he was fully compliant with all commands issued by the officers; and he was outnumbered." Commonwealth v. Torres-Pagan, 484 Mass. 34, 41 (2020).

V. CONCLUSION

Further Appellate Review is requested because the decision below is unconstitutional and irreconcilable with the decisions of this Court, supports the unreasonable search and seizure of citizens without reasonable suspicion, and undermines the interest of justice.

_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) and 27.1(b)of the Massachusetts Rules of Appellate Procedure

I, Brian A. Kelley, hereby certify that the foregoing application for further appellate review complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(k) and 27.1(b) by using monospaced 12 point font and that the section setting forth why appellate review is appropriate is no greater than 10 pages.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on 1/18/21, I have made service of this application for further appellate review upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System on:

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss. Docket No. 1773CR00246

COMMONWEALTH

v.

EARL GARNER

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

The defendant, Earl Garner, has been indicted for: (1) unlawful possession of a firearm, G.L. c. 269, § 10 (a), subsequent offense, G.L. c. 269, § 10 (d); and (2) unlawful possession of a loaded firearm, G.L. c. 269, § 10 (n). The crimes are alleged to have been committed on May 4, 2017 in Taunton.

The defendant has moved to suppress a firearm the police seized following a stop of the motor vehicle the defendant was operating on the night of the alleged offense. The Commonwealth has filed a written opposition to the motion.

FACTS

The court held an evidentiary hearing on the defendant's motion. Three witnesses testified: Troopers Paul Dunderdale and Keith Ledin of the Massachusetts State Police and Solange Goncalves, the defendant's fiancée. Based on the credible evidence and inferences drawn from such evidence, the court finds the following facts.

On the evening of May 6, 2017, Trooper Paul Dunderdale, Trooper Keith Ledin and Sergeant Frank Walls, all of the State Police, were in a single, unmarked police cruiser in Taunton. They were wearing vests with the words, "State Police," on the front and "Gang Unit"

on the back. They were also wearing police badges. They were on patrol. There was little traffic on the streets.

At about 10:30 p.m., they were on Oak Street when they saw a vehicle, driven by the defendant, make an abrupt right turn onto Maple Street. The windows on the vehicle were tinted. The police followed the vehicle north on Maple Street. The police officers could not see inside the vehicle. Trooper Ledin began to check the status of the vehicle using a laptop computer but did not complete the task. The vehicle began to make a left turn onto Granite Street, which is a short, dead-end street. Part way through the turn, the defendant abruptly turned to the right. The police activated the blue lights of the cruiser. The vehicle stopped in the middle of Granite Street.

The three police officers approached the vehicle. Trooper Dunderdale approached the driver's side while Trooper Ledin approached the passenger side. As they approached, the defendant said, "Dunderdale. Dunderdale."

This was the fifth time that Trooper Dunderdale made a motor vehicle stop of the defendant. The first stop was in 2011. On that occasion, the defendant was charged with possession of a firearm, subsequent offense. He was convicted and sentenced to State prison. Trooper Dunderdale again stopped the defendant about a week after the defendant was released from prison. That stop was in approximately June of 2014 in Brockton. On that occasion, the defendant at first became angry and accused the trooper of being "out to get" him. Trooper Dunderdale charged the defendant with operating with a suspended license. On the way to the police station, the defendant changed his attitude and became friendly with the trooper.

Trooper Dunderdale's third and fourth stops of the defendant occurred in Brockton. During the third stop Trooper Dunderdale determined that the defendant was operating with a

suspended license but did not charge him with that offense. Trooper Dunderdale also brought no charges against the defendant as a result of the fourth stop. During at least one of these stops, Trooper Dunderdale asked the defendant about criminal activity taking place in Brockton and asked the defendant to let him know if he had any such information. During both the third and fourth motor vehicle stops, the defendant was friendly toward Trooper Dunderdale.

When Trooper Dunderdale approached the defendant during the fifth stop, he told the defendant he had stopped him because the windows of the vehicle were tinted and the defendant made an abrupt turn. The defendant appeared nervous. One of his legs was shaking. He was using his cell phone.

Trooper Dunderdale asked the defendant whether his license was valid. The defendant said that it was and added that he had straightened out his life. The defendant repeated, "Come on. Come on, Dunderdale." Trooper Dunderdale asked what the defendant was doing. The defendant said that he was in Taunton to buy marijuana from his friend. He explained that although he had been to his friend's house before, he got lost. The defendant continued to say, "Come on, Dunderdale." The defendant did not make eye contact with the trooper.

Trooper Dunderdale asked the defendant if he "messed" with firearms anymore. The defendant replied, "No. I changed my life. Take a look if you want." Trooper Dunderdale asked, "You don't mind getting out?" The defendant said, "Nope." Trooper Dunderdale said, "Okay, get out." The defendant immediately exited his vehicle.

After he exited the vehicle, the defendant took a few steps backward,[1] away from the vehicle. Trooper Dunderdale said, "Whoa, Earl, come back to the car." Both Trooper Ledin and Sergeant Walls also instructed the defendant to move closer to the vehicle. The defendant yelled

[1] The defendant could not have taken more than two or three steps, at most, given the fact that he stopped his vehicle in the middle of Granite Street, without pulling over, and that Granite Street is narrow, as shown by the photograph introduced as Exhibit 3. No evidence was presented that the defendant left Granite Street.

for someone to come out of the nearby house but no one came out. The defendant did not run. He did not reach for anything.

Trooper Ledin took hold of the defendant and pat-frisked him. Trooper Ledin removed a handgun from the defendant's waistband and yelled, "Gun!" The defendant said that he had the gun for safety because his brother was charged with a homicide.

The police tested the tint on the windows of the defendant's vehicle with a meter carried in the police cruiser. No evidence was presented that the windows were less transparent than allowed under Massachusetts law.

ANALYSIS

"A police stop of a moving automobile constitutes a seizure, and therefore, any such stop, whatever its purpose, must comply with the Fourth Amendment to the United States Constitution and with art. 14 of the Massachusetts Declaration of Rights." *Commonwealth v. Rodriguez*, 472 Mass. 767, 773 (2015). "The Commonwealth bears the burden of demonstrating that the police officers acted lawfully in pursuing and seizing the defendant." *Commonwealth v. Williams*, 422 Mass. 111, 115-116 (1996) (*Terry* stop).

"Where the police have observed a traffic violation, they are warranted in stopping a vehicle." *Commonwealth* v. *Santana*, 420 Mass. 205, 207 (1995), quoting *Commonwealth* v. *Bacon*, 381 Mass. 642, 644 (1980). *Commonwealth v. Cruz*, 459 Mass. 459, 465 (2011) (police may stop a motor vehicle where they observe a civil motor vehicle infraction.)

As Trooper Dunderdale told the defendant, the police stopped the defendant for two reasons: (1) the windows of his vehicle were tinted; and (2) the defendant made an abrupt turn. Neither of these reasons justified the stop.

Tinted Windows. It is not unlawful to operate a motor vehicle with tinted windows on a public way unless the transparency of the windows is less than the standard set under G.L. c. 90, § 9D. "[T]he standard to be used in determining the legality of a stop based on a suspected violation of 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).

In *Baez,* the Appeals Court held that the stop of a motor vehicle for excessively tinted windows was justified in these circumstances:

> Here, the trooper testified that he was familiar with the state law concerning tinted windows, that he was in possession of a device to measure levels of transparency and that, while on highway patrol, his attention was drawn to the defendant's car because its side windows appeared to the trooper to be (and, as later measured, were) darker than the legal limit. He drove his cruiser next to the defendant's car in order to get a better look at the windows. He concluded, based on his experience, that the window tint exceeded the permissible limit and ordered the car over. In such circumstances, the stop was reasonable and warranted.
>
> *Id.*

In this case, by contrast, Trooper Dunderdale testified that he could not see into the vehicle as he drove behind it at 10:30 at night. There was no evidence that the interior of a vehicle with lawful tinting would be visible to another motorist at night. There was no evidence that Trooper Dunderdale had any training or experience in distinguishing between windows tinted to the extent permitted by law from those that exceed the lawful limit. There was no evidence, as there was in *Baez,* that Trooper Dunderdale drove close to the vehicle to inspect the transparency of the windows. Finally, in contrast to the facts in *Baez,* there was no evidence that when police used a light meter on the windows the meter showed a violation.[2]

[2] The reasonableness of the stop is measured by what the officers knew at the time of the stop, not by what they learned later. Nevertheless, the result of the light meter test sheds light on what they knew at the time of the stop.

Abrupt Turn. It is not unlawful to make an "abrupt" turn. It is, of course, unlawful to operate a motor vehicle negligently so that the lives and safety of the public might be endangered. G.L. c. 90, § 24.

"Negligence in this context is determined by the same standard that is employed in tort law." *Commonwealth v. Duffy*, 62 Mass. App. Ct. 921, 922 n. 2 (2004). "Negligence ... in its ordinary sense, is the failure of a responsible person, either by omission or by action, to exercise that degree of care, vigilance and forethought,which ... the person of ordinary caution and prudence ought to exercise under the particular circumstances." *Beaver v. Costin*, 352 Mass. 624, 626 (1967), quoting *Altman v. Aronson*, 231 Mass. 588, 591 (1919).

The testimony of Trooper Dunderdale at the motion hearing was that the defendant made an abrupt turn onto Maple Street and later, after beginning to turn left onto Granite Street, abruptly turned to the right. An abrupt turn, by itself, does not amount to negligence. *Bartlett v. Town Taxi, Inc.*, 263 Mass. 215, 217 (1928). There was no evidence as to the defendant's speed or other circumstances that might show a lack of reasonable care that might endanger the public. The only other fact in evidence, relevant to the issue of negligence, was that traffic was light.

"A police officer may stop a vehicle in order to conduct a threshold inquiry if he has a reasonable suspicion that the occupants have committed, are committing, or are about to commit a crime. His suspicion must be based on specific, articulable facts and reasonable inferences drawn therefrom." *Commonwealth v. Wren*, 391 Mass. 705, 707 (1984). *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). There are no "specific, articulable facts" or "reasonable inferences drawn therefrom" in this case supporting a finding that Trooper Dunderdale had a "reasonable suspicion" that the defendant was committing the crime of operating negligently so that the lives and safety of the public might be endangered. G.L. c. 90, § 24.

Since the troopers did not observe a motor vehicle violation and did not have reasonable suspicion that the defendant was involved in any criminal activity, the stop was unjustified and all evidence obtained from the motor vehicle stop must be suppressed.

ORDER

The defendant's motion to suppress evidence (Paper # 3) is **ALLOWED.** All evidence obtained as a result of the stop, including the firearm seized from the defendant and the defendant's statement concerning the firearm, are **ORDERED SUPPRESSED FROM EVIDENCE.**

March 7, 2018

Thomas F. McGuire, Jr.
Justice of the Superior Court

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#23

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss.

Docket No. 1773CR00246

COMMONWEALTH

v.

EARL GARNER

BRISTOL, SS SUPERIOR COURT
FILED
JUN 11 2018
MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

ORDER ON THE COMMONWEALTH'S MOTION FOR RECONSIDERATION OF ORDER OF SUPPRESSION

The court previously allowed the defendant's motion to suppress evidence obtained as a result of a police stop of the defendant's motor vehicle on May 4, 2017 in Taunton. The order was based on the court's conclusion that the police lacked reasonable suspicion to justify the stop. The Commonwealth has moved for reconsideration of that decision and has supplied the court with a transcript of the evidence at the motion hearing.

RECONSIDERATION OF PRIOR DECISION

The Commonwealth contends that the State police were justified in stopping the defendant because troopers observed that the windows of the defendant's vehicle were tinted beyond the limits permitted under G.L. c. 90, § 9D.

As the court noted in the prior decision, "the 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). In *Baez*, the Appeals Court held that reasonable suspicion existed based on the following facts:

> Here, the trooper testified that he was familiar with the state law concerning tinted windows, that he was in possession of a device to measure levels of transparency and that, while on highway patrol, his attention was drawn to the defendant's car because its side windows appeared to the trooper to be (and, as later measured, were) darker than the legal limit. He drove his cruiser next to the defendant's car in order to get a better look at the windows. He concluded, based on his experience, that the window tint exceeded the permissible limit and ordered the car over. In such circumstances, the stop was reasonable and warranted.
>
> *Id.*

The court distinguished the present case from *Baez* based on the lack of evidence (1) that Trooper Dunderdale had any training or experience in distinguishing between lawful and unlawful window tint; (2) that Trooper Dunderdale drove close to the vehicle to observe the level of tint; and (3) that when police used a light meter on the windows the meter showed a violation.

Although the prosecutor asked Trooper Dunderdale whether he had training and experience in identifying unlawful tinting, Trooper Dunderdale did not describe any training or experience. He merely answered that he had stopped vehicles for that reason in the past:

> Q. And have you received some training, and do you have experience in evaluating window tint, and do you actually have the capability of measuring window tint?
>
> A. Yes. I have a tint meter with me in my cruiser, and I mean, I've stopped numerous vehicles throughout my career which I believe to have excessive window tint.
>
> Motion Hearing, Tr. 14.

The transcript also confirms that Trooper Dunderdale did not drive next to the defendant's car to observe the tinting, as the officer did in *Baez*:

> Q. And about how close behind the vehicle do you get to it?
>
> A. We ended up getting probably a couple car lengths.
>
> Motion Hearing, Tr. 14.

However, the transcript also reveals that the court erred in recalling that there was no evidence that testing of the defendant's windows demonstrated a violation. Although that question was not asked on direct examination of the Trooper, on cross-examination, the defendant elicited the following testimony by Trooper Dunderdale:

> Q. And the other thing that you did after that was you tested the car for the tint?
>
> A. Yes, I did.
>
> Q. And the results of that were – well, strike that. How do you do that exactly?
>
> A. So we have a tint meter. It's a battery operated device. It's a handheld device. You slide down the window, and it generates the percentage of the darkness of the transparency.
>
> Q. And what were the results of the – do you recall what the results were of that test?
>
> A. I believe his front windows were 30 % and the back windows were 15.
>
> Q. Okay. And I think you testified on direct that it's 35 % that causes the violation; is that correct?
>
> A. 35 or under. 35 is the legal limit.
>
> Q. Is the legal limit?
>
> A. You can have 35 % window transparency.
>
> Motion Hearing, Tr. 55-56.

The court credits the above-quoted testimony of Trooper Dunderdale and therefore finds that the tinting of the side windows of the defendant's vehicle was in violation of the allowable tint under G.L. c. 90, § 9D. [1] In addition, the tinting of the side windows next to the rear passenger seat of the vehicle was far below the lawful limit of transparency.

[1] The court credits the testimony of the troopers, except where they speculate about the defendant's thoughts.

These facts support the conclusion that, under the conditions that night, the troopers could distinguish lawful from unlawful tint. Since the police had a reasonable suspicion that the defendant was operating a vehicle with excessive window tint, in violation of G.L. c. 90, § 9D, the stop of the defendant's vehicle was justified. *Commonwealth v. Cruz*, 459 Mass. 459, 465 (2011) (police may stop a motor vehicle where they observe a civil motor vehicle infraction.)

FURTHER ANALYSIS

Since the motor vehicle stop was lawful, the court must address the lawfulness of the police actions following the stop. These consist of: (1) the exit order; and (2) the pat-frisk of the defendant.

Exit Order. After the defendant stopped his vehicle and the three troopers approached it, Trooper Dunderdale, who knew the defendant, engaged him in conversation. Among other things, Trooper Dunderdale asked the defendant whether he "mess[ed] with firearms anymore?" Motion Hearing, Tr. 27. The defendant said, "no" and added, "Take a look if you want." Motion Hearing, Tr. 28. Trooper Dunderdale testified credibly:

> Q. And what happened next?
>
> A. So at that time I was taken back by the statement, and I said to him, "You don't mind getting out of the car? And he says, "Nope." So I said, "Okay. Hop out." And he exited the vehicle on his own without hesitation.
>
> Motion Hearing, Tr. 28.

Based on this testimony, the court finds that the police did not order the defendant to exit his vehicle. The defendant voluntarily offered to exit and allow the police to search the vehicle.

Pat-Frisk. After the defendant exited the vehicle, he took a few steps backward. Trooper Ledin grabbed him, pat-frisked him and seized a firearm from his waistband. Motion Hearing, Tr. 61-62.

The defendant consented to a search of his vehicle but not to the pat-frisk. The Commonwealth therefore bears the burden to prove facts that justify the pat-frisk. *Commonwealth v. DePeiza*, 449 Mass. 367, 369 (2007) ("It is the Commonwealth's burden to demonstrate that the police officers' stop and frisk of the defendant was within constitutional limits.")

Under *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) there is "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. ... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). *Commonwealth v. Silva*, 366 Mass. 402, 406 (1974).

In short, a pat-frisk is justified where "a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger." *Commonwealth v. Torres*, 433 Mass. 669, 675-676 (2001), (internal quotations omitted), quoting *Commonwealth v. Vazquez*, 426 Mass. 99, 102–103 (1997) and *Commonwealth v. Santana*, 420 Mass. 205, 212–213 (1995).

The police stopped the defendant for a civil motor vehicle infraction. The defendant obeyed the signal to stop. When the three troopers approached the defendant's vehicle, the defendant and Trooper Dunderdale recognized one another. This was the fifth time Trooper

Dunderdale had stopped the defendant over the course of several years. Trooper Dunderdale knew that the defendant had been twice convicted of unlawful possession of a firearm. Motion Hearing, Tr. 25. Nevertheless, Trooper Dunderdale and the defendant had "a really good rapport" that continued over the years. Motion Hearing, Tr. 23, 24 & 38.

Trooper Dunderdale asked the defendant a series of questions. The defendant's right hand was on his leg, which was shaking, and he had his phone in his left hand. Motion Hearing, Tr. 25. Trooper Dunderdale asked if the defendant's license was "good" and the defendant said that it was. *Id.* The defendant kept saying, "Come on, Dunderdale." Motion Hearing, Tr. 26. Trooper Dunderdale asked him what he was doing in Taunton and the defendant admitted he was going to buy marijuana from a friend but got "a little lost." Motion Hearing, Tr. 27. Trooper Dunderdale asked the defendant who he was trying to call and the defendant said it was his friend. Motion Hearing, Tr. 48. Trooper Dunderdale asked if the defendant "mess[ed] with firearms anymore?" The defendant said "no" and volunteered, "Take a look if you want." Motion Hearing, Tr. 28.

Trooper Dunderdale said, "Okay. Hop out." The defendant complied. At first, the defendant had his back toward Trooper Dunderdale but he then took a few steps backward, away from the Trooper, so that he must have been facing the Trooper. *Id.* Given the location of his vehicle, the defendant could not have taken more than two or three steps away from the vehicle. [2]

The defendant was alone, surrounded by three, armed State troopers. The troopers were all "[w]ithin a few feet" of him." Motion Hearing, Tr. 50. Trooper Ledin positioned himself behind the defendant. Motion Hearing, Tr. 60. The defendant glanced backward but that was

[2] The vehicle was stopped in the middle of Granite Street, at about the location of the arrow and orange barrel shown in Exhibit 3. Motion Hearing, Tr. 16-17 & 59. The defendant moved backward toward the houses depicted on the left side of the street in Exhibit 3. Motion Hearing, Tr. 28. Given the narrowness of the area between the vehicle and the edge of the street, the defendant could not have moved very far.

because Trooper Ledin said something to him to the effect of "Why don't you come over here towards the rear of the vehicle?" *Id.* The defendant did not run; nor did he reach for his waistband. Motion Hearing, Tr. 48 & 72. He called for someone to come out of a nearby house but no one came out. Motion Hearing, Tr. 30 & 61. Trooper Ledin grabbed the defendant, frisked him and seized a firearm from his waistband. Motion Hearing, Tr. 61-62.

The defendant's convictions for possession of firearms and his shaking leg, possibly indicating nervousness, did not indicate that the troopers were in danger. A past conviction, even for possession of a firearm, does not by itself indicate the defendant poses a present threat to police – especially where, as here, the defendant is known to the police, has a "really good rapport" with the police and has never engaged in or threatened violence against the police. Likewise, nervousness in dealing with police is "common" and does not indicate a threat. *Commonwealth v. Cruz*, 459 Mass. 459, 468 (2011).

Both Troopers Dunderdale and Ledin testified that they have been trained to recognize signs that a suspect is in "flight or fight mode" and that they concluded that the defendant was thinking of fleeing from them. Motion Hearing, Tr. 29 & 68-69. This testimony adds nothing to the analysis since: (1) they thought the defendant might take "flight," not "fight;" and (2) they did not testify to any factual basis for that conclusion other than what has been described above.

The defendant had a "good rapport" with Trooper Dunderdale. He did everything the police asked, answered their questions and offered to allow a search of his vehicle. He made no furtive gestures. He was not confrontational or belligerent. He made no threats. He was alone and surrounded by three armed State troopers. These facts do not demonstrate that a police officer would "reasonably suspect that the person stopped is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 326-327 (2009). *Commonwealth v. Narcisse*, 457 Mass. 1, 7 (2010).

ORDER

The Commonwealth's motion for reconsideration (Paper # 16) is **ALLOWED.** After reconsideration, the defendant's motion to suppress evidence (Paper # 3) is again **ALLOWED.** The firearm seized from the defendant, as well as his statements to police following his arrest for possession of the firearm are suppressed from evidence.

June 11, 2018

Thomas F. McGuire, Jr.
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1069

COMMONWEALTH

vs.

EARL GARNER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This is the Commonwealth's interlocutory appeal from a Superior Court judge's order, after an evidentiary hearing, allowing the defendant's motion to suppress.[1] The Commonwealth argues that it was error to allow the motion because the State troopers had reasonable suspicion that the defendant was armed and dangerous. We agree, and reverse.

"When reviewing a ruling on a motion to suppress, 'we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law.'" Commonwealth v. Almonor, 482 Mass. 35, 40 (2019), quoting Commonwealth v. Tremblay, 480 Mass. 645, 652 (2018). We also accept the motion judge's determination of

[1] The defendant was indicted for unlawfully carrying a firearm, second or subsequent offense, and carrying a loaded firearm.

the weight and credibility of the evidence. Commonwealth v. Contos, 435 Mass. 19, 32 (2001).

The judge found the following facts, supplemented by the testimony of the police witnesses, all of which the judge found credible "except where they speculate about the defendant's thoughts." See Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007) ("Appellate courts may supplement a judge's finding[s] of fact[] . . . where the judge explicitly or implicitly credited the witness's testimony"). On May 6, 2017 at approximately 10:30 P.M., State Troopers Paul Dunderdale and Keith Ledin and Sergeant Frank Walls were on patrol in an unmarked police car in Taunton. They saw a car with tinted windows, driven by someone later identified as the defendant, make an abrupt right turn. The troopers followed the car as it made a left turn on to a dead end street; the driver then abruptly turned the car to the right, part way through the turn. The troopers stopped the car in the middle of the street, in part for excessive window tint. As Dunderdale approached the driver's side window, the defendant said "Dunderdale. Dunderdale." The two recognized each other as this was the fifth time that Dunderdale stopped the defendant in the last few years.[2] Despite this, the two had a "really good rapport" over the years.

[2] Dunderdale first encountered the defendant in 2011 where, as a result of a stop, the defendant was charged, convicted and

As Dunderdale asked the defendant some questions, the defendant's right hand was on his leg, shaking. The defendant also had a telephone in his left hand and was continuously trying to call someone while the two spoke. He told Dunderdale that his license was "good" and kept repeating "Come on, Dunderdale." This caused Dunderdale's concern for his "level of safety to . . . ris[e] a little bit." The defendant told Dunderdale that he was in Taunton to buy marijuana from a friend but that he got "a little lost."[3] In stark contrast to their prior encounters, Dunderdale found the defendant to be "excessively nervous" and described his behavior as markedly different from their prior encounters which caused Dunderale some concern.

As a result of his rising sense of unease, Dunderdale asked the defendant if he "mess[ed] with firearms anymore," to which the defendant said "no" and volunteered "[t]ake a look if you want." Dunderdale responded "Ok. Hop out!" Dunderdale considered this offer insincere and described the defendant as nervous, "not much eye contact. And it was just sudden."

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served State prison time for firearm offenses. The two next met in 2014 when Dunderdale stopped the defendant for a traffic violation and charged him with operating after suspension. Dunderdale stopped the defendant on two more occasions.

[3] The houses on the street where the defendant's car stopped were completely dark. One house appeared to be abandoned.

Dunderdale felt as though the defendant did not "really want him to take a look."

As the defendant got out of the car, he was "kind of blading away from [Dunderdale] and start[ed] walking backwards across the street." Dunderdale responded "Whoa, whoa, whoa" and "hey come back to the car." Dunderdale said the defendant was looking around "in like a panicked manner."

Based on his training and experience, Dunderdale thought the defendant was in "flight or fight mode."[4] The defendant glanced backward towards Ledin who had asked him to "come over here towards the rear of the vehicle." Ledin described the defendant as "extremely nervous, almost like he had that look of him and his body movement, his body expressions were showing me that he was either getting ready to fight or flight. He was gonna run." The defendant turned and yelled to one house, "Yo, LT, Yo LT, come outside." No one responded. Ledin guided the defendant toward the rear of the car. A patfrisk of the defendant revealed a loaded firearm with a defaced serial number in the defendant's waistband.

"An officer needs more than safety concerns" to conduct a patfrisk. Commonwealth v. Torres-Pagan, 484 Mass. 34, 37

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[4] As previously noted, the judge credited the testimony of the troopers, "except where they speculate[d] about the defendant's thoughts." This is not central to our determination.

(2020).[5] To justify a patfrisk, police must have a "reasonable suspicion," based on articulable facts, "that the suspect is dangerous and has a weapon." Id. at 39. The standard is an objective one. Commonwealth v. Meneus, 476 Mass. 231, 235 (2017).

In all the previous encounters with Dunderale, the defendant was cooperative. By contrast, on this day, the defendant acted completely out of character. Cf. Commonwealth v. Mathis, 76 Mass. App. Ct. 366, 371, 373 (2010) (defendant's odd behavior supported police questioning and contributed to reasonable suspicion calculus). He was extremely nervous, see Commonwealth v. Hernandez, 77 Mass. App. Ct. 259, 268-269 (2010) (patfrisk justified where defendant nervously shaking and sitting on hand), and volunteered to get out of the car. This is evidence of the defendant's effort to redirect the trooper's attention to the car and away from him, as the defendant had a loaded firearm in his waistband. Commonwealth v. Amado, 474 Mass. 147, 151-152 (2016) (police knowledge of defendant's prior arrest for firearm possession factor in reasonable suspicion analysis). He also "bladed"[6] his body as he stepped from the

[5] The judge did not have the benefit of this decision at the time of the hearing.
[6] Blading can be characterized as "hiding one side of the body from the other person's view." Commonwealth v. Resende, 474 Mass. 455, 459 n.8, S.C., 475 Mass. 1 (2016). See Commonwealth

car, evincing an attempt to shield the firearm in his waistband from the troopers' view. Compare Commonwealth v. DePeiza, 449 Mass. 367, 373 (2007) ("officers' suspicion that the odd way of walking was a sign of a firearm was not a mere hunch, but was the result of the application of their experience and training . . . to their detailed observations of the defendant").

Moreover, the defendant called out to an unknown person in an area in which he said he was trying to buy marijuana. This suggested the possibility of others in the area who could be helpful to the defendant or who might pose a threat to the troopers. Commonwealth v. Gonsalves, 429 Mass. 658, 664 (1999) (officer safety is factor in patfrisk). Finally, the defendant backed away from the car which caused the troopers to believe the defendant might flee. Commonwealth v. Gomes, 453 Mass. 506, 513 (2009) (flight a factor in protective patfrisk). Viewing the evidence through the lens of experienced troopers, see Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 346 (2010), Dunderdale had reasonable suspicion that the defendant was armed and dangerous; thus the patfrisk was proper to ensure officer safety. See Torres-Pagan, 484 Mass. at 36-39.

The troopers were also entitled to detain the defendant until they completed the process of issuing a citation for the

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v. DePeiza, 449 Mass. 367, 372-374 (2007) ("straight arm" walk is one factor considered for reasonable suspicion).

tinted window civil infraction, which was a basis for the initial stop. See Commonwealth v. Obiora, 83 Mass. App. Ct. 55, 57 (2013).

Order allowing motion to suppress reversed.

By the Court (Meade, Blake & Lemire, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: December 28, 2020.

[7] The panelists are listed in order of seniority.