SUPREME JUDICIAL COURT
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
No. FAR-28219

APPEALS COURT
2020-P-0821

COMMONWEALTH

V.

ERNEST MONELL

ON APPEAL FROM DECISION OF THE MASSACHUSETTS APPEALS COURT

APPLICATION FOR FURTHER APPELLATE REVIEW OF THE APPELLEE ERNEST MONELL

ATTORNEY FOR APPELLEE

KELLY M. CUSACK
580 High Street, Unit 5
Dedham, MA 02026
BBO#675392
Phone 781-688-0110
Fax 781-634-6551
kelly@cusacklawoffices.com

May 2021

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V.

ERNEST MONELL

APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the defendant and requests, pursuant to Mass.R.A.P. 27.1, leave to obtain further appellate review of: the April 16, 2021 decision of the Massachusetts Appeals Court reversing the Suffolk Superior Court's March 31, 2020 decision allowing his motion to suppress evidence.

RELEVANT PRIOR PROCEEDINGS[1]

The defendant is appealing the Massachusetts Appeals Court's decision to reverse the Honorable Justice Cowin's decision that allowed his motion to suppress evidence. The Defendant was charged with three counts: (1) possession of a firearm, 2nd offense (G.L. c. 269, § 10(a); (2) carrying a firearm while loaded (G.L. c. 269, § 10(h); and (3) possession of

[1] The Commonwealth's Appendix filed in No. 2020-P-0821 will be referred to as (C.A. page).

ammunition (G.L. c. 269, § 10(n)). (C.A. 4) The Defendant filed a motion to suppress evidence obtained after the warrantless stop of a car, subsequent exit order, and search of his person and the car from May 21, 2019 which the Commonwealth opposed. (C.A. 7-8; 10-26) Following an evidentiary hearing Justice Cowin allowed the defendant's motion to suppress in a decision and order docketed on April 9, 2020. (C.A. 9)

The Commonwealth filed a notice of appeal with the Suffolk Superior Court on April 27, 2020. (C.A. 27-28) Then, the Commonwealth filed an interlocutory appeal pursuant to Mass. R. Crim. Pr. 15 with the Supreme Judicial Court ("S.J.C.") on June 3, 2020. (SJ-2020-447)(C.A. 29-57) The Defendant filed his opposition on June 17, 2020. (C.A. 58-70) On July 2, 2020 the single justice (Lowy, J.) allowed the Commonwealth's interlocutory appeal and ordered the case to proceed in the Appeals Court. (SJ-2020-447)

On September 2, 2020, the Commonwealth filed its brief with the Appeals Court. (2020-P-0821) The Defendant filed his brief on October 15, 2020 and argument on the issues was held on March 4, 2021. (Milky, J., Kinder, J., Sacks, J.) The Appeals Court reversed the trial court's decision allowing the

Defendant's motion to suppress evidence in a published opinion on April 16, 2021. See Attached Commonwealth v. Monell, 99 Mass. App. Ct. 487 (2021).[2]

FACTS RELEVANT TO THE APPEAL[3]

This is the case where the Defendant was stopped by police for a motor vehicle infraction. The Defendant failed to stop at a stop sign coming off Millet Street turning onto Southern Avenue[4]. (Feb. 24/41) Officers were traveling on Southern Avenue and

"had to like abruptly slow the vehicle down so that we wouldn't make contact with the vehicle and at this point we were directly behind the vehicle."

(Feb. 24/13) Then, the car took a left onto Darlington Street and pulled over immediately once the police activated their lights. (Feb. 24/13; 60) While there was a fatal shooting that occurred two hours earlier on Millet Street, Officers Antoine Ramos (Officer Ramos) and Dennis Layden (Officer Layden) were uninvolved in that investigation. (Feb. 24/68) As such, they were on routine patrol "...to like play, as how we say, drive around and patrolling the area," when they pulled the Defendant over. (Feb. 24/49)

[2] The Appeals Court opinion is attached.
[3] The Motion to Suppress Transcript is referred to by the 2020 date (date/page).
[4] The Defendant did not challenge the motor vehicle stop.

Officer Ramos noticed a holster near the Defendant's right foot, this type of holster is not illegal to possess nor requires a license to carry and can be purchased on Amazon. (Feb. 24/52) Officer Ramos testified that, in his experience, when he has seen a holster it is in the possession of a licensed gun owner. (Feb. 24/55) Conversely, when Officer Ramos encounters illegal firearms on the street there is no holster present. (Feb. 24/65)

Neither officer had ever met or interacted with Mr. Monell prior to May 21, 2019. (Feb. 24/51) During his interaction with police, the Defendant:

> "...seemed very calm. It was – it wasn't anything that – just from my perspective he seemed like very calm. He was answering the questions that – whatever Officer Layden was asking him. I didn't – I didn't pick up on anything that – at that point that, you know, raised my level of safety or made me feel in fear of my safety at that point."

(Feb. 24/20) Upon being told to exit, "[t]here was a bit of a hesitation." (Feb. 24/22) Despite this hesitation, Officer Layden was able to physically grab both Mr. Monell's hands and remove him from the car. (Feb. 24/21; 61)

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

I. Did the Appeals Court err in reversing the trial court's order suppressing the gun recovered on May 21, 2019?

A. The Trial Court allowed the Defendant's motion to suppress evidence following a stop of a car, where he was the sole occupant, because the likely presence of a gun in a car was not enough to justify an exit order. On appeal, the Appeals Court reversed this order of suppression relying on the time of night, prior fatal homicide where the shooter had not yet been apprehended, and presence of a holster.

B. The Appeals Court justified the pat-frisk of the Defendant's person, which yielded no weapons or contraband, and the subsequent search of the car relying on the Defendant's hesitation when ordered out of the car coupled with the empty holster inside the car, time of night, and prior fatal shooting.

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further appellate review is appropriate, in the interests of justice, because the Appeals Court

misapprehended the factual circumstances leading to the exit order and conflated the standard for the pat-frisk of the Defendant's person. Additionally, this Court should take this opportunity, as suggested by Justice Milkey in his concurrence, to reexamine existing case law surrounding police authority to search the interior of a car where an individual is pulled over for a civil infraction, pat-frisked, and no contraband or weapons are located. See attached decision.

ARGUMENT

I. The exit order was not justified because the presence of a holster during a routine traffic stop does give rise to a reasonable concern for officers' safety nor does it provide specific or articulable facts that criminal activity is afoot.

An exit order during a motor vehicle stop is not a minimal intrusion and can only be justified in limited circumstances. Commonwealth v. Torres-Pagan, 484 Mass. 34, 39 (2020)("...[I]ssuing an order to a motorist to get out of his or her vehicle during a traffic stop is an imposition that cannot be considered minimal"). Such limited circumstances include the following:

> "(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."

Torres-Pagan, 484 Mass. at 38. In this case, the Appeals Court focused on "the perceived threat to officers' safety," while the Trial Court focused on both officers' safety concerns and reasonable suspicion of criminal activity. See attached decisions. Neither can be used to justify the exit order of Mr. Monell on May 21, 2019.

Officers' concern for safety to issue an exit order must be objectively reasonable under a totality of the circumstances. Commonwealth v. Gonsalves, 429 Mass. 658, 668 (1999)("[U]nder art. 14, the balancing of interests requires that Massachusetts citizens should not be subjected to unjustified exit orders during routine traffic stops"). This concern for safety must be "based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience." Commonwealth v. Silva, 366 Mass. 402, 406 (1974). Here, there should be little weight given to the homicide by shooting that occurred two hours earlier given the lack of specific facts related to that shooting. Silva, 366 Mass. at 406. While the Defendant was coming from the same street it was over two hours

later such that it would not be reasonable to conclude he was involved in the shooting. Commonwealth v. Warren, 475 Mass. 530, 538 (2016)("...where the timing and location of the stop lacked a rational relationship to each other, proximity lacks force as a factor in the reasonable suspicion calculus") The Appeals Court discounts the "high crime" nature of the area for not having a direct connection yet gives weight to the prior homicide by shooting, which also lacks a direct connection. Commonwealth v. Monell, 99 Mass. App. Ct. at *2 n. 3. These two propositions cannot exist together. Cf. Commonwealth v. Evelyn, 485 Mass. 691, 709 (2020)(upholding stop of defendant thirteen minutes after shooting half a mile away from the location versus general nature of high crime area). The homicide by shooting occurred too remote in time for the weight that the Appeals Court gives that factor and should only be considered in the "high crime" context which it discounted.

Second, the presence of a holster does not imply that an unlicensed gun is nearby. For either the Appeals or Trial Court to justify an exit order based on reasonable suspicion, there must be evidence of a crime present. Commonwealth v. Chin-Clarke, 97 Mass.

App. Ct. 604 (2020)(finding "[a] reed as thin as this [one person showing another clothing] does not support reasonable suspicion of criminal activity") The mere fact that someone has a gun is not enough. Commonwealth v. Alvarado, 423 Mass. 266, 268 (1996)("Carrying a gun is not a crime. Carrying a firearm without a license (or other authorization) is"). A holster does not require a license to possess and can be easily purchased on Amazon. (Feb. 24/52) Cf. Commonwealth v. Dargan, 98 Mass. App. Ct. 1111 (September 28, 2020)(Exit order justified upon Trooper viewing ammunition, which requires a license to possess, in plain view following a valid motor vehicle stop) Here, the mere presence of a holster which may imply the presence of a gun does not give rise to evidence of criminal activity. Accordingly, further appellate review should be granted because it is in the interests of justice.

II. The pat-frisk of Mr. Monell and the subsequent search of the interior of the car were not justified because there were no facts that he was "armed and dangerous".

Here, the Appeals Court relies heavily on the Defendant's reaction to the exit order (coupled with the factors discounted above) to justify the

subsequent pat-frisk of his person and search of the car. See attached Commonwealth v. Monell, 99 Mass. App. Ct. 487 at *7. A lawful patfrisk requires more than concern for officer's safety. Torres-Pagan, 484 Mass. at 38-39. "[P]olice must have a reasonable suspicion, based on specific and articulable facts, that the suspect is *armed* **and** *dangerous*." Torres-Pagan, 484 Mass. at 38-39.

When Mr. Monell is told to exit the car, officers, both present at the driver's side door and outnumbering him, claim he "froze." (Feb. 24/21; 61) This reaction is not uncommon as up until this point, the Defendant was being pulled over for a motor vehicle infraction-failing to stop for a stop sign. (Feb. 24/13) "It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police..." Commonwealth v. Cruz, 459 Mass. 459 (2011). "A surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous." Torres-Pagan, 484 Mass. at 40. The Defendant's momentary "freezing" does not raise to the level of "armed and dangerous," permitting a pat-frisk of his person.

The Officers and the Appeals Court characterize that during this "freezing" or "hesitation," the Defendant was "acting as if he was trying to conceal his right hand" See Attached Commonwealth v. Monell, No. 99 Mass. App. Ct. 487 at *7. However, this movement is ambiguous at best, and it is not the type of movement considered to be "furtive." See Commonwealth v. Stampley, 437 Mass. at 327 ("Numerous cases have recognized that such gestures, suggestive of the occupant's retrieving or concealing an object, raise legitimate safety concerns to an officer conducting a traffic stop"). Mr. Monell's momentary freezing is not a "furtive gesture that would indicate criminal activity." Commonwealth v. Devoe, 95 Mass. App. Ct. 1107 (2019). This characterization by the Appeals Court ignores the fact that despite the "hesitation," Officer Layden was able to physically grab both Mr. Monell's hands and remove him from the car, i.e. his hands were in plain view. (Feb. 24/21; 61)

Prior to removing Mr. Monell from the car, neither officer had met nor interacted with Mr. Monell so he was not "known to police." Commonwealth v. Sweeting-Bailey, 98 Mass. App. Ct. 862

(2020)(upholding exit order and pat-frisk of defendant where front seat passenger was known to police, had prior firearms arrest, and his behavior differed from previous interactions). Additionally, there is no evidence he was affiliated with any gang. Commonwealth v. Elysee, 77 Mass. App. Ct. 833 (2010)("...police are not required to blind themselves to the significance of either gang members or the circumstances in which they encounter gang members..") Equally, at the time of the pat-frisk the officers were unaware that Mr. Monell had a criminal record let alone one with a previous firearms arrest. Cf. Commonwealth v. Dasilva, 66 Mass. App. Ct. 556, 561 (2007)(finding police personal knowledge of a defendant's criminal record a factor to be considered in the reasonable suspicion calculus)

Given the lack of any other factors, the only evidence left is an inference that a gun may be on Mr. Monell or in the car. As previously discussed, possessing a gun, without more, does not give rise to reasonable suspicion of a crime. Alvarado, 423 Mass. at 268. Nor should it follow that lawful gun owners who are duly licensed be subjected to an automatic

pat-frisk merely because a gun is present[5]. Commonwealth v. Fisher, 54 Mass. App. Ct. 41, 46 (2002)("[c]arrying a gun is not necessarily a crime and that the mere suspicion that someone is carrying a gun does not confer a basis to stop and frisk"). Such conclusion would run afoul of the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights for citizens to be free from unreasonable searches and seizures.

What is required of police is that a suspect be both "armed **and dangerous**," to justify a pat-frisk of the person. Commonwealth v. Narcisse, 457 Mass. 1 (2010)(reversing denial of motion to suppress where "defendant clearly did not manifest behavior that indicated he was engaged in criminal activity or that he was armed and dangerous"). This Court has repeatedly used the conjunction, "and," in articulating the pat-frisk standard. Torres-Pagan, 484 Mass. at 40. "And" is "used to indicate connection or addition esp. of items within the same class or type or to join words or phrases of the same grammatical rank or function." *And*, The Merriam-Webster Dictionary

[5] G.L. ch. 140 § 129C requires for licensed gun owners to produce the firearm identification card upon demand from police when they carry guns outside their own home.

(5th ed. 1997) The conjunction "and" used in this context gives emphasis to both elements. One cannot be used to infer the other. The Appeals Court failed to analyze each element separately as required and there are no factors present that Mr. Monell posed a danger giving rise to a pat-frisk of his person. Accordingly, this Court should grant further appellate review to correct this error and clarify the standard for future cases.

Once Mr. Monell is out of the car, pat-frisked and handcuffed, the officers observe that the holster is empty. Commonwealth v. Monell, 99 Mass. App. Ct. 487 at *2. There were no weapons or contraband on the Defendant's person. Id. The Appeals Court relied upon precedent that "has consistently held that in these circumstances the police are permitted to perform a limited, protective search of the car interior." Commonwealth v. Monell, 99 Mass. App. Ct. 487 at *3. The Defendant maintains that the pat-frisk of his person was illegal and therefore the search of the interior of the car could not have followed. However, as Justice Milkey suggests in his concurrence, this case presents a unique set of circumstances for this Court to reevaluate existing precedent. See Attached

Commonwealth v. Monell, 99 Mass. App. Ct. 487 at *7. This Court has previously concluded that Article 14 provides greater protections against unreasonable searches and seizures than the Fourth Amendment. Commonwealth v. Alexis, 481 Mass. 91, 99 (2018)("we have sometimes held that art. 14 may provide more substantive protection to individuals than that provided by the Fourth Amendment") Currently, the authority granted to officers to extend searches, once the threat of safety or weapons is dispelled, is overly broad and without significant limitation. See Commonwealth v. Monell, 99 Mass. App. Ct. 487 at *4 (Milkey, J., concurring)("The wide latitude afforded to police officers during routine traffic stops threatens to erode constitutional protections by allowing such stops to serve as cover for unwarranted searches and seizures"). Accordingly, this Court should grant further appellate review to revisit whether, following a pat-frisk, a search of the interior of a car should continue to apply in these circumstances.

CONCLUSION

For all the reasons set out above, the Defendant's Application for Further Appellate Review should be

granted because the issues raise substantial reasons affecting the public interest and the interests of justice.

ERNEST MONELL
By his attorney

/s/ Kelly M. Cusack
_____

Kelly M. Cusack
BBO # 675392
1988 Centre Street
Boston, MA 02132
Tel. 781-688-0119
Fax 781-634-6551
kelly@cusacklawoffices.com

CERTIFICATE OF COMPLIANCE

I, Kelly M. Cusack, hereby certify pursuant to Mass.R.App.P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass.R.App.P. 16(a)(6), 16(e), 16(f), 16(h), 18 & 20. Additionally, this brief complies with the length and typeface limitations of Rule 20(a)(2) and 20(a)(4)(B) because it is in the proportional font Courier New at size 12 and contains 1,955 total words in the parts of the brief required by Rule 27.1 as counted using the word count feature of Microsoft Word 2016.

/s/ Kelly M. Cusack

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 13(d) I, certify under the pains and penalties of perjury, that I served the foregoing upon counsel of record, Sarah Montgomery Lewis, via electronic mail delivery this 21st day of May 2021.

/s/ Kelly M. Cusack

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 1984CR475

COMMONWEALTH

v.

ERNEST MONELL

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

The defendant, Ernest Monell ("Monell"), is charged with firearms offenses arising from the discovery of a firearm during a warrantless search of the vehicle he was driving. Monell moves to suppress evidence of the firearm, arguing that the exit order which preceded the search was unjustified.

A hearing on Monell's motion was held on February 24, 2020. Upon consideration of the testimony given therein, the exhibits submitted into evidence, and the memoranda and oral arguments of counsel, and for the reasons set forth below, the motion is ALLOWED.

FINDINGS OF FACT

Antoine Ramos ("Ramos"), a Boston police officer for 10 years, was the only witness to testify at the hearing on the defendant's motion. The Court credits his testimony in its entirety.

On the evening of May 21, 2017, Ramos and his partner, Dennis Laydon ("Laydon"), were on patrol in the area of Southern Avenue and Millet Street in the Dorchester section of Boston. Ramos had made drug-related arrests and assisted on domestic violence calls in the neighborhood, and considered it a "high-crime" area. A homicide by shooting had occurred at 95 Millett Street just before 9 p.m. that evening. Ramos and Laydon were not assisting in that investigation.

Shortly after 11 p.m., as the officers were traveling west on Southern Avenue, they observed a vehicle coming from Millett Street run a stop sign and turn right on Southern Avenue. Laydon, who was driving the cruiser, followed and when the vehicle turned left onto Darlington Street, activated his lights and pulled the vehicle over.

Laydon approached the driver's side of the vehicle and asked the driver for his license and registration. The driver, who was the defendant, identified himself and stated that he did not have his license with him but did provide a social security number. (Subsequently, the officers learned that Monell's license was active and the car was lawfully registered to a relative.) Monell was compliant with Laydon's requests and showed no signs of nervousness.

Meanwhile, Ramos approached the passenger side of the vehicle and shone his flashlight through the closed window. On the driver's side floor, to the right of Monell's foot, Ramos observed a holster. From personal experience Ramos knew the holster was of the type that is used to conceal a firearm, by holding the firearm inside one's pants with only the clip visible on the outside of the pants.

Ramos, believing that the holster might be concealing a firearm and fearing for his safety and that of Laydon's, went around the back of the vehicle and told Laydon about the holster, whereupon Laydon immediately ordered Monell out of the car. At that point, Monell "froze" while acting as if he was trying to conceal his right hand. After a few seconds, Laydon grabbed Monell and pulled him out of the vehicle, and handcuffed and frisked him, finding no contraband. Laydon then searched the driver's side compartment of the vehicle and found a case under the driver's seat. Patting the outside of the case, he felt what he believed was a firearm, then opened the case and discovered a handgun. The officers subsequently learned Monell did not have a license to carry firearms, and placed Monell under arrest.

RULINGS OF LAW

As noted, Monell argues that evidence of the firearm should be suppressed because the exit order that preceded the search of the vehicle was unlawful.

"Where a vehicle has been stopped for an observed traffic violation,[1] an exit order issued to a driver or passenger of the vehicle is justified if (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. Barreto, 483 Mass. 716, 721 (2019) (citing Commonwealth v. Amado, 474 Mass. 147, 151 (2016)).

Ramos testified that the exit order was issued because he feared for the officers' safety when he saw the holster, which he believed might have been concealing a firearm within reach of the defendant – a belief the Court finds was reasonable.[2] Ramos did not testify to any behavior by Monell which added to his suspicion, such as furtive gestures, nervousness, or odd statements. Thus, the question posed in this case is whether, during a routine traffic stop in a high-crime area, knowledge that a firearm is (potentially) within reach of the driver creates a reasonable belief that officer safety is at risk. Barreto, 483 Mass. at 721 (quotation omitted) (the Court "ask[s] whether a reasonably prudent person in the officer's position would be warranted in the belief that the safety of the police or that of other persons was in danger").

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[1] It is uncontested that the police had a sufficient basis for stopping the vehicle, based on Monell's failure to stop at a stop sign. Commonwealth v. Santana, 420 Mass. 205, 207 (1995).

[2] There were no "other grounds" to search the vehicle, and it is settled that knowledge that one is carrying a concealed firearm does not by itself create reasonable suspicion of criminal activity. Commonwealth v. Alvarado, 423 Mass. 266, 270-71 (1996) (information that handgun wrapped in a towel was present in vehicle did not provide reasonable suspicion of criminal activity justifying stop of vehicle); Commonwealth v. Couture, 407 Mass. 178, 180-81, 183 (1990) (information that driver was carrying handgun not a basis for stop absent any evidence defendant had been acting suspiciously).

The Court concludes, based on relevant appellate caselaw, that the answer to that question is "no."

Specifically, in Commonwealth v. DeJesus, 72 Mass.App.Ct. 117, review denied, 452 Mass. 1108 (2008), police responding to a reliable tip that an individual was in possession of a handgun encountered the subject of the tip seated in an automobile and immediately ordered him out of the vehicle, based solely on the information that he had a gun. The Court suppressed evidence of a firearm that was recovered during a subsequent search of the defendant, holding that there was no basis to justify the exit order, because there were no actions by the defendant or other information that would create a suspicion that he either posed a threat to public safety or had committed, or was about to commit, a crime. Id., 72 Mass.App.Ct. at 120 ("[t]here was no reasonable basis for the officer to believe that he was in danger").

Similarly, in Commonwealth v. Gomes, 458 Mass. 1017 (2010), the Court held that information that the defendant had held a gun in the air, in an area known for gang activity, did not justify an order that he exit a vehicle, as there were no facts creating a suspicion that he was a threat to public safety. Id., 458 Mass. at 1018-19; contrast Commonwealth v. Edwards, 476 Mass. 341, 342, 346, 348 (2016) (in "an exceedingly close case," Court held exit order would have been justified based on defendant's actions in handling gun as he got out of and then re-entered vehicle, then sat in the vehicle alone with the lights off on deserted street in high-crime area at 1:30 a.m.).

The facts of this case are so similar to those at issue in DeJesus and Gomes that a similar result is required. As noted, Monell did not make any furtive gestures, display nervousness, or say anything suspicious; rather, he was compliant and calm as Laydon engaged with him prior to the exit order. There was no evidence he had used the gun, or was otherwise a dangerous person.

No additional facts existed that would create a suspicion that the firearm was either an instrument of criminality or an imminent threat to safety.[3]

The fact that Monell appeared to become nervous when he was ordered out of the vehicle ("freezing," and acting as if he was concealing something in his right hand) is not relevant because this did not occur until after the exit order was issued, and thus cannot be part of the grounds for the order. DeJesus, 72 Mass.App.Ct. at 120-21 (citing Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981).

Nor is the fact that the stop occurred in a high-crime area sufficient to create the necessary suspicion of danger, absent other factors. DeJesus, 72 Mass.App.Ct. at 120 (citing Commonwealth v. Cheek, 413 Mass. 492, 496-97 (1992)). While a shooting had occurred nearby two hours earlier, there was no information potentially linking the defendant to the shooting (Ramos did not claim there was); to the contrary, it was unlikely the defendant was involved in the shooting given that two hours had elapsed and he was stopped so near the crime scene. Commonwealth v. Warren, 475 Mass. 530, 538 (2016) (defendant's presence near crime scene, within a time frame inconsistent with having recently fled the scene, did not support reasonable suspicion).

The only information the officers had here relative to a risk to their safety was the likely presence of a firearm in the vehicle. Caselaw holds that this is not enough to justify an exit order. As such, evidence of the firearm must be suppressed.

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[3] See, e.g., Commonwealth v. Alvarado, 427 Mass. 277, 282-283 (1998) (report that individual had sawed-off shotgun, which is "an extremely lethal weapon which poses an ominous threat in and of itself ...[and] has virtually no legitimate use"); Commonwealth v. Graham, 78 Mass.App.Ct. 127, 128-29 (2010) (driver refused to stop reaching down between seat and center console after officer told him to keep his hands in sight.); Commonwealth v. Foster, 48 Mass.App.Ct. 671, 676-77 (2000) (display of gun in high-crime area at 5:30 a.m. by individual who had just come from an after-hours party).

ORDER

For the foregoing reasons, the defendant's Motion to Suppress is ALLOWED.

/s/Jackie Cowin
Jackie Cowin
Associate Justice of the Superior Court

Date: March 31, 2020

99 Mass.App.Ct. 487
Appeals Court of Massachusetts,
Suffolk..

COMMONWEALTH
v.
Ernest MONELL.

No. 20-P-821
|
Argued March 4, 2021.
|
Decided April 16, 2021.

Synopsis

Background: Defendant was charged with carrying a firearm without a license, second offense, carrying a loaded firearm without a license, and possession of ammunition without a firearm identification card. The Superior Court Department, Suffolk County, Jackie A. Cowin, J., allowed defendant's pretrial motion to suppress firearm seized from defendant's car following a traffic stop. The Commonwealth appealed.

Holdings: The Appeals Court, Kinder, J., held that:

exit order during traffic stop was lawful;

patfrisk of defendant following exit order was lawful; and

search of defendant's car and seizure of firearm discovered underneath driver's seat were justified.

Reversed.

Milkey, J., filed concurring opinion.

Constitutional Law, Stop and frisk, Reasonable suspicion, Search and seizure. Search and Seizure, Reasonable suspicion, Motor vehicle, Protective frisk, Protective sweep. Practice, Criminal, Motion to suppress, Traffic violation. Firearms. Motor Vehicle, Firearms.

Indictments found and returned in the Superior Court Department on August 14, 2019.

A pretrial motion to suppress evidence was heard by Jackie A. Cowin, J.

An application for leave to prosecute an interlocutory appeal was allowed by David A. Lowy, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

Attorneys and Law Firms

Sarah Montgomery Lewis, Assistant District Attorney, for the Commonwealth.

Kelly M. Cusack for the defendant.

Present: Milkey, Kinder, & Sacks, JJ.

Opinion

KINDER, J.

***1** The defendant has been charged with carrying a firearm without a license, second offense, in violation of G. L. c. 269, § 10 (a); carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10 (n); and possession of ammunition without a firearm identification card, in violation of G. L. c. 269, § 10 (h) (1). Following an evidentiary hearing, a Superior Court judge allowed the defendant's motion to suppress the firearm seized from the defendant's car following a traffic stop, reasoning that the exit order was unlawful. The Commonwealth's application to pursue an interlocutory appeal was allowed by a single justice of the Supreme Judicial Court, who reported the matter to this court. The Commonwealth's principal arguments on appeal are that the exit order was justified by a concern for officer safety, and that the subsequent patfrisk search of the defendant's person and the limited search of his car were based on a reasonable suspicion that the defendant was armed and dangerous. We agree and reverse the suppression order.

Background. We summarize the relevant facts from the judge's findings on the motion to suppress, supplemented where appropriate by uncontroverted suppression hearing testimony that the judge explicitly or implicitly credited. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431, 35 N.E.3d 357 (2015). At approximately 8:42 p.m. on May 21, 2019, there was a homicide by gunshot at 95 Millett Street in the Dorchester section of Boston.[1] A little over two hours later, Boston Police Officers Antoine Ramos and Dennis Layden were on routine patrol in the area of Millet Street,

which they knew to be a "high crime" area based on previous arrests there, many of which involved firearms. The officers were not directly involved in investigating the homicide, but they were aware that it had occurred and that the shooter remained at large. The officers observed a car fail to stop for a stop sign while "coming off of Millet," such that the officers were forced to slow down abruptly to avoid a collision. They activated their vehicle lights, stopped the car without incident, and approached the driver and sole occupant, later identified as the defendant.

1 The judge's finding that the homicide occurred on May 21, 2017, appears to have been a typographical error. The uncontroverted testimony was that the events at issue in this case occurred in 2019.

Officer Layden approached the driver's side and asked the defendant for his license and registration. The defendant was compliant and did not appear nervous.[2] Officer Ramos went to the passenger's side and illuminated the inside of the car with his flashlight. He observed a holster for a firearm on the driver's side floor, touching the defendant's right foot. Based on his experience, Officer Ramos knew the holster was the type used to conceal a firearm inside of one's pants. He could not see whether the holster contained a firearm.

2 The defendant explained that he did not have his operator's license with him, but provided a Social Security number. The officers later confirmed that the defendant had an active driver's license and that the car was registered to one of the defendant's relatives.

***2** Fearing for his safety and that of Officer Layden, Officer Ramos immediately notified Officer Layden of his observation. Officer Layden ordered the defendant to get out of the car. The defendant " 'froze' while acting as if he was trying to conceal his right hand." Officer Layden then physically removed the defendant from the car and pat frisked his person. The defendant was not armed and possessed no contraband. After the officers placed the defendant in handcuffs, they saw that the holster in the car was empty. Officer Layden then searched the driver's seat area and under the seat discovered a case that felt as if it contained a firearm. He opened the case and discovered a handgun.

Discussion. We accept the judge's factual findings unless they are clearly erroneous. See Commonwealth v. Welch, 420 Mass. 646, 651, 651 N.E.2d 392 (1995). However, we "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, 663 N.E.2d 243 (1996).

1. The exit order. Our analysis begins with the validity of the exit order because there is no dispute that the initial stop of the defendant's vehicle was valid. See Commonwealth v. Amado, 474 Mass. 147, 151, 48 N.E.3d 414 (2016), quoting Commonwealth v. Santana, 420 Mass. 205, 207, 649 N.E.2d 717 (1995) ("Where the police have observed a traffic violation, they are warranted in stopping a vehicle"). "[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, 138 N.E.3d 1012 (2020), citing Amado, supra at 151-152, 48 N.E.3d 414. Our focus here is on the first factor, the perceived threat to the officers' safety. To justify an exit order on this basis, 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, 154 N.E.3d 904 (2020). See Commonwealth v. Silva, 366 Mass. 402, 406, 318 N.E.2d 895 (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, 711 N.E.2d 108 (1999).

Here, the defendant was stopped late at night by officers on patrol in an area where they knew there had been a fatal shooting approximately two hours earlier.[3] The officers also knew that the shooter remained at large. When Officer Ramos saw a holster on the floor within the defendant's reach, he believed that the holster might contain a firearm, and the judge found his belief to be reasonable. These facts were enough to cause "a heightened awareness of danger that would warrant an objectively reasonable police officer" in fearing for his safety (citation omitted). Commonwealth v. Stampley, 437 Mass. 323, 326, 771 N.E.2d 784 (2002). We recognize that the defendant was unknown to the officers and did not engage in suspicious behavior prior to the exit order. But the test we apply is based on the totality of the circumstances, and "it 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, 711 N.E.2d 108. "The Constitution does not require officers to gamble with their personal safety" (quotation and citation omitted). Commonwealth v. Haskell, 438 Mass. 790, 794, 784 N.E.2d 625 (2003). Mindful of these principles, we are satisfied that

the totality of the circumstances in this case justified the officers' concern for their safety. Accordingly, the exit order was lawful. See Torres-Pagan, 484 Mass. at 38, 138 N.E.3d 1012.[4]

3 Although there was evidence that the stop occurred in a "high crime" area, we discount that factor here because the high crime nature of the area did not have a "direct connection with the specific location and activity being investigated." Commonwealth v. Evelyn, 485 Mass. 691, 709, 152 N.E.3d 108 (2020), quoting Torres-Pagan, 484 Mass. at 41, 138 N.E.3d 1012.

4 This case is not like Commonwealth v. Gomes, 458 Mass. 1017, 937 N.E.2d 13 (2010), or Commonwealth v. DeJesus, 72 Mass. App. Ct. 117, 888 N.E.2d 1014 (2008), on which the judge relied. In each of those cases, the police responded to an anonymous tip of a man with a gun, approached a suspect in a parked vehicle, and ordered him to exit based on the information provided by the anonymous tipster. See Gomes, supra at 1017-1018, 937 N.E.2d 13; DeJesus, supra at 118, 888 N.E.2d 1014. The holding in each of those cases was that, without more than the anonymous tip, and despite the interaction having occurred in a high crime area, there was no reasonable basis for the officer to suspect that he was in imminent danger. See Gomes, supra at 1018-1019, 937 N.E.2d 13; DeJesus, supra at 120, 888 N.E.2d 1014. In this case, as we have said, there was more.

***3** 2. The patfrisk and search. On appeal, the defendant argues that even if the exit order was lawful, the suppression order should be affirmed because the patfrisk of his person and the limited search of the interior of the car were unconstitutional. The test for a patfrisk is more stringent than for an exit order. 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, 138 N.E.3d 1012. Here, the defendant " 'froze' while acting as if he was trying to conceal his right hand" when he was ordered out of the car. This specific and articulable fact, considered together with the presence of the holster, the time of night, and the earlier fatal shooting, was sufficient to establish a reasonable suspicion that the defendant was armed and dangerous. See Commonwealth v. DePeiza, 449 Mass. 367, 374 n.4, 868 N.E.2d 90 (2007) (defendant's reaching gesture contributed to officers' reasonable fear for their safety).

Once the defendant was removed from the car and no weapon was discovered during the patfrisk of his person, the officers were justified in their concern that a weapon might remain in the car. See Commonwealth v. Gouse, 461 Mass. 787, 792-793, 965 N.E.2d 774 (2012). The Supreme Judicial Court has consistently held that in these circumstances the police are permitted to perform a limited, protective search of the car interior. See Silvelo, 486 Mass. at 16, 154 N.E.3d 904 (protective search of vehicle permitted where "defendant may access a weapon left behind upon returning to the vehicle"); Commonwealth v. Douglas, 472 Mass. 439, 447, 35 N.E.3d 349 (2015) (protective search of car permitted before allowing defendant to reenter); Commonwealth v. Daniel, 464 Mass. 746, 752, 985 N.E.2d 843 (2013) (protective limited search of car permitted if defendant likely to return to car at conclusion of inquiry); Commonwealth v. Almeida, 373 Mass. 266, 272-273, 366 N.E.2d 756 (1977), S.C., 381 Mass. 420, 409 N.E.2d 776 (1980) (protective search of area around driver's seat permitted following observation of holster); Silva, 366 Mass. at 408, 318 N.E.2d 895 ("Terry type of search may extend into the interior of an automobile so long as it is limited in scope to a protective end"). Here, Officer Layden's search of the car was limited to a search for a weapon in the area of the driver's seat. He immediately found a case under the seat through which he felt the weight and shape of a firearm. His seizure of the firearm was justified. See Commonwealth v. Wilson, 441 Mass. 390, 396-397, 805 N.E.2d 968 (2004) (officer may seize object during Terry-type frisk if contraband nature of object can readily be identified by its mass and contour).

Conclusion. The order allowing the motion to suppress is reversed.

So ordered.

MILKEY, J. (concurring).

I agree with the majority that the exit order and patfrisk of the defendant's person were justified. I also agree that the subsequent sweep of the interior of the vehicle for weapons is consistent with the broad pronouncements that the Supreme Judicial Court has made on the subject. See, e.g., Commonwealth v. Silvelo, 486 Mass. 13, 16, 154 N.E.3d 904 (2020). I write separately because I believe that in the particular circumstances presented, the sweep was inconsistent with applicable constitutional principles. For that reason, I think this case offers an appropriate opportunity to reexamine the breadth of the existing case law.

Outside of the traffic stop context, the police generally cannot pat frisk a detained individual based only on a reasonable

belief that the individual is armed and dangerous. See Commonwealth v. Narcisse, 457 Mass. 1, 7-9, 927 N.E.2d 439 (2010). Instead, the police also must have reasonable suspicion that a crime is afoot. Id. at 9, 927 N.E.2d 439. That rule generally does not apply in the context of a traffic stop, because the person being pat frisked is being detained on an independent ground (the civil infraction). See Commonwealth v. Torres-Pagan, 484 Mass. 34, 36-37, 138 N.E.3d 1012 (2020). This is one of the many ways in which search and seizure jurisprudence involving traffic stops fundamentally differs from that involving stops that occur in other contexts.[1]

1 The case law recognizes an automobile exception under which the need for a search warrant is excused, even if no exigencies exist. See Commonwealth v. Bongarzone, 390 Mass. 326, 350-351, 455 N.E.2d 1183 (1983) (no warrant needed where car searched fewer than two hours after impoundment). In addition, the cases have created exceptions under which searches of cars may be conducted without probable cause. As but one example, so long as the police have a reason to impound a car and a written policy for inventorying its contents -- however all-encompassing that policy may be -- police are allowed to conduct an inventory search of the vehicle. Compare Commonwealth v. Rosario-Santiago, 96 Mass. App. Ct. 166, 175-177, 134 N.E.3d 563 (2019) (upholding detailed search of car that went beyond mechanical cataloguing of its contents), with id. at 188, 134 N.E.3d 563 n.14 (Milkey, J., dissenting) (characterizing term "inventory search" as a "misnomer that beckons for abuse").

***4** The wide latitude afforded to police officers during routine traffic stops threatens to erode constitutional protections by allowing such stops to serve as cover for unwarranted searches and seizures. The potential for bias exacerbates such problems. See Commonwealth v. Buckley, 478 Mass. 861, 876, 878, 90 N.E.3d 767 (2018) (Budd, J., concurring) (discussing "pretextual stops of people of color [which] stem from explicit bias [i.e., racial profiling], unconscious bias, ... or a combination of both," and recognizing that "pretextual [traffic] stops disproportionately affect people of color," even where driver was not stopped merely for "driving while black"). See also Commonwealth v. Long, 485 Mass. 711, 717, 152 N.E.3d 725 (2020) ("This court has identified the discriminatory enforcement of traffic laws as particularly toxic").[2]

2 To be clear, nothing in the record suggests that the officers here were biased or acting in bad faith. But presumably, officers seeking to fulfill their mission to uncover evidence of illegality generally will make use of whatever constitutional leeway courts afford them. See Arizona v. Gant, 556 U.S. 332, 336-337, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (noting that, "[w]hen asked at the suppression hearing why the search was conducted, [the officer] responded: 'Because the law says we can do it' "); Commonwealth v. Darosa, 94 Mass. App. Ct. 635, 638 n.8, 118 N.E.3d 131 (2019) ("When asked then why he searched the minivan, [the detective] replied, 'I have that right' "). The question here, as always, is where to draw the line between the authority given to police to fulfill their law enforcement mission and the right of the populace to be free from unwarranted searches and seizures.

In light of such issues, the Supreme Judicial Court in recent years has recognized the need for increased scrutiny of police actions during traffic stops for civil infractions. Thus, for example, it is now well recognized that a "routine traffic stop may not last longer than 'reasonably necessary to effectuate the purpose of the stop.' " Commonwealth v. Cordero, 477 Mass. 237, 241, 74 N.E.3d 1282 (2017), quoting Commonwealth v. Amado, 474 Mass. 147, 151, 48 N.E.3d 414 (2016). And just last year, the Supreme Judicial Court recognized that even when a traffic stop initially presents safety concerns justifying the police in ordering an occupant to exit a vehicle, that by itself does not justify conducting a patfrisk. Torres-Pagan, 484 Mass. at 38-39, 138 N.E.3d 1012. Instead, there needs to be a nuanced examination whether the facts as then known to police created a reasonable suspicion that the defendant was armed and dangerous. Id. I believe the principles underlying Cordero and Torres-Pagan should be applied to sweeps like the one in this case.[3]

3 To the extent that such an approach has been rejected by the United States Supreme Court applying Federal law, see Michigan v. Long, 463 U.S. 1032, 1051-1052, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), I note that the Supreme Judicial Court long has held that art. 14 of the Massachusetts Declaration of Rights provides greater protection against searches and seizures in some respects. See, e.g., Commonwealth v. Balicki, 436 Mass. 1, 11 n.11, 762 N.E.2d 290 (2002).

When the officers here spotted the gun holster lying directly next to the defendant's foot, they faced a "swiftly developing situation," a context in which they are allowed increased latitude (citation omitted). Commonwealth v. Feyenord, 445 Mass. 72, 80, 833 N.E.2d 590 (2005), cert. denied, 546 U.S.

1187, 126 S.Ct. 1369, 164 L.Ed.2d 77 (2006). The officers were well justified in removing the defendant from the car in light of immediate safety concerns. For similar reasons, I also believe that once the defendant was out of the car, there was enough of a basis to consider him armed and dangerous so as to justify the patfrisk of his person.

From that point on, however, any immediate threat to the officers effectively was gone. The defendant had been taken from the car, handcuffed, pat frisked, and made to sit on the sidewalk. What remained was for the officers to complete the traffic stop by issuing the defendant a civil citation for running the stop sign while he was detained outside his car.[4] The officers then could have told the defendant that he was free to go, released him, and gone about their other business.

4 The defendant was cooperative with the police throughout the traffic stop. Although he did not have his driver's license in his immediate possession, he provided the police his Social Security number, from which they could (and, after they searched for and found the gun, did) confirm that he had an active license. Once he provided his name, the police learned that he had the same last name as the person to whom the car was validly registered, which the officers testified they had obtained by querying the license plates even before approaching the car. At least once the defendant had been removed from the car, pat frisked, handcuffed, and placed on the ground outside his car, there was no longer any "swiftly developing situation" that interfered with the police confirming that the defendant was validly licensed and the car validly registered (citation omitted). Commonwealth v. Brown, 75 Mass. App. Ct. 528, 537, 915 N.E.2d 252 (2009).

***5** Of course, it can be argued that the defendant in theory still could have posed a danger to the officers after they released him. But to make such a threat more than hypothetical, one would have to posit that after learning that he was being allowed to drive away while escaping detection of the gun he knew was hidden in the car, the defendant nevertheless would retrieve the gun and attack the police with it as they were leaving. In other words, the defendant posed a continuing threat to the officers only if we assume that he would react to his release in a completely irrational manner. Nothing known to the police justified such an assumption. Thus, any objective threat to officer safety had dissipated by the time that the police decided to conduct their thorough search of the interior of the car.[5] That search was necessary neither to complete what was left of the civil traffic stop, nor for officer safety.

5 A protective sweep of a car in theory is a limited search designed only to uncover weapons lying within the reach of the occupants of the car. See Commonwealth v. Manha, 479 Mass. 44, 50, 91 N.E.3d 669 (2018). In a typical passenger car, the reach of a driver or passenger extends virtually to the entire interior of the vehicle. Id. And a protective sweep of a car is hardly an unobtrusive search as this case well illustrates, involving, as it did, the discovery of a gun located inside of a case hidden under the driver's seat.

When the search of the car is stripped of such trappings, the reality of what occurred here readily becomes apparent: the police were conducting an investigatory search for the firearm that they (correctly) surmised was somewhere in the defendant's car. But such an investigatory search of the car required something that the Commonwealth acknowledges the police never had: probable cause. See Commonwealth v. Motta, 424 Mass. 117, 124, 676 N.E.2d 795 (1997).

In my view, the search of the car survives only because the Supreme Judicial Court's pronouncements about police authority to conduct protective sweeps of cars during ordinary civil traffic stops have been broad. In particular, those cases do appear to say, without qualification, that if, under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the police have a reasonable basis to pat frisk someone whom they have ordered out of a car during an ordinary traffic stop, they also may conduct a protective sweep of the car whenever the person could be allowed to reenter it. See Commonwealth v. Silva, 366 Mass. 402, 409-410, 318 N.E.2d 895 (1974). Those pronouncements constrain us to reverse. And, although I believe that cases such as Cordero and Torres-Pagan provide a basis for adopting a more nuanced approach, I appreciate that this question does not properly fall to us as an intermediate appellate court. I therefore join with the majority.

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