FAR-____
2020-P-1334

Commonwealth of Massachusetts

Appeals Court

COMMONWEALTH

vs.

LINCOLN FORD

DEFENDANT-APPELLEE'S APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR FURTHER APPELLATE REVIEW

The case presents a simple question, with far-reaching consequences for new police technologies:

Does a defendant moving to suppress the fruits of a warrantless search or seizure bear the burden of establishing that facts proffered by the prosecutor to meet the Commonwealth's constitutionally-required quantum of suspicion are not reliable for that purpose?

In reversing the order suppressing evidence, the Appeals Court answered this question in the affirmative. It did so in a case where the Commonwealth's only witness conceded that he lacked knowledge about the investigative tool's reliability, and, indeed, affirmatively testified that it often yielded false positives.

That was error. The Appeals Court's approach upends the settled rule allocating to the Commonwealth the burden to establish the reliability of information to justify a warrantless intrusion. The opinion below turns this procedure on its head, charging the defendant with disproving the Commonwealth's evidence in the first instance.

That is not the law. Under both art. 14 and the Fourth Amendment, the Commonwealth must establish, for example, the threshold reliability of an informant's tip and a drug-dog's competence. The same is true here. This rule is more—not less—important when it comes to novel and untested investigative

tools. The Appeals Court's opinion invites the Commonwealth to proffer evidence to meet its burden, and then decline to vouch for it. New technologies—like ShotSpotter—illustrate the folly of this approach, and the wisdom of holding the Commonwealth to its threshold burden.

The Appeals Court's conclusion that Mr. Ford waived a challenge to the ShotSpotter's reliability is untenable. Mr. Ford asserted that he was stopped without reasonable suspicion. At the hearing, the prosecutor attempted to establish reasonable suspicion with ShotSpotter alerts and the subsequent investigation. Defense counsel explained that the Commonwealth's evidence did not meet the constitutional threshold and that untested ShotSpotter alerts could not carry the Commonwealth's burden. The motion judge correctly recognized that the Commonwealth bore this burden. His factual finding concerning ShotSpotter's lack of reliability was fully supported by the evidence, and his legal conclusion that without the ShotSpotter, the Commonwealth lacked reasonable suspicion was entirely sound.

Because the Appeals Court's opinion departs from established precedent, and compels trial courts to accept unreliable facts proffered to justify constitutional intrusions, this Court should allow Mr. Ford's petition for further appellate review pursuant to Mass. R. A. P. 27.1.

PRIOR PROCEEDINGS

On May 5, 2019, Mr. Ford was charged with firearms-related offenses in the Chelsea District Court. G.L. c. 269, § 10(n); G.L. c. 269, § 11C; G.L. c. 131, § 58; G.L. c. 269, 10(b); G.L. c. 269, 10(h)(1). He filed a motion to suppress on January 16, 2020. The court (Livingston, J.) held an evidentiary hearing on February 28, 2020, and allowed Mr. Ford's motion to suppress in a memorandum of decision docketed on March 6, 2020. The Commonwealth applied for leave to pursue an interlocutory appeal on October 2, 2020. A single justice (Cypher, J.) allowed the Commonwealth's motion to file a late application, and allowed the interlocutory appeal to proceed in the Appeals Court. The appeal was entered in that court on November 23, 2020.

Oral argument was held before a panel of that court (Green, C.J., Singh, & Grant, JJ.) on October 15, 2021. On February 18, 2022, the panel issued a published opinion reversing Judge Livingston's order allowing the motion to suppress. No party is seeking reconsideration in the Appeals Court.

STATEMENT OF FACTS AND CASE

I. THE INVESTIGATION AND SEIZURE

Most of the pertinent facts are set forth in the opinion of the Appeals Court, with one omission. Mass. R. A. P. 27.1(b).

The motion judge credited Officer Villanueva's testimony that "he heard what he believed to be gunshots," after turning right on Bellingham Street. [Add.36][1] But he declined to credit the officer's testimony that he could discern the location of the gunshot that he "believed" that he heard. Compare [Tr. 14] ("I continue going . . . towards the gunshots") with [Add.36] ("[[H]e heard what he believed to be gunshots"). Thus, the motion judge made no finding that Officer Villanueva discerned the approximate location of the sound. See [DB26-29]. Given the Appeals Court's reliance on the ShotSpotter alerts to establish reasonable suspicion, it did not address this aspect of the motion judge's findings.

II. THE MOTION TO SUPPRESS

Mr. Ford moved to suppress all evidence "seized from Mr. Ford due to the illegal stop, arrest, and search," for which there was "no probable cause or reasonable suspicion." [CA64] The motion, which was supported by an affidavit [CA65], relied on the Fourth and Fourteenth Amendments to the United States Constitution and art. 14 of the Declaration of Rights. [CA64] As motion counsel explained in the accompanying memorandum of law and at the hearing, the

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[1]The Appeals Court's opinion and Judge Livingston's order are appended to this application, and cited as [Add. #] The transcript of the motion hearing is cited as [Tr.#]. Mr. Ford's appellee brief is cited as [DB.#]. The appendix is cited as [CA#].

Commonwealth failed to establish individualized reasonable suspicion to stop Mr. Ford when the officer encountered him on the steps of his building. [Tr.37-38, CA63]

The Commonwealth's sole witness was the responding officer. On direct examination by the prosecutor (as well as questioning by the motion judge) the officer explained that "ShotSpotter" is "pretty much like satellites around the city . . . that activate based on sound." [Tr. 8-9] Officer Villanueva testified that when a ShotSpotter alerts "units are dispatched just to make sure it is a gunshot as sometimes it might be fireworks or something." [Tr. 9]

On cross examination, the officer testified that he was "not familiar with the actual [ShotSpotter] device" or how it works, and that his only role is to respond to the alert by investigating. [Tr.27] The officer acknowledged that "many [ShotSpotter alerts] are false alarms." [Tr. 27] And the officer offered no testimony concerning ShotSpotter's locational accuracy (or inaccuracy).

III. THE MOTION JUDGE'S ORDER

Judge Livingston concluded that Mr. Ford was seized when Officer Villanueva exited his cruiser with his firearm drawn and ordered Mr. Ford to the ground. [Add.37] The question was whether the officer had specific and articulable facts giving rise to individualized reasonable suspicion that Mr. Ford was involved in criminal activity. [Add.38] Judge Livingston recognized that, in

seeking to justify the warrantless search, the Commonwealth "ha[s] the burden of proof." [Tr.34] He observed that, in opposing the motion to suppress, "the Commonwealth seeks to justify the stop . . . based on the shot spotter alert combined with the circumstances of Villanueva's observations of the defendant on Bellingham Street." [Add.38]

Based on testimony presented by the Commonwealth at the hearing, the motion judge found that the ShotSpotter "lacks reliability both in determining that a shot has been fired and where it has been fired." [Add.38] As the judge explained, "[t]he shot spotter alert does little more than point the police in the right direction to investigate the possibility of a shot being fired, the ensuing investigation possibly establishing reasonable suspicion or probable cause that a crime has occurred. Thus, the shot spotter alert standing alone or in combination with a police investigation does little to support reasonable suspicion." [Add.38] He thus turned his attention to the investigation.

Judge Livingston explained that when Officer Villanueva encountered Mr. Ford "on the landing to the entrance of 86 Bellingham Street," (1) he "had no description of the person who may have been involved in the shots fired incidents;" (2) "there was nothing about the defendant's conduct that suggested that he may have been involved in the shots fired incident if it occurred;" and (3)

he "was not travelling on Bellingham Street" as suggested by the trajectory of the alerts. [Add.38]

Although Judge Livingston credited the officer's testimony that he "heard what he believed to be gunshots," [Add.36] he made no finding crediting the testimony that the officer could discern the location of the noise. The fact that Mr. Ford was "the only one in the area as observed" by the officer added little to the reasonable suspicion calculus. The judge therefore concluded that "[r]easonable suspicion did not exist to stop" Mr. Ford. [Add.38]

IV. THE APPEALS COURT'S OPINION

The Appeals Court reversed the order allowing the motion. The opinion faulted Judge Livingston for setting aside the ShotSpotter alerts in his reasonable suspicion analysis. [Add.27]

The Appeals Court analogized the ShotSpotter alerts to "multiple innocuous facts [which] may in the aggregate give rise to reasonable suspicion." [Add.28]. According to the Appeals Court, when the ShotSpotter alerts were added to the "remainder of the judge's factual findings" — the officer's hearing of apparent gunshots, and the fact that Mr. Ford was the "only person that the officer saw" at the location of the last alert — there was individualized reasonable suspicion to seize him. [Add.30-31]

In the Appeals Court's view, Mr. Ford had not "squarely raise[d]" the issue of the ShotSpotter's reliability by "request[ing] a hearing to test [its] scientific reliability." [Add.28 n.7]

ISSUES PRESENTED

Whether a defendant moving to suppress the fruits of a warrantless seizure bears the burden of establishing that facts relied on by the Commonwealth to meet its constitutional burden are not reliable for that purpose, contrary to the allocation of burdens set out in *Antobenedetto?*

Whether the Commonwealth met its burden of establishing reasonable suspicion by relying on ShotSpotter alerts, where the only facts proffered to establish the reliability of the alerts (as to the occurrence or location of gunshots) came from a witness who disclaimed knowledge about how the technology functions or its accuracy, and where that witness testified from personal knowledge as to many false alerts?

ARGUMENT

THE MOTION JUDGE PROPERLY OMITTED SHOTSPOTTER ALERTS FROM THE REASONABLE SUSPICION CALCULUS.

A. The Appeals Court misunderstood and misallocated the burden.

"No right is held more sacred . . . than the right of every individual to the possession and control of his person." *Terry v. Ohio*, 392 U.S. 1, 9 (1968). To

safeguard this right, officers must have objectively reasonable suspicion of criminal activity before initiating a compulsory stop. *Commonwealth v. Phillips*, 452 Mass. 617, 626 (2008).

The motion judge correctly concluded that "reasonable suspicion did not exist" when Mr. Ford was seized. [Add.38] Because the Commonwealth failed to present any facts supporting ShotSpotter's reliability in identifying the occurrence and the location of gunshots, Judge Livingston properly omitted the alerts from his analysis. [Add.38] The remaining facts, gleaned from the investigation, did not establish reasonable, individualized suspicion.

The Appeals Court faulted Judge Livingston for discounting the alerts. This ruling is untenable, and threatens to upset the well-established procedures safeguarding constitutional rights.

For half-a-century, it has been the prosecution's burden to establish the requisite suspicion for a constitutional seizure. *Commonwealth v. Antobenedetto*, 366 Mass. 51, 56-57 (1974). At the threshold, the prosecutor must establish the reliability of the facts on which the Commonwealth relies. "If the party who has the burden of producing evidence does not meet that burden, the consequence is

an adverse ruling on the matter at issue." W.R. LaFave, Search and Seizure § 11.2(b) at 49 (6th ed. 2020).[2]

Judge Livingston's analysis was faithful to this rule.

On the motion to suppress, the Commonwealth sought to meet its burden with ShotSpotter alerts indicating a gunshot where the officer encountered Mr. Ford. [Tr.7-9, Tr.34-35] But the prosecutor offered no evidence concerning ShotSpotter's "reliability both in determining that a shot has been fired and where it has been fired." [Add.38] Instead, the officer disclaimed knowledge about ShotSpotter's accuracy. Moreover, the officer conceded, from personal experience, "many . . . false alarms." [Tr.27] Because there was no evidence that ShotSpotter alerts were reliable, and some evidence that they were not, Judge Livingston's *factual finding* with respect to the alerts was supported by the evidence, and his *legal conclusion* that ShotSpotter could not support reasonable suspicion was sound.

The Appeals Court's contrary view relieves the Commonwealth of its threshold burden, and directs courts to impute reliability to untested, and

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[2] Mr. Ford does not contend that the Commonwealth must prove the accuracy of ShotSpotter under *Daubert-Lanigan*. See *Commonwealth v. Evelyn*, 485 Mass. 691, 705-706 (2020). "Even at a suppression hearing, however, a trial court's findings must be supported by competent and credible evidence." *United States v. Stepp*, 680 F.3d 651, 668-669 (6th Cir. 2012), cited in *Evelyn*, 485 Mass. at 706.

affirmatively questionable, facts. That approach is incongruous with longstanding procedure, and fatally undermines the constitutional framework for assessing warrantless stops.

Antobenedetto illustrates this principle. There, "in a departure from" prior cases, this Court announced a new, watershed rule placing on the prosecutor the burden to establish the lawfulness of a warrantless search. *Commonwealth v. Antobenedetto,* 366 Mass. 51, 56-57 (1974). That has been the law ever since.

Significantly, the dissenting justices in *Antobenedetto* would have put the burden on the defendant to show that the search was not justified. See *id.* at 537-539 (Tauro, C.J., dissenting) (noting "fundamental policy change" in majority opinion). In excusing the prosecutor from establishing the reliability of ShotSpotter alerts, the Appeals Court echoed the *Antobenedetto* dissent. That is not the law. The *Antobenedetto* rule "is designed to lead the prosecution to present at the proper time the evidence that the originator of the radio communication [or other fact], on the basis of which the intercepting police acted, had reliable advice on the occurrence of the crime." *Id.* at 57. Judge Livingston applied this rule; the Appeals Court ignored it.[3]

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[3] The rule is supported by sound policy, including that (1) the party charged with the burden of persuasion has the burden of going forward with evidence, (2) the prosecution has access to the relevant information, and (3) it is less

"Reasonable suspicion . . . is dependent upon both the content of the information possessed by police and its degree of reliability." *Alabama v. White*, 496 U.S. 325, 330 (1990). The Appeals Court's carve-out for ShotSpotter is unprecedented. Untested tools require more scrutiny, not less.[4] Two examples illustrate this point.

Informant tips. "Information from an anonymous informant may warrant reasonable suspicion if it is shown to be reliable." *Commonwealth v. Costa*, 448 Mas. 510, 514 (2007). The Commonwealth must establish tip's reliability with facts concerning its basis of knowledge (circumstances underlying tip) and veracity (credibility and reliability). See *id.* at 514 (articulating *Aguilar-Spinelli* test). It is the Commonwealth's burden to establish these predicates, not the defendant's to disprove them. As this Court recently explained, where the prosecutor invokes a tip, but presents "no information at all regarding the basis of knowledge or reliability of the confidential informant" a court should "not consider it in

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burdensome to establish constitutionally-required suspicion than its absence. See generally W.R. LaFave, Search and Seizure § 11.2(b).

[4] That is not to say that the prosecutor must establish anew the reliability of an investigative tool at each hearing. "If a theory or methodology has been established as reliable" by *Daubert-Lanigan* or by "general acceptance" it is "subject to judicial notice." *Commonwealth v. Davis*, 487 Mass. 448, 453 (2021). GPS, for example, is "widely used and acknowledged as a reliable relator of time and location data." *Commonwealth v. Thissel*, 457 Mass. 191, 198 (2010) (GPS reliability at revocation proceeding). ShotSpotter does not currently meet either test.

analyzing the justification for the stop." *Commonwealth v. Barreto*, 483 Mass. 716, 719 (2019).

Judge Livingston applied this rule, in light of the prosecutor's failure to offer any evidence about how ShotSpotter captures, assesses, and associates audio recordings with time and location (basis of knowledge), and its accuracy as to the occurrence and location of gunshots (veracity). There was no error. To "consider [the ShotSpotter] in analyzing the justification for the stop," *id.* at 719, is no different than relying on an informant with a record of misleading tips.

Drug-detection dogs. Whether the prosecutor can rely on a drug-detection dog to justify a warrantless stop "depends upon the dog's reliability." *Commonwealth v. Overmyer*, 469 Mass. 16, 22 (2014). The Commonwealth bears the burden of establishing reliability "consistent with the usual rules of criminal procedure," by making its "best case" with a training certification or other records. *Florida v. Harris*, 568 U.S. 237, 242 (2013). The defendant is then afforded "an opportunity to challenge such evidence of a dog's reliability." *Id.* at 247. See, e.g., *Grimm v. State,* 458 Md. 602, 607-608 (2018). This framework applies readily to investigative tools like ShotSpotter. Because the Commonwealth failed to put forward any evidence supporting ShotSpotter's reliability, Judge Livingston's analysis discounting ShotSpotter is consistent with *Harris*, while Appeals Court's reasoning directly conflicts with its teaching.

B. The Appeals Court's waiver analysis is misguided.

Nor did Mr. Ford did waive a challenge to ShotSpotter's relevance to reasonable suspicion by failing to "squarely raise the scientific reliability of the ShotSpotter system" in his motion to suppress. [Add.28 n.7] To the contrary, Mr. Ford properly asserted that the officer lacked reasonable suspicion, based on the ShotSpotter alerts and the investigation. [Tr.38] Questioning by the parties and the motion judge leaves no doubt that ShotSpotter was a live issue at the hearing on the motion. It was on this basis that Judge Livingston made findings concerning ShotSpotter's reliability.

No more was required to put ShotSpotter at issue. See *Harris*, 568 U.S. at 247 (defendant afforded opportunity to challenge reliability *after* prosecutor makes case); *Barreto*, 483 Mass. at 719 (declining to consider tip where Commonwealth did not establish reliability).

The Appeals Court turned this rule on its head. The error follows from its departure from *Antobenedetto*. Notably, the only authority mustered by the Appeals Court for this burden-shifting arises in an incongruous context, where the defendant had the burden of establishing entitlement to relief from sex-offender registration under G.L. c. 6, § 178E(f). See *Ernest E. v. Commonwealth*, 486 Mass. 183 (2020), cited in [Add.28 n.7]. That standard does not apply here.

C. **Untested tools are not "innocuous facts."**

Mr. Ford agrees, as indeed, the motion judge recognized, that "multiple innocent activities taken together" can, in appropriate circumstances, justify a stop. See [Add.38] citing *Commonwealth v. Watson*, 430 Mass. 725, 729 (2000). But the Appeals Court's characterization of ShotSpotter alerts as "multiple innocuous facts" is a category error. [Add.28]

"Innocuous facts" are observations made in the course of an investigation, not the proceeds of untested investigative tools for which the Commonwealth makes no showing of reliability. See, e.g. *Terry v. Ohio,* 392 U.S. 1, 22-23 (1968) (men continually strolling by store windows); *Watson,* 430 Mass. at 729 (men entering hotel room without luggage and emerging with heavy suitcases while interacting with suspected drug dealer). Classifying ShotSpotter alerts as "innocuous facts" is a shell game. This approach would relieve the Commonwealth of its threshold burden, and permit, for example, consideration of "innocent" alerts by untrained pets, and "innocuous" tips from unreliable informants. This Court should make clear that this is not the law. If the ShotSpotter is not reliable, it cannot be considered at all.

D. **There is good reason to doubt ShotSpotter's reliability.**

Judge Livingston's finding that the ShotSpotter "lacks reliability both in determining that a shot has been fired and where it has been fired" is amply

supported by the only evidence at the hearing. [Add.38] Contrary to the Appeals Court's view, Judge Livingston was not required to impute reliability to a technology whose reliability the Commonwealth did not establish, and which its witness affirmatively disclaimed. On this record, reliance on the ShotSpotter would have been clear error.

Had the Commonwealth sought to meet its burden under the "usual rules of criminal procedure," *Harris*, 568 U.S. at 242, the outcome is uncertain. ShotSpotter's methods for distinguishing gunfire from other loud noises are not validated and are shrouded in secrecy. Available evidence establishes no empirical basis to conclude that a ShotSpotter alert reliably reflects that a gunshot was actually fired at a specified location. See Brief of Amici Curiae MacArthur Justice Center and Innocence Project, filed in the present case in the Appeals Court.[5]

The "proper time" to establish that ShotSpotter is "reliable" is at the hearing on the motion, *Antobenedetto*, 366 Mass. at 57, where the Commonwealth should

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[5] A recent assessment of ShotSpotter by the Chicago Office of Inspector General underscores these concerns. The Chicago Police Department's Use of ShotSpotter Technology (Aug. 2021) https://igchicago.org/wp-content/uploads/2021/08/Chicago-Police-Departments-Use-of-ShotSpotter-Technology.pdf.

make its "best case," *Harris*, 586 U.S. at 242. On this record, the Commonwealth made no case at all.[6]

E. Without the ShotSpotter, the officer lacked reasonable suspicion.

The Appeals Court and the motion judge agree that the ShotSpotter alerts were necessary for reasonable suspicion. [Add.30, 38] The question presented on further appellate review is not only critical to ensuring the reliability of evidence at motions to suppress, but is also determinative of the outcome of the motion in this case.[7]

CONCLUSION

For the foregoing reasons, this Court should grant this application for further appellate review.

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[6] Mr. Ford agrees that it would be premature to "announce that the technology and methodology underlying" ShotSpotter can never be reliable "in the circumstances of this case." See [Add.23 n.1] The record reflects the Commonwealth's evidence, where it had the burden and controlled access to the relevant facts. Nothing prevents the Commonwealth, in a future case, from presenting facts supporting ShotSpotter's reliability. The Appeals Court's approach penalizes the defendant for the Commonwealth's failure, incentivizing proffers of untested investigative tools to support a showing of reasonable suspicion—and compels motion judges to accept them.

[7] Judge Livingston declined to credit the officer's testimony that he discerned the approximate location of the gunshots. [Add.36] See *Commonwealth v. Jones-Pannell,* 472 Mass. 429, 433 n.5 (2015). In the absence of a finding substantiating the location from which the sound originated, the officer's hearing of gunshots somewhere could not corroborate the ShotSpotter alerts.

Respectfully submitted,

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By his attorney,

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Addendum

20-P-1334 Appeals Court

COMMONWEALTH vs. LINCOLN FORD.

No. 20-P-1334.

Suffolk. October 15, 2021. – February 18, 2022.

Present: Green, C.J., Singh, & Grant, JJ.

Firearms. Threshold Police Inquiry. Search and Seizure, Threshold police inquiry, Reasonable suspicion, Protective frisk. Constitutional Law, Search and seizure, Investigatory stop, Reasonable suspicion. Practice, Criminal, Motion to suppress.

Complaint received and sworn to in the Chelsea Division of the District Court Department on May 6, 2019.

A pretrial motion to suppress evidence was heard by D. Dunbar Livingston, J.

An application for leave to prosecute an interlocutory appeal was allowed by Elspeth B. Cypher, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by her to the Appeals Court.

Elisabeth Martino, Assistant District Attorney, for the Commonwealth.

Matthew Spurlock, Committee for Public Counsel Services, for the defendant.

Alexa Van Brunt, of Illinois, Jonathan Manes & Tania Brief, of New York, & Christopher T. Bavitz, for Roderick & Solange

MacArthur Justice Center & another, amici curiae, submitted a brief.

SINGH, J. The defendant was charged with various firearm offenses after an investigatory stop and patfrisk revealed that he was unlawfully carrying a loaded firearm. Following an evidentiary hearing, a District Court judge allowed the defendant's motion to suppress on the ground that the stop was not supported by reasonable suspicion. A single justice of the Supreme Judicial Court granted the Commonwealth leave to file an interlocutory appeal and reported the matter to this court. See Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017). We conclude that, in the circumstances presented by this case, it was reasonable for the officer to conduct an investigatory stop of the defendant. We also conclude that the record contains sufficient evidence to support the patfrisk. Accordingly, we reverse the order allowing the motion.[1]

[1] We acknowledge the amicus brief submitted by the Roderick & Solange MacArthur Justice Center at Northwestern Pritzker School of Law and the Innocence Project, Inc., in support of the defendant. The amici urge that we use this case to announce that the technology and methodology underlying a ShotSpotter alert lack scientific reliability, and that we disclaim the relevance of ShotSpotter alerts in determining whether an investigatory stop was supported by reasonable suspicion. For the reasons stated infra, we decline the request in the circumstances of this case.

Background.[2] On May 5, 2019, at approximately 2:20 A.M., a Chelsea police officer was on uniformed patrol duty, traveling along Central Avenue, when he received a radio dispatch informing him of a ShotSpotter[3] alert in the area of 185 Shurtleff Street.[4] As he was directed to respond, the officer activated his cruiser's blue lights as he drove down Central Avenue. Turning right onto Shurtleff Street, he received two more reports of ShotSpotter alerts, one at 30 Bellingham Street and then another at 70 Bellingham Street. He turned onto Bellingham Street, and as he approached the address where the third ShotSpotter had alerted, he heard "what appear[ed] to be gunshots" himself. Almost simultaneously, dispatch reported a fourth ShotSpotter alert at 92 Bellingham Street. The officer began to "scan" the area for "shooters or victims." The only

[2] "We recite the facts found or implicitly credited by the motion judge, supplemented by additional undisputed facts where they do not detract from the judge's ultimate findings." Commonwealth v. Kaplan, 97 Mass. App. Ct. 540, 541 n.3 (2020), quoting Commonwealth v. Jessup, 471 Mass. 121, 127-128 (2015).

[3] At the hearing, the officer described ShotSpotter devices as "pretty much like satellites located around the city" that "activate based on sound." According to the officer, "when they activate, they give a general area of where the possible gunshot took place." See Commonwealth v. Watson, 487 Mass. 156, 157 n.2 (2021) ("ShotSpotter uses sensors to detect a possible gunshot and approximates its location").

[4] Although the judge referred to 185 Bellingham Street, the record supports the location as being 185 Shurtleff Street, which is on the corner of Bellingham Street.

person that he saw was the defendant, who was standing at the top of the landing at the doorway of 86 Bellingham Street, the building next to and attached to 92 Bellingham Street.[5]

The officer stopped in the middle of the street and got out of his cruiser. For his safety, because he was investigating possible gunshots, he unholstered his firearm but kept it in the "low, ready position," pointed at the ground. The defendant began to come toward the officer, "stumbling down the steps" from the front door to the street. He appeared to be intoxicated. The officer ordered the defendant to the ground "so [he] could control the scene" until another officer arrived, at which point the defendant was placed in handcuffs. A patfrisk of the defendant uncovered a firearm in his right pocket.

Discussion. "When reviewing a ruling on a motion to suppress, we accept the motion judge's findings of fact absent clear error," Commonwealth v. Evelyn, 485 Mass. 691, 696 (2020), but we "conduct an independent review of his ultimate findings and conclusions of law,"[6] Commonwealth v. Jimenez, 438 Mass. 213,

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[5] The officer encountered the defendant approximately three minutes after receiving the initial radio dispatch.

[6] Neither party claims that any of the judge's subsidiary findings of fact are clearly erroneous. Rather, the Commonwealth's "issue" with the judge's finding that the ShotSpotter "system lacks reliability" in identifying gunshots is a quarrel with the judge's ultimate findings, which we review

218 (2002). "Our duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Scott, 440 Mass. 642, 646 (2004), quoting Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

1. The stop. The parties agree with the judge's finding that the moment of seizure occurred when the officer ordered the defendant to the ground. Accordingly, our analysis begins with the validity of the stop. See Commonwealth v. Warren, 475 Mass. 530, 534 (2016).

"To justify a police investigatory stop under the Fourth Amendment to the United States Constitution or art. 14 of the Massachusetts Declaration of Rights, 'the police must have "reasonable suspicion" that the person has committed, is committing, or is about to commit a crime.'" Commonwealth v. Vick, 90 Mass. App. Ct. 622, 625 (2016), quoting Commonwealth v. Costa, 448 Mass. 510, 514 (2007). Reasonable "suspicion must be grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom' rather than on a 'hunch.'" Commonwealth v. Meneus, 476 Mass. 231, 235 (2017), quoting Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007). It "is measured by an objective standard, and the totality of the facts

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de novo. See Commonwealth v. Barillas, 484 Mass. 250, 253 (2020).

on which the seizure is based must establish 'an individualized suspicion that the person seized by the police is the perpetrator' of the crime under investigation" (citation omitted). Meneus, supra, quoting Warren, 475 Mass. at 534.

The judge concluded that the officer did not have reasonable suspicion to stop the defendant, reasoning:

> "The [ShotSpotter] alert system lacks reliability both in determining that a shot has been fired and where it has been fired. The [ShotSpotter] alert does little more than point the police in the right direction to investigate the possibility of a shot being fired, the ensuing investigation possibly establishing reasonable suspicion or probable cause that a crime has occurred. Thus, the [ShotSpotter] alert standing alone or in combination with a police investigation does little to support reasonable suspicion. It is the police investigation as a result of a [ShotSpotter] alert that is primarily determinative on the issue of reasonable suspicion."

Consequently, the judge, in his reasonable suspicion calculus, considered only the information known to the officer beginning from the time at which the officer first encountered the defendant. Because the officer did not testify as to conduct that suggested that the defendant was "involved in the shots fired incident," and because the officer had not received a witness description of the perpetrator, the judge determined that the officer did not have "reasonable suspicion" to believe the defendant was committing, had committed, or was about to commit a crime.

The defendant maintains that the judge "properly discounted the ShotSpotter alerts" because the officer's testimony did not prove that a ShotSpotter alert is "reliable";[7] that is, that a single ShotSpotter alert is conclusive as to the presence of gunfire.[8] The defendant's argument fails to recognize that although a fact known to an officer might not suggest criminal activity standing alone, multiple innocuous facts may in the aggregate give rise to reasonable suspicion. Cf. Commonwealth v. Watson, 430 Mass. 725, 729 (2000) ("Seemingly innocent

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[7] To the extent that the judge was referring to scientific reliability, we note that the defendant did not request a hearing to test the scientific reliability of ShotSpotter. See Ernest E. v. Commonwealth, 486 Mass. 183, 189 n.9, 190-191 (2020) (appellate court unable to review issue dependent upon scientific reliability where no hearing held pursuant to Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-595 [1993], and Commonwealth v. Lanigan, 419 Mass. 15, 25-26 [1994]). Neither did the defendant's motion squarely raise the scientific reliability of the ShotSpotter system; it stated only that the stop of the defendant was unjustified because, aside from "reports . . . generated by a device/system known as 'ShotSpotter[,]' [t]he police had no other information" linking the defendant to criminal activity.

[8] The officer who testified at the hearing explained that, although he was "not familiar with the actual device," he had responded to ShotSpotter alerts before. He acknowledged that, in addition to gunfire, the alerts could pick up similar sounds, like fireworks or a car backfiring. He indicated that, just as when people called in to report possible gunshots, police had to respond to ShotSpotter alerts "to make sure it is or it isn't actual gunshot." As the officer's testimony showed, the Commonwealth's reasonable suspicion argument did not depend on ShotSpotter's reliability as an indicator of "actual" gunshots, but merely as an indicator of "potential" gunshots, i.e., noises that could be gunshots. The defendant did not challenge the reliability of ShotSpotter in this sense.

activities taken together can give rise to reasonable suspicion justifying a threshold inquiry"). The defendant's position -- that reports of a series of ShotSpotter alerts should carry equal weight in the reasonable suspicion calculus as the report of a single alert -- is inconsistent with the basic principle that a court considers the totality of the circumstances when assessing reasonable suspicion. See Meneus, 476 Mass. at 236.

Here, the officer began driving toward 185 Shurtleff Street following an alert from a ShotSpotter device located at or near that address. The officer understood that even though the ShotSpotter device may have been activated by something harmless, he had a responsibility to investigate the possibility that someone was discharging a firearm in a residential neighborhood. See, e.g., Commonwealth v. Dasilva, 66 Mass. App. Ct. 556, 559 (2006) ("Police officers have a duty to investigate citizen reports of criminal activity, particularly if the conduct implicates the safety of the public" [citation omitted]). It may well be, as the judge stated, that when the officer first initiated his investigation, the initial ShotSpotter "alert [did] little more than point the police in the right direction to investigate the possibility of a shot being fired."

The timing and location of the alerts that followed, however, also should have been considered in evaluating the

lawfulness of the officer's conduct. The ShotSpotter alerted in the early hours of the morning in a residential area. Each successive report of a ShotSpotter alert, combined with the officer's own hearing of apparent gunshots, made it increasingly reasonable for the officer to infer that the ShotSpotter devices were activating in response to consecutive gunshots. These factors, taken together, supported a reasonable inference that a crime was being committed, namely the discharge of a firearm within 500 feet of a dwelling. See G. L. c. 269, § 12E. Most significantly, the reports of the second, third, and fourth ShotSpotter alerts indicated a specific linear trajectory that began at the intersection of Shurtleff and Bellingham Streets and continued along Bellingham Street. Contrast Commonwealth v. Torres, 424 Mass. 153, 161 (1997), quoting Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 472 (1996) (tallying up multiple "innocuous observations . . . does not produce" reasonable suspicion). The ShotSpotter alerts created an acoustic trail of breadcrumbs, from which it was reasonable to infer that the person responsible for the potential gunshots would be at or near the location where the ShotSpotter had last activated.

Once the information reasonably inferred from the sequence of ShotSpotter alerts is considered in the holistic analysis, the remainder of the judge's factual findings take on greater

significance. "The seizure of a suspect in geographical and temporal proximity to the scene of the crime appropriately may be considered as a factor in the reasonable suspicion analysis." Meneus, 476 Mass. at 240. It is particularly relevant where, as here, the officer encountered the defendant less than a minute after the last reported ShotSpotter alert, at the location where the trail of ShotSpotter alerts ended. Contrast Commonwealth v. Jones, 95 Mass. App. Ct. 641, 647 (2019) (proximity of stop to crime less meaningful where, for example, officer sought out "defendant on [a specific street] because he knew it was near the defendant's home, not because it was near the shooting"). Finally, the officer was scanning the street for potential involved parties, and the defendant was the only person that the officer saw. Cf. Commonwealth v. Privette, 100 Mass. App. Ct. 222, 229-231 (2021) (fact that defendant was only pedestrian on street late at night near scene of crime supported reasonable suspicion). Contrary to the defendant's contention, these facts were sufficient to create "an individualized suspicion" that the defendant was connected to the shots fired. Meneus, supra at 235, quoting Warren, 475 Mass. at 534.

2. Disproportionate force. The defendant argues, in the alternative, that the quantum of force employed by the officer escalated the stop into an arrest without probable cause. We disagree. "[P]olice officers conducting a threshold inquiry may

take reasonable precautions, including drawing their weapons, when the circumstances give rise to legitimate safety concerns." Commonwealth v. Haskell, 438 Mass. 790, 794 (2003). See Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 313 (2013) ("the pertinent inquiry is whether the degree of intrusion is reasonable in the circumstances" [citation omitted]). While it is true that "without the presence of other fear-provoking circumstances," Commonwealth v. Bottari, 395 Mass. 777, 782 (1985), the suspected presence of a firearm alone may not justify the police in drawing their weapons, here the officer had a reasonable belief that, just moments before he encountered the defendant, a person had fired multiple gunshots in a residential neighborhood in the early hours of the morning. Ordering the defendant to the ground until additional officers arrived was reasonable in light of the threat to the safety of the public and to the officer. Where "the police are acting in a swiftly developing situation, . . . the court should not indulge in unrealistic second-guessing." Commonwealth v. Sinforoso, 434 Mass. 320, 325 (2001), quoting United States v. Sharpe, 470 U.S. 675, 686 (1985).

3. The patfrisk. The judge did not reach the issue of the lawfulness of the patfrisk, although it was raised in the defendant's motion to suppress, because the judge concluded that the investigatory stop was improper. The question whether an

officer has a "reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous" is a question of law. Commonwealth v. Torres-Pagan, 484 Mass. 34, 39 (2020). See Commonwealth v. Jones-Pannell, 472 Mass. 429, 433-434 (2015) ("The legal question then becomes whether, at the time the defendant was seized, the officers had an objectively reasonable suspicion of criminal activity, based on specific and articulable facts" [quotation and citation omitted]). Because the subsidiary findings of fact are uncontroverted in this case, it is also a question that we can answer in the first instance. Contrast Jones-Pannell, supra at 438 (appellate court may not engage in independent fact finding to reach conclusion of law contrary to that of motion judge).

This case presents the circumstance in which "[t]he same factors that supported reasonable suspicion for the stop supported the officer's suspicion that [the defendant] was armed and dangerous." Commonwealth v. Henley, 488 Mass. 95, 105 (2021). See Commonwealth v. Narcisse, 457 Mass. 1, 9 (2010) (reasonable suspicion to conduct investigatory stop "may occur simultaneously" with reasonable suspicion to conduct patfrisk). Because we conclude that the officer had reasonable suspicion to believe that the defendant had just repeatedly discharged a firearm in a residential neighborhood, it was also reasonable for the officer to believe that the defendant was armed with the

instrumentality of that crime at that time. See id. at 10 n.7. See also Commonwealth v. Gomes, 458 Mass. 1017, 1019 (2010) (recognizing imminent danger caused by unlawful use of firearm).

Conclusion. We reverse the order allowing the defendant's motion to suppress.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

CHELSEA DISTRICT COURT

Complaint # 1914CR00843

COMMONWEALTH	)	
	)	
	)	
V.	)	MEMORANDUM OF DECISION
	)	Findings of Facts and Rulings of Law
	)	
LINCOLN FORD	)	

Issue Presented

The defendant has filed a motion to suppress evidence seized as a result of a warrantless search. The defendant claims that the police lacked justification to stop him and then search his person resulting in the discovery and seizure of a firearm. The defendant seeks to suppress all of the evidence seized as well as any fruit of the poisonous tree, including statements.

Findings of Facts

Based upon the evidence presented at a hearing on the defendant's motion to suppress on February 28, 2020, the court finds as follows:[1]

Officer Michael Villanueva (Villanueva) has been a member of the Chelsea Police Department for approximately 4 years. Villanueva works as a uniformed patrol officer.

On May 5, 2019, Villanueva was working the 11:30 pm to 7:30 am shift assigned alone and in uniform to a marked cruiser patrol. At approximately 2:20 am, Villanueva was traveling in his cruiser on Central Avenue at the intersection with Willow Street when he received a radio communication from

[1] The only witness to testify at the hearing was Officer Michael Villanueva of the Chelsea Police department.

the Chelsea Police dispatcher of a shot spotter alert in the area of 185 Bellingham Street. See Exhibit #1.[2]

The City of Chelsea has a shot spotter alert system that is comprised of listening devices located throughout the city, primarily on light poles. The listening devices detect sounds similar to gun shots and electronically report the occurrence of such sounds to the police station, resulting in a shot spotter alert. The police then respond to the shot spotter alert location to determine if a gunshot has been fired. The shot spotter alert system can generate a false positive which may be caused by such events as firecrackers being set off or backfiring motor vehicles. Villanueva is not familiar with the reliability of the shot spotter alert system with respect to accurately determining that a gunshot has occurred or accurately determining with specificity the location of a gunshot.

The dispatcher directed Villanueva to respond to 185 Bellingham Street to investigate the shot spotter alert. Officer Emilio Ramirez (Ramirez) was also dispatched to the shot spotter alert. Villanueva activated his emergency blue lights, drove down Central Avenue, and turned right onto Shurtleff Street. See Exhibit #1. While turning right onto Shurtleff Street, Villanueva received a second radio communication from the dispatcher advising him of a second shot spotter alert at 30 Bellingham Street. Shortly thereafter, Villanueva received a third radio communication from the dispatcher advising him of a third shot spotter alert at 70 Bellingham Street.

Villanueva turned right from Shurtliff Street onto Bellingham Street. Villanueva drove past 185 Bellingham Street heading toward 70 Bellingham Street. See Exhibit #1. Villanueva heard what he believed to be gunshots. Villanueva received a fourth radio communication from the dispatcher advising him of a shot spotter alert at 92 Bellingham Street. See Exhibit #1. As he traveled on Bellingham Street toward 92 Bellingham Street, Villanova did not observe any pedestrians in the area.

The building located at 92 Bellingham Street is on the left side of the street from the perspective of Villanueva as he traveled towards it. The building at 92 Bellingham Street is attached to the building at 86 Bellingham Street. The building at 86 Bellingham Street is to the left of the building at 92 Bellingham Street from the perspective of a person standing in front of the two buildings.[3] Both buildings are "big brick apartment" buildings. This area of Chelsea is known as a "high crime area." There are "crime watch" signs posted in the area.

Villanueva observed a person, later identified as the defendant, standing on the landing at the top of the steps to the entrance to the building at 86 Bellingham Street. See Exhibit #2. It was approximately 3 minutes from the time that Villanueva received the first dispatch of a shot spotter alert until the time that he first saw the defendant. The defendant was the only male observed by Villanueva in the area.

Villanueva stopped the cruiser in the middle of the street. Villanueva exited his cruiser with his firearm drawn and in the "low ready position." The firearm was pointing at the ground. Villanueva remained near the cruiser. Villanueva observed the defendant stumbling as he walked down the steps. Based upon his observations, Villanueva believed that the defendant may be intoxicated. The defendant

[2] Exhibit #1 is a map of the area. The red "X" marks Villanueva's location when he received the first dispatch. The red line delineates the route of travel taken by Villanueva. The location of the shot spotter alerts are identified on the map by number.

[3] Thus, Villanueva would arrive at the building at 86 Bellingham first as he traveled on the street.

was walking toward the cruiser. Villanueva ordered the defendant to, "Get on the ground. Hands to the side." The defendant complied. Villanueva drew his firearm and ordered the defendant to get to the ground because he believed there was a possibility that the defendant was involved in the shots fired incident and may be armed.[4] Villanueva radioed for backup to respond to the scene.

Ramirez arrived at the scene within approximately one minute of Villanueva's request for backup. Ramirez exited his cruiser and provided "cover" while Villanueva approached the defendant. Shortly after Ramirez arrived at the scene, Sergeant Burns (Burns) of the Chelsea Police Department arrived.

Villanueva conducted a pat frisk of the defendant. On the defendant's right side in a pocket Villanueva felt a hard object which he believed to be a firearm, based upon his training and experience. Villanueva advised Burns and Ramirez of his discovery of a firearm. Villanueva with the assistance of Burns turned the defendant onto his side. In plain view, Villanueva observed what he believed to be the grip to a firearm. Villanueva seized the firearm. The defendant was placed under arrest.[5]

Rulings of Law

Under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, warrantless searches and seizures are presumptively invalid. Commonwealth v. Viriyahiranpaiboon 412 Mass 224, 226 (1992). Where a warrantless search occurs, the Commonwealth has the burden to prove that it comes within one of the narrowly defined exceptions to the warrant requirement. Commonwealth v. Franklin 376 Mass 885 898 (1978). A defendant cannot test the reasonableness of the search unless he first shows that he was seized within the meaning of the Fourth Amendment to the United States Constitution or art. 14 of the Massachusetts Declaration of Rights. Commonwealth v. Thomas 429 Mass 403, 405 (1999).

A. The Seizure

In the circumstances of this case, the stop in a constitutional sense occurred when Villanueva exited his cruiser with his firearm drawn and ordered the defendant to get on the ground. See Commonwealth v. Matta 483 Mass. 357, 362 (2019).

B. Justification for the Seizure

A police officer may make an investigatory stop where suspicious conduct gives the officer reasonable grounds to suspect that a person is committing, has committed, or is about to commit a crime. Commonwealth v. Wilson 441 Mass 390, 393-394 (2004). The actions of the officer must be based on specific and articulable facts and reasonable inferences therefrom, in light of the officer's experience. Id. Facts and inferences underlying the officer's suspicion

[4] In his testimony Villanueva alternatively used the phrases "might be involved," "could possibly be involved," "might be a possibility," and "wasn't sure if involved or armed."

[5] The defendant is charged with the following offenses: 1) Carrying a Loaded Firearm; 2) Possession of Defaced Firearm; 3) Discharge Firearm within 500 feet of a Building (seven counts;); 10) Unlawful Possession of a Firearm; 11) Carrying a Dangerous Weapon; and 12) Unlawful Possession of Ammunition.

are viewed as a whole when assessing the reasonableness of his acts. Commonwealth v. Thibodeaux 384 Mass 762, 764 (1981). Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry. Commonwealth v. Watson 430 Mass 725, 729 (2000). However, reasonable suspicion may not be based merely on good faith or a hunch. Commonwealth v. Grandison 433 Mass 135, 139 (2001).

Here, the Commonwealth seeks to justify the stop of the defendant based upon the shot spotter alert combined with the circumstances of Villanueva's observations of the defendant on Bellingham Street.

The shot spotter alert system lacks reliability both in determining that a shot has been fired and where it has been fired. The shot spotter alert does little more than point the police in the right direction to investigate the possibility of a shot being fired, the ensuing investigation possibly establishing reasonable suspicion or probable cause that a crime has occurred. Thus, the shot spotter alert standing alone or in combination with a police investigation does little to support reasonable suspicion. It is the police investigation as a result of a shot spotter alert that is primarily determinative on the issue of reasonable suspicion.

Villanueva followed a series of shot spotter alerts on Bellingham Street toward the last alert at 92 Bellingham Street. The shot spotter alerts suggested that the perpetrator was traveling on Bellingham to the area of 92 Bellingham Street. Villanueva first saw the defendant on the landing to the entrance of 86 Bellingham Street. While the defendant was the only one in the area as observed by Villanueva, the defendant was not traveling on Bellingham Street toward 92 Bellingham Street. Further, there was nothing about the defendant's conduct that suggested that he may have been involved in the shots fired incident if it occurred. Villanueva had no description of the person who may have been involved in the shots fired incidents. Describing the area as a "high crime" area adds little to the reasonable suspicion calculus, as has often been observed in reported cases. Reasonable suspicion did not exist to stop the defendant.

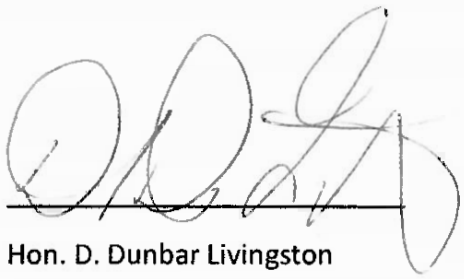
Conclusion

The stop of the defendant was not justified.

The motion to suppress is ALLOWED.

So ORDERED.

Date: 3/3/20



Hon. D. Dunbar Livingston

CERTIFICATE OF COMPLIANCE

This application for further appellate review complies with the rules of court, including those specified in 27.1 of the Massachusetts Rules of Appellate Procedure. It complies with the type-volume limitation of Rule 27.1(b) because it contains 1,995 words, excluding portions of the application exempted by the rule. It complies with the type-style requirements of Rule 27.1 because it has been prepared in proportionally-spaced typeface using Microsoft Word in 14 point Athelas font.

/s/ Matthew Spurlock
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March 10, 2022

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I hereby certify that on March 10, 2022, I have made service of this application for Further Appellate Review upon the attorney of record for the Commonwealth by Electronic Filing System on:

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/s/ Matthew Spurlock
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March 10, 2022