

S.J.C. No. DAR-____
No. 2025-P-0964

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH,
Appellant,
vs.

LOVANT WHEELER,
Defendant-Appellee

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

APPLICATION FOR DIRECT APPELLATE REVIEW

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REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. A. P. 11, defendant Lovant Wheeler requests that this Court allow direct appellate review of this appeal. Mr. Wheeler did not voluntarily consent to the search of his car because, at the time he made an offer for officers to search his car, they were physically detaining and illegally patfrisking him. However, even if this purported consent was voluntary, Mr. Wheeler withdrew it through the combination of his actions and words as soon as he noticed a search of his car was taking place. This appeal presents a question of law regarding the Massachusetts Declaration of Rights: Whether, under art. 14, the withdrawal of consent to search is valid where, “in light of all the circumstances, a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent giver.” *Commonwealth v. Cantalupo*, 380 Mass. 173, 178 (1980).

PRIOR PROCEEDINGS

On August 27, 2024, the defendant, Lovant Wheeler, was indicted in Suffolk Superior Court on one count of trafficking in cocaine, G.L. c. 94C, § 32(E)(b). R.4, 9.¹ On April 28, 2025, Mr. Wheeler filed a motion to suppress items seized from his car and person. R.7. The Commonwealth filed an anticipatory opposition on April 24. R.6. On April 29, an evidentiary hearing was held on the motion (Gant, J.,

¹ “R.” refers to the record appendix filed with the Commonwealth’s appellant brief in the Appeals Court. “A” refers to the addendum to this application. The transcript will be cited by volume and page as “Tr. __/__.” “E1A” refers to Officer Sean Burke’s body worn camera footage (marked as Exhibit 1A at the motion hearing). “E1B” refers to Officer Patrick Fullam’s body worn camera footage (marked as Exhibit 1B at the motion hearing).

presiding). R.7; Tr.3. On May 5, the judge allowed Mr. Wheeler's motion. R.7, 10-26; A.21-37.

The Commonwealth filed a notice of appeal on June 2, 2025, and on August 6, the single justice (Wendlandt, J.) allowed the Commonwealth's application for leave to file an interlocutory appeal pursuant to Mass. R. Crim. P. 15(a)(2). The case was entered in the Appeals Court the following day. R.7-8, 27. The Commonwealth filed its brief on September 30. CB.1. The defendant filed his brief on December 1, 2025.

STATEMENT OF FACTS

At the evidentiary hearing on the motion to suppress, the Commonwealth introduced the body-worn camera footage of Officers Sean Burke and Patrick Fullam, two of the three officers who stopped and searched Mr. Wheeler and his car. Tr.19, 30. Officer Burke testified at the motion hearing. Tr.7. The facts found by the motion judge and shown on the body worn camera footage are summarized below.

i. The stop

On March 1, 2024, around 8:30 P.M., Mr. Wheeler was driving in South Boston when he was pulled over by three Boston police officers for failure to fully stop at a stop sign. R.10; A.21. After observing the traffic violation, Officer Burke turned his cruiser around, activated the lights, and another officer entered the license plate number into the Criminal Justice Information System. R.11; A.22. Police discovered that the car was registered to Mr. Wheeler. R.11; A.22.

Officer Burke knew Mr. Wheeler, having interacted with him one-on-one four to five times in the previous three to four years, along with occasionally

seeing him in a group of people he was investigating or had previously arrested. R.11; A.22; Tr.13-15. Officer Burke last saw Mr. Wheeler about a year before this stop. R.11; A.22; Tr.50. Officer Burke was aware that Mr. Wheeler had a prior conviction for illegal possession of a firearm, which he believed was at least four years old and later learned was ten years old. R.11; A.22.

Mr. Wheeler immediately complied with the stop, pulled over to the side of the road, and got out of his car. R.12; A.23. He stood next to the sidewalk with the door of his car open while he waited for police. R.12; A.23. The officers did not observe any “red flags from the interior of the car” as Mr. Wheeler was pulled over. R.11-12; A.22-23.

As captured on the officers’ body worn cameras, Mr. Wheeler stood by his car with one arm out, gesturing and holding two cellphones in one hand, as the three officers approached him. R.12; A.23; E1A-00:25–00:30; E1B-00:29–00:33. Mr. Wheeler appeared “nervous, frustrated, and scared regarding the police encounter.” R.12; A.23. The three officers wore plain clothes and were armed. R.12; A.23; Tr.59-60. Mr. Wheeler’s initial statements to the officers are not audible on either camera but based on Officer Burke’s response—“You didn’t even slow down”—the motion judge inferred that Mr. Wheeler was asking them why he was stopped. R.12; A.23; E1A-00:30–00:31; E1B-00:30–00:31.

As he approached Mr. Wheeler, Officer Burke asked, “Do you have your license and registration on you?” and Mr. Wheeler responded, “Yes I do, but—.” E1A-00:31–00:33; E1B-00:34–00:37. Officer Burke then physically put himself between Mr. Wheeler and the open car door, asking, “Why are you getting out [of the car]?” as Mr. Wheeler turned back towards his car. E1A-00:33–00:34; E1B-00:36–00:37. At this point, Mr. Wheeler was surrounded by the officers. R.12; A.23;

EIA-00:34-00:40; EIB-00:36-00:42. As the motion judge described Mr. Wheeler during this portion of the interaction, “Mr. Wheeler can be seen raising his hands and clearly getting nervous as the officers close in on him.” R.12; A.23. Officer Fullam said to Mr. Wheeler, “Buddy, look look look, relax, hey listen” as Mr. Wheeler put his arms up and as Officer Fullam grabbed one of his arms. EIA-00:35-00:40; EIB-00:37-00:41. Officer Burke then told him to “relax,” saying, “wrong foot,” presumably referring to the fact that the encounter started on the wrong foot. EIA-00:38-00:40; EIB-00:40-00:42.

The motion judge explicitly discredited Officer Burke’s testimony that Mr. Wheeler was “aggressive” and showing “a fighting stance,” during this initial interaction, Tr.77-78, instead finding that “Mr. Wheeler did not take a fighting stance with police,” nor did he act “aggressively.” R.13; A.24. The judge found Officer Burke’s description of Mr. Wheeler’s behavior as “animated,” Tr.17, to be more accurate, noting that Mr. Wheeler “was verbally protesting the stop and its escalation.” R.13; A.24. The motion judge credited Officer Burke’s concern for his and his fellow officers’ general safety based on “Mr. Wheeler’s panicked and nervous behavior, and, as Officer Burke testified, Mr. Wheeler’s decision to get out of his car.” R.13-14; A.24-25.

ii. Patfrisk and offer to search car

At the same time, Officer Burke began to patfrisk Mr. Wheeler, touching his side and then his front sweatshirt pocket, saying, “Relax, we’re good.” EIA-00:39-00:40; EIB-00:42-00:43. The motion judge noted, “Mr. Wheeler’s increasing nervousness and fear is visible the moment the officers began to search his physical person.” R.24; A.35.

In response, Mr. Wheeler leaned over to the open driver's side door and told the three officers, "You can pop, lemme, look, Imma pop everything, you can search everything." R.14; A.25; E1A-00:40-00:43; E1B-00:43-00:46. As the motion judge properly found, Mr. Wheeler made this statement as Officer Burke put "his hands on Mr. Wheeler's body and front hoodie pocket." R.14; A.25. Officer Burke then continued frisking Mr. Wheeler and immediately told him, "Alright, alright, just relax, that's fine, we're not trying to search everything, just relax, I'm just, okay." R.14; A.25; E1A-00:43-00:49; E1B-00:46-00:51. As Officer Burke told Mr. Wheeler that they were "not trying to search everything," he continued patfrisking Mr. Wheeler. R.14; A.25; E1A-00:50-00:52; E1B-00:48-00:50. As he was being patfrisked by Officer Burke, Mr. Wheeler told Officer Fullam, "Damn bro, I don't get in trouble with the law, I haven't been in trouble for ten years bro." E1A-00:47-00:51; E1B-00:50-00:54. Officer Burke responded, "I get it, listen, listen, relax," as he continued patfrisking Mr. Wheeler. E1A-00:50-00:53; E1B-00:53-00:55.

iii. Continued patfrisk and revised offer to pop trunk

As the patfrisk continued, Mr. Wheeler told Officer Fullam, "I'm selling clothes, now, look look, pop my trunk." R.15; A.26; E1A-00:52-00:55; E1B-00:55-00:58. Officer Burke and Officer Fullam responded, "That's fine," and Officer Fullam told Mr. Wheeler, "Relax, we're not trying to." R.15; A.26; E1A-00:53-00:57; E1B-00:58-01:00.

During the patfrisk, Officer Burke felt cash in Mr. Wheeler's front sweatshirt pocket, which he pulled out and then returned. R.14-15; A.25-26; E1A-00:44-00:54; Tr.21. He pulled up Mr. Wheeler's sweatshirt and patfrisked Mr. Wheeler's legs. E1A-00:54-01:00. He then patted down Mr. Wheeler's top. E1A-

01:00–01:04. No weapons or contraband were found during the patfrisk. R.15; A.26.

Mr. Wheeler said, “See, I’m about to get fucked with, I’m like come on bro.” E1A-01:02–01:05; E1B-01:05–01:07. Officer Burke responded, “We weren’t going to fuck with you, it’s just you ran through a stop sign right in front of us.” E1A-01:05–01:07; E1B-01:07–01:10. Mr. Wheeler asked the officers, “Want me to get my registration though?” R.15; A.26; E1A-01:07–01:08; E1B-01:10–01:11. Officer Burke replied, “Where is it? I’ll grab it.” R.15; A.26; E1A-01:09–01:10; E1B-01:12–01:13. Mr. Wheeler told him, “It’s on the—you gotta go around,” gesturing to the passenger side of the car, and Officer Burke responded, “Yeah I will.” R.15; A.26; E1A-01:10–01:15; E1B-01:14–01:18.

iv. Second offer to pop trunk

The officers told Mr. Wheeler to go to the back of the car. R.15-16; A.26-27; E1A-01:15–01:18; E1B-01:18–01:22. As Officer Burke turned back to Mr. Wheeler’s car, Mr. Wheeler asked him, “Like, but bro, can you pop the trunk though? I can show you everything.” R.16; A.27; E1A-01:21–01:25; E1B-01:23–01:27. As he said this, Officer Fullam interrupted him, saying, “We don’t care about that, we’re not, we’re not trying to.” R.16; A.27; E1B-01:25–01:28. Mr. Wheeler responded, “This shit’s crazy bro, I’m tired of this bro.” R.16; A.27; E1B-01:28–01:30.

v. Officer Burke’s search

Officer Burke went to the passenger side of the car, examined Mr. Wheeler’s license, which was sitting on the passenger seat, opened the glove compartment, briefly rifled through it, and then closed it again without pulling out Mr. Wheeler’s registration. R.17; A.28; E1A-01:33–01:41. At that point, “Officer Burke testified that he decided to start searching the vehicle.” R.17; A.28; Tr.65-66.

He then opened and looked through the center console, finding one rubber-banded bunch of cash and other cash in the console, which he later determined to be \$1,020 wrapped in a band and \$600 in loose currency. R.17-18; A.28-29; EIA-01:41-01:57. Officer Burke felt under the passenger seat and continued going through the contents of the center console, including shaking and opening a sealed container. R.17-18; A.28-29; EIA-01:57-02:37. He then examined the front console, in front of the gear shift, and found a palm-sized black box, which he testified was a magnetic key carrier. R.18; A.29; EIA-02:37-02:42. When he opened it, he found cocaine and immediately arrested Mr. Wheeler. R.18; A.29; EIA-02:43-03:20.

vi. Mr. Wheeler's attempt to record

Meanwhile, when Officer Burke first went to the passenger side of the car, Mr. Wheeler stood by the trunk with Officers Fullam and Hamilton, debating the events that led to the stop. R.16; A.27; EIB-01:30-01:46. The motion judge described the two officers as “laughing or smiling at Mr. Wheeler’s insistence that he paused for ‘two seconds’ at the stop-sign.” R.16; A.27.²

After the conversation died down, Mr. Wheeler looked towards his car and appeared to notice Officer Burke beginning to search the passenger area of his car. R.17; A.28; EIB-01:46-01:53. As soon as he became aware of the search, he raised both phones and asked the officers, “What, can I, can I record this?” EIB-01:53-01:54. Immediately, the two officers told him, “No, hold on hold on hold on, relax.” EIB-01:54-01:57. Mr. Wheeler repeated, “I just want to record this, I just want to

² The Commonwealth describes this interaction as “border[ing] on the jovial,” CB.23, but although the two officers are laughing, Mr. Wheeler is visibly upset and frustrated. EIB-01:30-01:46.

record this, I just want to record this!” R.17; A.28; E1B-01:54–01:58. As the two officers told him he could not record, Mr. Wheeler approached the driver’s side of his car, but his path was immediately blocked by the two officers, and Officer Fullam grabbed his raised hand holding a cellphone. R.17; A.28; E1B-01:54–01:59. While grabbing Mr. Wheeler’s hand, Officer Fullam told him, “Come back over here, just come back over here.” E1B-01:58–02:01. As Officer Fullam tugged Mr. Wheeler away from the car by his hand, Mr. Wheeler once again repeated, “I just want to record.” E1B-02:02–02:04. Officer Hamilton told Mr. Wheeler, “Right now it’s just a stop sign thing, it doesn’t need to turn into anything,” and Officer Fullam told him, “You’re making it a lot bigger than it is.” R.17; A.28; E1B-02:04–02:08.

Officer Burke then walked up and placed Mr. Wheeler under arrest. E1B-03:15–03:34. Other than the cocaine found in the magnetic key carrier, no other contraband was found in the car or on Mr. Wheeler’s person.

ISSUE PRESENTED

Mr. Wheeler’s actions—attempting to record the search of his car—and words—asking to record and stating he did not know what the searching officer was doing—demonstrated an intent to withdraw his consent to search. The Commonwealth argues that any withdrawal of consent must be unambiguous. The question presented by this appeal is whether art. 14 requires police to stop or limit a consent search where, “in light of all the circumstances, a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent giver.” *Commonwealth v. Hinds*, 437 Mass. 54, 59 (2002), quoting *Commonwealth v. Cantalupo*, 380 Mass. 173, 178 (1980). This issue is fully preserved by the

defendant's motion to suppress. Because this issue presents a question of law, review is de novo. See *Commonwealth v. Miller*, 366 Mass. 387, 389 (1974) (questions of law reviewed de novo).

ARGUMENT

The allowance of Mr. Wheeler's motion to suppress must be affirmed because he did not voluntarily consent to a search of his car, and because his actions and words upon discovering police were searching his car reasonably conveyed a withdrawal of any purported consent to search.

A. Mr. Wheeler's offers to search his car were made while and immediately after he was being illegally patfrisked and therefore do not constitute voluntary consent.

Officer Burke's search of Mr. Wheeler's car was not justified by Mr. Wheeler's consent. Because there was no other justification for the warrantless search of Mr. Wheeler's car, the motion judge correctly concluded that the search violated Mr. Wheeler's Fourth Amendment and Article 14 rights, and that the fruits of the illegal search must be suppressed. R.26; A.37.

"Searches and seizures conducted outside the scope of valid warrants are presumed to be unreasonable. In such circumstances, the burden is on the Commonwealth to show that the search or seizure falls within a narrow class of permissible exceptions." *Commonwealth v. Rodriguez*, 378 Mass. 296, 303 (1979), quoted in *Commonwealth v. Seng*, 436 Mass. 537, 550 (2002). In reviewing the judge's order suppressing the evidence, this Court grants deference to factual findings based on witness testimony and conducts an independent review of the body-worn camera footage. *Commonwealth v. Yusuf*, 488 Mass. 379, 385 (2021). Legal rulings are reviewed de novo. *Id.*

As the motion judge correctly found, Mr. Wheeler did not consent to Officer Burke's search of his car. R.24; A.35. Consent is an exception to the warrant requirement and requires that a "person possessing the ability and apparent authority to consent" give "free and voluntary consent" to a search. *Commonwealth v. Yehudi Y.*, 56 Mass. App. Ct. 812, 816 (2002). The question of whether consent is free and voluntary is a question of fact "to be determined from all of the circumstances" of the interaction. *Id.* at 816-817. "The Commonwealth has the burden of demonstrating that the consent was unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority." *Id.* at 817, quoting *Commonwealth v. Voisine*, 414 Mass. 772, 783 (1993) (cleaned up). This is because the "[w]aiver of constitutional rights must be unequivocal and specific." *Commonwealth v. McGrath*, 365 Mass. 631, 631 (1974) (defendant telling officer "I'm clean this time" while spreading his hands out did not amount to invitation to search him). Thus, the central question presented by this case is whether a reasonable person in the police officer's position would believe that Mr. Wheeler voluntarily agreed that officers could search his car. It is clear he did not.

The motion judge properly found, R.19-22; A.30-33, and the Commonwealth concedes, CB.16 n.9, that Officer Burke's patfrisk of Mr. Wheeler was illegal. Because the illegal patfrisk began before Mr. Wheeler's first offer to search, the motion judge correctly concluded that Mr. Wheeler's consent was not freely and voluntarily given. R.24; A.35. Specifically, the motion judge found that, at the time of that offer, Mr. Wheeler had been grabbed on his arm by police and Officer Burke had started his illegal patfrisk. R.14, 24; A.25, 35; E1A-00:35-00:43; E1B-00:40-00:46. "Where consent is obtained as a result of the exploitation of a prior illegality that follows close in time, then consent is not considered to be freely given." *Yehudi Y.*,

56 Mass. App. Ct. at 817, citing *Commonwealth v. Midi*, 46 Mass. App. Ct. 591, 595 (1999). Here, Mr. Wheeler’s offer for officers to search his car, and his later more limited two offers for them to look at his trunk, were made during and immediately after this illegal patfrisk and thus was not freely given.

B. The Commonwealth’s interpretation of the standard for limiting or withdrawing consent improperly and unfairly flips the burden of showing unambiguous consent from the Commonwealth to the defendant.

Even if Mr. Wheeler had voluntarily consented to the search of his car, he withdrew that purported consent prior to the searching officer’s discovery of any contraband in the car. The Commonwealth contends that Mr. Wheeler never withdrew his consent after ostensibly offering it. CB.27-31. The motion judge disagreed, properly finding that, “a reasonable person in the position of the police would have understand that any consent they perceived Mr. Wheeler to have given was being withdrawn.” R.25; A.36.

The Commonwealth relies on a parenthetical quotation in *Commonwealth v. Suters*, 90 Mass. App. Ct. 449, 455 (2016), to a District of Columbia Court of Appeals decision, *Burton v. United States*, 657 A.2d 741, 746-747 (D.C. 1994), to claim that a person’s withdrawal of consent must be unambiguous: “[C]onduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer’s authority to conduct the search, or some combination of both.” CB.24, 28-30.³

But the Commonwealth’s reading of the parenthetical undercuts the true animating principle of *Suters*. In *Suters*, officers obtained consent to enter the defendant’s home from his wife to turn off the water valve in the basement. 90 Mass. App. Ct. at 451. The defendant then entered the basement, told officers he knew

³ The motion judge also cited the *Burton* parenthetical in his order. R.25; A.36.

where the water valve was located, and then entered a separate room in the basement, shutting the door behind him. *Id.* The Appeals Court held that the effectively withdrew his wife's consent for police to enter their home through the combination of his actions in shutting the door behind him and his statements to police that he knew where the water valve was. *Id.* at 454-455. The Appeals Court quoted *Burton* to buttress the idea that consent can be withdrawn verbally or by actions inconsistent with consent. In full context, *Burton* was cited as additional support for a holding of this Court that *Suters* quoted: "[t]he ultimate question is whether, in light of all the circumstances, a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent giver." *Id.* at 455, quoting *Cantalupo*, 380 Mass at 178. The Appeals Court's citation to *Burton* did not and could not establish that, under art. 14, a person's withdrawal of consent must be "unambiguous."

The Commonwealth, thus, has it backwards: it is *their* burden to establish that a defendant's consent to search is unambiguous, with any ambiguity working against the Commonwealth. *Commonwealth v. Ortiz*, 478 Mass. 820, 825 (2018), quoting *Commonwealth v. Carr*, 458 Mass. 295, 299 (2010) ("We have held that the voluntariness of consent to a search must be unambiguous; '[t]he Commonwealth must provide us with more than an ambiguous set of facts that leaves us guessing about the meaning of [the] interaction and, ultimately, the [consenting person's] words or actions.'"). Article 14 is animated by the concept of "reasonableness." A search based on purported consent is only reasonable if the searching officer, at the time of the search, has a reasonable basis to believe the person has, in fact, given "free and voluntary consent." *Cantalupo*, 380 Mass. at 178 ("Because consent can legitimize what would otherwise be an unreasonable and illegal search, a search with

consent is reasonable and legal only to the extent that the individual has consented”).

The Commonwealth’s view that Mr. Wheeler’s withdrawal of consent must be “unambiguous” works to shift this burden of establishing the existence of consent at the time of the search from the Commonwealth to Mr. Wheeler.⁴ But the question underlying the entire series of events in this case is not whether Mr. Wheeler unambiguously withdrew his consent. Rather, it is whether there was an unambiguous and therefore reasonable basis to believe that Mr. Wheeler consented to a search of his car. *Ortiz*, 478 Mass. at 825. There was not. This Court has repeatedly held that the scope of a consent search must be determined based on whether “a man of reasonable caution would be warranted in the belief that some limitation was intended by the consent giver.” *Hinds*, 437 Mass. at 59, quoting *Cantalupo*, 380 Mass. at 178. It should now clarify that under art. 14, the same rule applies to the withdrawal of consent. If the purported consent giver’s words and actions would indicate to a reasonably cautious officer that he intended to limit or withdraw his previously given consent, a search that ignores those terms is unreasonable

⁴ For example, the Commonwealth argues that Mr. Wheeler’s statements about popping his trunk were “not unambiguous and not clearly inconsistent with consent.” CB.29. Later, the Commonwealth argues that Mr. Wheeler may have been motivated by a fear that police were stealing from him when he tried to record them, not by a desire to end the search: “there was a reasonable alternative explanation precluding a finding that his conduct was unambiguous: the defendant may have feared that the officers wanted to steal something from his car (perhaps clothing or other merchandise).” CB.30.

C. Mr. Wheeler’s actions and words reasonably demonstrated that he withdrew any ostensible consent.

Here, there was a “reasonable basis for the police to infer that the defendant had . . . withdrawn[] his consent.” *Caputo*, 439 Mass. at 163. Mr. Wheeler’s statements and actions upon discovering that Officer Burke was searching the passenger area of his car would indicate to any reasonable person that he did not want the search to take place. Once he became aware that Officer Burke was not merely getting his license and registration, as he had claimed, E1A-01:09–01:10; E1B-01:12–01:13, Mr. Wheeler immediately objected. He asked the other two officers, “What, can I, can I record this?” E1B-01:52–01:54. He then repeatedly asked “can I record this?” with each statement growing in volume. E1B-01:54–01:57. He asked the officers twice more if he could record, finally telling them, “I don’t know what he [Officer Burke] is doing.” E1B-02:02–02:20.

Each of these requests was met with either a denial of Mr. Wheeler’s right to record, or with a deflection that his requests were making the stop a bigger deal than it needed to be. E1B-02:03–02:07 (“Right now it’s just a stop sign thing, it doesn’t need to turn into anything,” “You’re making it a lot bigger than it is”). The officers’ body language and physical actions—blocking Mr. Wheeler’s path, blocking his ability to see the search, and grabbing the arm he was using to attempt to record—also clearly indicated that police would not permit Mr. Wheeler to exercise his constitutional right to record or to even view the search taking place. See *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (“[T]hough not unqualified, a citizen’s right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment”).

The Commonwealth argues that, because Mr. Wheeler may have been motivated by a fear that police were stealing from him, his actions cannot be understood as a withdrawal of consent. CB.30. Regardless of *why* Mr. Wheeler wanted to record, whether from a fear police were stealing from him or because he objected to the search for other reasons, his actions show that he objected to the search and did not want it to occur. Because the Commonwealth has the burden to prove Mr. Wheeler’s “free and voluntary” consent, any ambiguity must weigh against the Commonwealth, particularly where the three officers had the opportunity to clarify what Mr. Wheeler meant by his statements. *Ortiz*, 478 Mass. at 825 (where scope of defendant’s consent “most generous[ly]” understood as “ambiguous,” “police are not allowed to take advantage of such ambiguity when they have the ability to resolve it with clarifying questions”).

REASONS TO GRANT DIRECT APPELLATE REVIEW

This case presents a question of law concerning the standard under Article 14 for limiting the scope of or withdrawing consent in the consent search context. This Court has previously articulated the standard for limiting the scope of consent to search. However, the Appeals Court, in citing to a District of Columbia Court of Appeals case, has confused this standard and inadvertently placed too high a burden on defendants to prove an unambiguous withdrawal of consent.

The issue of warrantless and otherwise unjustifiable searches being justified as consent searches remains a pressing one in Massachusetts, particularly with the ever-expanding use of car stops in policing. “Consent searches are no longer an occasional event . . . but are now a wholesale activity accompanying a great many traffic stops” LaFave, 4 Search & Seizure § 9.3(e), at 547 (6th ed. 2025). And studies consistently show that minority drivers are more likely to be

asked for consent and are more likely to be the subject of consent searches than white drivers.⁵ The present case presents an opportunity for this Court to directly address the standard by which people may limit or withdraw their consent to search.

⁵ See Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 *Nature Hum. Behav.* 736, 738 (2020), <https://www.nature.com/articles/s41562-020-0858-1> (“We find that minority drivers are more likely than whites to undergo consent searches in the seven states for which we have reliable data (Colorado, Florida, Massachusetts, Maryland, North Carolina, Texas, and Washington); controlling for stop location, date and time, and driver age and gender, we find that black drivers have 2.2 times the odds of whites and Hispanic drivers have 1.9 times the odds of whites of undergoing a consent search”); Kelly, *Race, Cars and Consent: Reevaluating No-Suspicion Consent Searches*, 2 *DePaul J. for Soc. Just.* 253, 273-75 (2009), <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1066&context=jsj> (data from Illinois and Rhode Island reveals that minority drivers are “substantially more likely” to be subject to consent searches).

CONCLUSION

For the reasons stated herein, this Court should grant the defendant's application for direct appellate review.

Respectfully submitted,

LOVANT WHEELER

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December 12, 2025

ADDENDUM

Order on Defendant's Motion to Suppress	A.21
Suffolk Superior Court Docket	A.38

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 2484CR00436

COMMONWEALTH

vs.

LAVONT WHEELER

FINDINGS OF FACT, RULINGS OF LAW, AND ORDER
ON THE DEFENDANT'S MOTION TO SUPPRESS

In this matter, the Defendant Lavont Wheeler seeks to suppress the alleged narcotics police found inside a small, closed container in the center console of his car, as well cash police seized from Mr. Wheeler's pockets and from the inside of his car. The Court held an evidentiary hearing on April 29, 2025, at which Boston Police Officer Sean Burke testified. Mr. Wheeler and the Commonwealth introduced nine exhibits, including videos from two officers' body-worn cameras. For the reasons below, the Defendant's motion to suppress is **ALLOWED**.

FINDINGS OF FACT

On March 1, 2024, Officer Burke and his two partners were on patrol in a section of the South Boston neighborhood. Around 8:30 p.m. – approximately four hours into their shift – Officer Burke saw a car drive through a stop-sign without fully coming to a stop. The car was traveling towards the police cruiser, in the opposite direction of traffic. There were no other vehicles traveling on the road and no pedestrians in the area. Officer Burke estimated that the driver was also driving at an accelerated speed as he rolled through the stop-sign, but he testified that predictably gauging the speed of a car driving towards you is difficult. When asked, he admitted he would not feel comfortable estimating the speed of a car in this circumstance, and, for this reason, did not cite Mr. Wheeler for speeding.

In any event, having witnessed a traffic violation, Officer Burke activated the cruiser's lights, performed a U-turn, and got behind the car. He recalled saying – or overhearing one of his partners saying – “oops, stop-sign” – regarding the general level of discussion within the cruiser as the reason for the stop. Officer Burke's partner entered the license plate in the cruiser's computer and searched the Criminal Justice Information System. The search showed that the car was registered to Mr. Wheeler, who resides in the neighborhood.

The hearing evidence made clear that the officers in this case and Mr. Wheeler have history. Although it was somewhat opaque, the evidence suggested that this history was, at times, fraught. Officer Burke testified that he has had approximately 4-5 one-on-one interactions with Mr. Wheeler at some point in the past 3-4 years, in addition to occasionally encountering him in a group of individuals that police were otherwise investigating or questioning. Officer Burke also alleged that Mr. Wheeler had occasionally been seen with other individuals that Officer Burke had, at other times, arrested. However, Officer Burke acknowledged that, prior to this particular evening in 2024, it had been approximately a year or more since he last interacted with Mr. Wheeler. Officer Burke also knew that Mr. Wheeler had a prior conviction for illegal possession of a firearm. However, at the time of the stop, Officer Burke could not say definitively how long ago this conviction occurred. He knew it was more than 4 years prior to the stop because it occurred before his assignment to this police district.¹ Officer Burke testified that his two partners and Mr. Wheeler had this same level of familiarity with one another.

Mr. Wheeler pulled his car over quickly and without any issues. There was no evidence that Mr. Wheeler made any concerning movements inside the car, took a concerning long time

¹ At the hearing, Officer Burke testified that he had since learned that Mr. Wheeler was convicted in 2014 – 10 years before the stop in this case.

to stop, drove erratically, or parked in an obstructive way. In short, there was no evidence presented at the hearing that police observed any red flags from the interior of the car as they pulled Mr. Wheeler over.

However, when Mr. Wheeler parked, he immediately got out of his car. He stood at the driver side with the door open and waited for police to walk up. The sequence of events that followed, as shown unmistakably on Officer Burke's and his partner's body worn camera ("BWC") footage, are important to the Court's factual findings and analysis. As can be seen on Officer Burke's BWC footage, Mr. Wheeler appears nervous, frustrated, and scared regarding the police encounter. The officers were all dressed in plain clothes.

Although the BWC footage does not contain an audio recording of the initial moments of the stop, Mr. Wheeler can be seen talking to the police as they walked towards him. Based on Officer Burke's response, which is audible, the Court finds it reasonable to infer that Mr. Wheeler was inquiring as to the reason for the stop. Officer Burke can be overheard responding to Mr. Wheeler's un-heard statement, "you didn't even slow down." He then immediately asked, "do you have your license and registration on you?" Mr. Wheeler said he did. However, before obtaining Mr. Wheeler's license and registration, Officer Burke attempted to get in-between Mr. Wheeler and the open driver side door.

At that same moment, one to two other officers quickly surrounded Mr. Wheeler. On the BWC footage Mr. Wheeler can be seen raising his hands and clearly getting nervous as the officers close in on him. Officer Burke appears to try to calm Mr. Wheeler, telling him, "look, buddy, relax . . . we're good," and explain again that they have just pulled Mr. Wheeler over for a traffic violation. However, while Officer Burke attempted to assuage Mr. Wheeler, one or more of the surrounding officers put their hands on Mr. Wheeler's arm to seemingly attempt to guide him away

from the car. As is apparent on the BWC footage, this physical contact further increased Mr. Wheeler's nervousness. He continues to move around in the same area near the open motor vehicle, displaying some level of concerned panic. Officer Burke agreed in his testimony, describing Mr. Wheeler as "pretty animated."

At this point of the interaction between Mr. Wheeler and the police, only 10-15 seconds had passed since the officers first approached Mr. Wheeler and his car. In addition to finding Mr. Wheeler's behavior to be animated, Officer Burke also characterized Mr. Wheeler as aggressive and showing "a fighting stance." However, having thoroughly reviewed all of the BWC footage submitted in evidence, the Court finds that Mr. Wheeler did not take a fighting stance with police. He did not raise his fists or stand in a way that gestured or suggested he wanted to or was prepared to fight anyone. He did not make threatening or aggressive statements. Likewise, it is not clear from the totality of the evidence that Mr. Wheeler was acting "aggressively." Rather, from viewing the BWC footage, the Court finds Officer Burke's repeated use of "animated" as a more accurate description. The BWC footage shows Mr. Wheeler was acting nervous, frustrated, and scared. In short, he was verbally protesting the stop and its escalation. His hands were in full view of the officers at all times – generally raised up towards his shoulders, one hand holding a cell phone – and he did not appear to be leaning into or trying to access the interior of his car.

However, the Court agrees with the substance and totality of what Officer Burke was communicating through his testimony: Mr. Wheeler's "animated" behavior in these initial moments of the stop made him concerned for his and his fellow officers' general safety. From the BWC footage, Officer Burke's visible movements and de-escalation attempts all underscored the nature of this concern. Indeed, viewing the BWC footage together with Officer Burke's testimony, the Court finds that Officer Burke's safety concern was grounded on Mr. Wheeler's panicked and

nervous behavior, and, as Officer Burke testified, Mr. Wheeler's decision to get out of his car. Officer Burke explained that during motor vehicle stops he expects drivers to be sitting in their car unless he issues an exit order. Therefore, he continued, when Mr. Wheeler got out of his car at the moment of the stop, Officer Burke found it "very strange." He testified: "We didn't know what was going to happen next. Was he going to run away? We didn't know." As such, Officer Burke's perceptions of the situation were directly related to Mr. Wheeler initially getting out of his car, and as the contact with Mr. Wheeler escalated, Mr. Wheeler's increasingly nervous emotional state increased.

Officer Burke testified that because of Mr. Wheeler's behavior and his getting out of the car before Officers approached, which informed his general safety concern, he performed a patfrisk of Mr. Wheeler. There was no evidence – either through testimony or the BWC footage – that there appeared to be an object in Mr. Wheeler's waistband, pockets, or other area of his clothes; nor did Mr. Wheeler put his hands in his pocket or hold either of his arms rigidly at the side, actions that may cause concern he had a weapon.

The BWC footage shows that as Officer Burke put his hands on Mr. Wheeler's body and front hoodie pocket, Mr. Wheeler offered, "I'm going to pop everything, you can search everything." Exasperated at the escalating stop, he adds, "c'mon, bro!" Officer Burke again told Mr. Wheeler to relax, explaining that they were just going to stop him for a traffic violation but "then [he] hopped out" of his car. Officer Burke continued the patfrisk.

Officer Burke testified that in Mr. Wheeler's front pocket he felt what appeared to be paper, which he believed to be money. Officer Burke testified (and the BWC footage clearly shows) that he then manipulated the pocket to get a greater feel of the paper he believed to be money, and then put his hands inside the pockets and pulled out some of the cash before putting it back in Mr.

Wheeler's pocket. Based on the BWC footage and Officer Burke's testimony, this Court finds that prior to his manipulation of the pocket and search of its interior, Officer Burke's patfrisk of that area gave him no indication that it contained a weapon. Indeed, Officer Burke definitively did not testify that he thought the paper he felt might be a weapon or narcotics. Rather, he was confident that it felt like paper money. The subsequent manipulation of the item he believed to be cash also gave him no indication that the item he felt was a weapon or narcotics. After inspecting the contents of Mr. Wheeler's front pocket, he continued his patfrisk. Although he did not count it at the time, Officer Burke testified that the pocket cash amounted to \$171.

As this patfrisk continued, Mr. Wheeler told officers that he had not gotten in trouble with the law in 10 years. He tells officers that he sells clothes now, gestures at his car generally, and tells officers, "look! Pop my trunk." He expresses concern for why he was stopped, asserting that the officers were "fuck[ing] with" him. Officer Burke told Mr. Wheeler that they were not interested in searching his car, telling him again to relax. Officer Burke completed the patfrisk, finding no weapons or contraband of any kind on Mr. Wheeler.

As Officer Burke took a step back towards the open car door – now fully positioned between the car door and Mr. Wheeler – Mr. Wheeler asked if Officer Burke wanted him to go get his registration from inside the car. Officer Burke asked for the location of the registration, saying that *he* would get Mr. Wheeler's registration. Mr. Wheeler pointed to whether the registration was located, and telling Officer Burke that he would need to go around to the passenger side of the car. Officer Burke testified that he understood from this exchange that the registration was inside Mr. Wheeler's glove compartment. Given Mr. Wheeler's nervous and panicked behavior, Officer Burke instructed Mr. Wheeler to stand at the back of his car. Other officers led Mr. Wheeler in that direction, and Officer Burke walked around the car to the passenger side. Mr. Wheeler was

not placed in handcuffs: he stood at the rear of his car with his cell phone in his hand, as two officers stood near him.

As Officer Burke went to the passenger side, the BWC footage shows Mr. Wheeler asking him to “pop the trunk” so Mr. Wheeler “can show them everything.” Officer Burke again told Mr. Wheeler that they did not care about the clothing he sells. The Commonwealth asked Officer Burke a series of questions about whether – by mentioning the trunk – Mr. Wheeler was attempting to distract or dissuade the officer from going into the passenger side of the car. Confusingly, the Commonwealth also seemed to ask Officer Burke whether – by pointing to the passenger side of the car – Mr. Wheeler was attempting to dissuade the officer from going into another area of the car. However, Officer Burke testified and the BWC footage shows, and this Court accordingly finds, that Mr. Wheeler’s “trunk” comment was a continuation of his prior comments about having done nothing wrong and his frustration and nervousness surrounding the stop. Officer Burke seemingly did not understand – and, objectively, the Court does not view – Mr. Wheeler’s comment to be an attempt to distract or dissuade police. Likewise, his “passenger side” comment was directional: giving Officer Burke the location of the registration that he just said he would retrieve. Officer Burke testified that this was also his understanding of Mr. Wheeler’s comment.

As Officer Burke enters the passenger side of the car, the BWC footage shows Mr. Wheeler frustratedly telling the other officers, “this shit is crazy, . . . I’m tired of this.” Mr. Wheeler and the two officers then proceeded to have a calmer discussion, disagreeing whether Mr. Wheeler actually stopped at the stop-sign. Regarding the tenor of this conversation, both officers can be seen laughing or smiling at Mr. Wheeler’s insistence that he paused for “two seconds” at the stop-sign. One of the officers understandably chuckled and said, “we were right there! You didn’t even remotely stop.” As temperatures cooled and they talked, Mr. Wheeler is moving freely from the

back of the car to up on the curb and back again. At some point during the discussion, he also reached into his pocket and pulled out another cell phone; all movements which the officers did not seem particularly concerned about.

While this discussion occurred at the back of the car, Officer Burke opened the glove compartment – containing the registration – but then quickly closed it without retrieving the registration. Officer Burke testified that he decided to start searching the vehicle. He felt around the underside of the passenger seat, and then moved to the center console. He went through some papers and cash there, as well as some other personal items (e.g., cologne, matches).

At this point, the BWC footage shows, Mr. Wheeler was standing on the curb near the rear of his car. He appeared to be watching Officer Burke, and asked the other officers if he could record what Officer Burke was doing. He moved back towards the open driver side door and appeared to be pressing buttons on his cell phone. As the other officers told him he needed to come back to the rear of the car, and grabbed his arm, Mr. Wheeler said, “I just want to record this.” The officers told him, “right now, this is just a stop-sign thing” and “you’re making this a lot bigger than it is.” Mr. Wheeler repeated that he wanted to record what Officer Burke was doing. The officers told Mr. Wheeler – as did Officer Burke, from the interior of the car – that their BWCs were recording everything. Mr. Wheeler continued to protest, “I don’t know what he’s doing.” One of the officers near Mr. Wheeler reassured him that Officer Burke was not taking his property and told him, “all it is . . . is speeding and a stop-sign.” Still protesting the search and the extension of the motor vehicle stop, Mr. Wheeler lifted up his shirt to show the officers his waistband, saying, “no weapons, no nothing.”

Officer Burke continued his search of the center console. He picked up a small, round metal canister about the size of his palm, shook it, and then opened and inspected its contents. He closed

that container and put it back in the center console. Then, he moved to center cubby area in front of the gear stick and felt around. He found a small black box – also about the size of his palm – with two magnets on the back. Initially, but very briefly, Officer Burke thought that the box might be used to remove security tags from clothing stolen from stores. He noted that he observed, as Mr. Wheeler repeatedly explained, the car was full of clothing merchandise. However, Officer Burke quickly realized that this object was a magnetic key holder – designed to hold a spare key.

Upon this realization, Officer Burke recalled information from a Boston Regional Intelligence Center advisory that magnetic key holders or objects like them can be used to hide narcotics or contraband. He testified that people use them by sticking the magnet side against the metal frame or chassis of the car. However, he acknowledged that he found this key holder on the interior of Mr. Wheeler's car, in a cubby in the center console area. He did not know whether that area was metal, but admitted he did not have to apply any force to remove it as one would if it were magnetically stuck to something. In any event, Officer Burke opened this container and found suspected narcotics inside. He placed Mr. Wheeler under arrest. A subsequent search of Mr. Wheeler's car found no additional contraband, but the cash found in the center console amounted to approximately \$600 in loose currency and \$1,020 wrapped with a band.

RULINGS OF LAW

Absent a recognized exception, the Fourth Amendment to the U.S. Constitution and article 14 of the Mass. Declaration of Rights requires police to have a warrant or probable cause to perform a search or seizure of a person and/or their property. Mr. Wheeler concedes that police lawfully stopped him for his traffic violation. However, he argues that police lacked any authority to patfrisk him and to search the car. He seeks to suppress the alleged narcotics discovered in the magnetic keyholder during the search of the car, and, as a fruit of the poisonous tree, the money

seized. The Commonwealth opposes, arguing that police lawfully patfrisked Mr. Wheeler for the officers' safety, and lawfully searched the car pursuant to Mr. Wheeler's consent. The Commonwealth concedes that, absent this consent, the police had no authority to do a full-scale search of Mr. Wheeler's car.

I. The Patfrisk

While the police found no weapons or evidence of criminality during their patfrisk of Mr. Wheeler, its occurrence and escalation of the event into something more than a routine traffic stop is centrally relevant to the Court's analysis of consent and the subsequent search of the vehicle. As such, and because Mr. Wheeler challenges its lawfulness, the Court analyzes the constitutionality of the patfrisk.

A. The Initial Patfrisk

A patfrisk is not a search in the constitutional sense if "an officer has reasonable suspicion that the suspect is armed and dangerous." Commonwealth v. Torres-Pagan, 484 Mass. 34, 37 (2020). In addition to being reasonable and based on articulable facts, this suspicion must rise above mere "safety concerns": the totality of the objective facts must support "a more particularized fear that the suspect is presently armed and dangerous." *Id.* at 37-38, quoting Terry v. Ohio, 392 U.S. 1, 24-25 (1968). Here, based on the totality of the facts, Officer Burke did not have a reasonable suspicion that Mr. Wheeler was presently armed and dangerous.

This case is similar in many regards to Torres-Pagan. There, as here, the police stopped the defendant for a traffic violation, and the defendant exited his car and stood in the open doorway as the officers approached. 484 Mass. at 35. Similarly, the defendant there was outnumbered by police officers. *Id.* Also, the defendant exhibited behaviors the officers found concerning, including "turn[ing] to look inside the vehicle on more than one occasion." *Id.* Nevertheless, the

Supreme Judicial Court found the defendant's behavior did not rise to the level of providing police with reasonable suspicion that he was presently armed and dangerous. Id. at 39.

[W]e acknowledge that the police may have found the defendant's behavior unexpected. Nevertheless, surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous.

Id. at 40.

Likewise, in Commonwealth v. Gomes, 453 Mass. 506 (2009), the Court rejected the government's argument that the factors surrounding the traffic stop permitted a patfrisk. 453 Mass. at 512-513. There, as here, the arresting officer "gave no testimony that the police observed anything suggesting that the defendant had a weapon. There was no evidence that the defendant made particular gestures or used any body language that would cause the officers to believe that he was carrying a weapon." Id. at 513. Also, the defendant, like Mr. Wheeler here, did not attempt to flee when the officers approached, and the officers again outnumbered the defendant. Id.

In Commonwealth v. Torres, 424 Mass. 153 (1997), the Court specifically rejected the argument that the defendant's act of getting out of his car provided police with any reasonable suspicion warranting an extension of the traffic stop into something more: "it is not unnatural for either the driver or the passenger in an automobile (or both) to get out of the vehicle to meet a police officer who has signalled the vehicle over to the side of the road." Id. at 159. By so concluding, the Court did not accept the motion judge's determination that the defendant's "unusual" behavior in getting out of the car provided police reasonable suspicion to escalate a routine traffic stop into something more. Id.

As such, Mr. Wheeler's animated behavior and protestations about the stop do not add enough to the evidentiary pile to have permitted Officer Burke's patfrisk. See Commonwealth v. Gonsalves, 429 Mass. 658, 660 and 669 (1999) (it was insufficient that defendant was "extremely

nervous,” moving his hands around, and breathing heavily); and Commonwealth v. Williams, 46 Mass. App. Ct. 181, 184-185 (1999) (defendant acting suspiciously, moving around, and appearing extremely nervous insufficient). While Officer Burke absolutely “had every right to be careful for his own safety” and the safety of his fellow officers, Gonsalves, 429 Mass. at 669 n.11, safety concerns do not warrant a reasonable suspicion that someone is presently armed and dangerous. While the Court acknowledges the fast-moving nature of the stop and the encounter, and that Mr. Wheeler’s behavior was “animated” and likely escalated tensions beyond those officers observe in a routine traffic stop, an officer’s mere suspicion and safety concern alone are not enough.

Mr. Wheeler’s prior firearm conviction does not bridge the gap for the Commonwealth. While an officer’s knowledge that the defendant has a history of a firearms offense can certainly factor into an officer’s reasonable suspicion, see Commonwealth v. Dasilva, 66 Mass. App. Ct. 556, 561 (2006), it does not by itself carry the day. This is especially true where, as here, Officer Burke acknowledged that he knew that Mr. Wheeler’s conviction occurred at some time in the past before he started patrolling the area, at least 3-4 years ago. Put differently, Officer Burke’s knowledge that Mr. Wheeler – at some point in his past – had a conviction for illegally possessing a firearm did not provide a reasonable suspicion that he was presently armed and dangerous. While the knowledge that Mr. Wheeler had a prior conviction at some point years ago was not nothing, adding it to the above “observations . . . does not produce a sum of suspicion that justifies” the extension of the traffic stop. Gomes, 424 Mass. at 161. As such, without “a more particularized fear that [Mr. Wheeler was] presently armed and dangerous,” Officer Burke should not have taken “the more intrusive step of pat frisking” Mr. Wheeler. Torres-Pagan, 484 Mass. at 37-38, citing Terry, 392 U.S. at 24-25. See also Commonwealth v. Powell, 102 Mass. App. Ct. 755, 760 (2023) (“Although certitude is not required . . . [an officer] must be able to point to particular facts from

which he reasonably inferred that the individual was armed and dangerous.”) (cleaned up).

B. The Manipulation and Search of the Pocket

Even if the patfrisk of Mr. Wheeler were permissible, it did not provide Officer Burke further cause to reach into Mr. Wheeler’s front hoodie pocket. The scope of a patfrisk – and the constitutional norms permitting this limited search for weapons – is “not exceeded if, during a lawful patfrisk, it is immediately apparent to the police officer . . . that a concealed item is contraband.” Commonwealth v. Wilson, 441 Mass. 390, 396 (2004), citing Minnesota v. Dickerson, 508 U.S. 366, 376 (1993). The “plain feel” doctrine permits an officer to make a further intrusion of privacy – for example, as relevant here, into the interior of a suspect’s pocket – to “seiz[e] an item whose identity is already known” and its incriminating character is immediately apparent. Wilson, 441 Mass. at 397. This doctrine “is limited; it does not permit an officer to conduct a general exploratory search for whatever evidence of criminal activity he might find.” Id.

Here, Officer Burke testified that he immediately knew the item in Mr. Wheeler’s front hoodie pocket was cash and not a weapon. Nevertheless, he manipulated the pocket to get a greater feel, then put his hand inside the pocket and pulled out its contents, and gave it a brief inspection. While the identity of the contents was immediately known to Officer Burke – because he knew it was not a weapon, the item he was searching for in his patfrisk – his further manipulation and search of the pocket ran aground of Mr. Wheeler’s constitutional privacy rights.

II. The Search and the Issue of Consent

During its argument at the evidentiary hearing, the Commonwealth conceded that Officer Burke’s search of Mr. Wheeler’s car was a general search, and that he was no longer performing a protective or limited search for the presence of weapons. The Commonwealth acknowledged that even if Officer Burke had lawful authority to perform a patfrisk of the car for weapons – which,

again, it conceded he did not – this authority would not extend to the search of a magnetic keyholder (or any of the other items in the center console) that clearly could not contain a weapon. While a general search would normally require an analysis of whether the police possessed probable cause, the Commonwealth contends that Mr. Wheeler consented to this general search and thus it was lawful absent probable cause. The Commonwealth points to Mr. Wheeler offering to “pop his trunk” and to permit the police to “search everything,” and also argues that Mr. Wheeler did not revoke his consent at any time during the encounter. Viewing the totality of the circumstances in this case, the Court disagrees.

For a defendant’s consent to be valid, it must be freely and voluntarily given. Commonwealth v. Ortiz, 478 Mass. 820, 823 (2018). The Commonwealth has the burden of proving that the consent to search was “unfettered by coercion, express or implied, and also something more than the mere acquiescence to a claim of lawful authority.” Id., quoting Commonwealth v. Walker, 370 Mass. 548, 555 (1976), and Bumper v. North Carolina, 391 U.S. 543, 548 (1968). The voluntariness of consent “is a question of fact to be determined in the circumstances of each case.” Commonwealth v. Cantalupo, 380 Mass. 173, 177 (1980) (quotation omitted). Indeed, “[w]hether consent is voluntary depends on the nature of this interaction between the police and the occupant.” Commonwealth v. Rogers, 444 Mass. 234, 238 (2005). A reviewing court must take into account the conduct of the police and the conduct and the statements of the person allegedly providing consent. Id.

The Commonwealth lays heavy emphasis on the scope of Mr. Wheeler’s consent. While the Court grants that Mr. Wheeler said, “I’m going to pop everything, you can search everything,” which a reasonable person would interpret to mean everything the car contained, Ortiz, 478 Mass. at 823, quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991), the prerequisite issues here are

whether (i) Mr. Wheeler freely and voluntarily gave this consent; and (ii) revoked that consent at any time prior to Officer Burke's search.

The evidence in this case shows that Mr. Wheeler made this offer when Officer Burke and the other officers put their hands on Mr. Wheeler and Officer Burke began patfrisking him. Put simply, Mr. Wheeler made this statement at the moment, as this Court has concluded above, that Officer Burke already signaled that he was enlarging a routine traffic stop into an investigation. On the BWC footage, Mr. Wheeler's increasing nervousness and fear is visible the moment the officers began to search his physical person. At this point, based on the nature of this interaction, the scales tip towards a conclusion that Mr. Wheeler was acquiescing to the police's claim of authority to search.

However, the interaction did not end here. Officer Burke and the other officers responded to this offer clearly and immediately that they had no interest in searching the car. After Officer Burke finished the patfrisk, Mr. Wheeler did not then open the trunk and police did not immediately begin searching his car. Instead, Mr. Wheeler turned back to why the officers continuously explained was the reason for the stop – the traffic violation – and asked if he himself should retrieve his registration. If Mr. Wheeler had consented to a general search of the interior of his car, such a question would be unnecessary.

At this point, Mr. Wheeler more narrowly offered to Officer Burke, "pop my trunk." If the circumstances ended here, and Officer Burke immediately began searching "everything" in Mr. Wheeler's trunk and subsequently found evidence of a crime there, the Commonwealth's argument for consent might carry the day. See Ortiz, 478 Mass. at 826. However, the situation did not end here. Instead, Officer Burke responded again to Mr. Wheeler that they had no interest in searching his car, and Mr. Wheeler was directed to stand at the back of the car. Officer Burke moved to the

passenger side of the car, where Mr. Wheeler had just told him he could find the registration. Crucially, at the point at which Mr. Wheeler became aware that Officer Burke was not retrieving the registration and was performing a full-scale search of the car, he began protesting. Mr. Wheeler asked to record the encounter on his phone and tried to move towards the front of the car to capture the search on video. His protests became louder and he became more frustrated, saying about Officer Burke's search, "I don't know what he's doing."

Ordinarily, consent to search follows a predictable pattern: "an exchange in which a police officer makes some type of inquiry [to search an area] . . . and in response, the [consenting individual] verbally or physically reacts in a manner that is interpreted as 'consent.'" Rogers, 444 Mass. at 238. Regardless of how consent is given, however, the consent to perform a search "can be withdrawn or limited at any time before completion of the search." Commonwealth v. Stewart, 469 Mass. 257, 261-262 (2014). However, the withdrawal of consent must either be an unambiguous statement challenging the officer's authority to conduct the search, conduct that is clearly inconsistent with the perceived consent to search, or some combination of both. See, e.g., Commonwealth v. Suters, 90 Mass. App. Ct. 449, 455 (2016). The touchstone here is, in light of all the circumstances, whether police had a "reasonable basis . . . to infer that the defendant had limited, or withdrawn, his consent." Commonwealth v. Caputo, 439 Mass. 153, 163 (2003), citing Cantalupo, 380 Mass. at 178.

Viewing the totality of the circumstances in this case, a reasonable person in the position of the police would have understand that any consent they perceived Mr. Wheeler to have given was being withdrawn. See Suters, 90 Mass. App. Ct. at 455. Mr. Wheeler was visibly and audibly upset and protesting the fact that Officer Burke was not retrieving the registration and was, contrary to what he had just stated, interested in searching his car. This reasonable basis to understand Mr.


Wheeler's withdrawal of consent is supported by the fact that both of the officers surrounding him repeatedly told him that "all it is . . . is speeding and a stop-sign." Mr. Wheeler saying, "I don't know what he's doing," and lifting his shirt and saying, "no weapons . . . no nothing" was a direct challenge to Officer Burke's lawful authority for performing a general search of his car.

As such, the Court concludes that Mr. Wheeler did not consent to the search Officer Burke was performing, or had withdrawn that consent by some combination of his conduct or statements. Because Officer Burke was performing a search without probable cause or consent, his search of the magnetic keyholder and the remainder of the interior of the car was unlawful. Therefore, the alleged narcotics and cash seized must be suppressed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** the Defendant's motion to suppress shall be **ALLOWED**.

Dated: May 5, 2025



Ira L. Gant
Justice of the Superior Court

2484CR00436 Commonwealth vs. Wheeler, Lovant E OKA Wheeler, Lovant

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 08/28/2024
- DCM Track:
- B - Complex
- Initiating Action:
- COCAINE, TRAFFICKING IN 18 GRAMS OR MORE, LESS THAN 36 GRAMS c94C §32E(b)
- Status Date:
- 09/11/2024
- Case Judge:
-
- Next Event:
- 01/08/2026

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

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Party Charge Information

- **Wheeler, Lovant E**
- - Defendant
- Charge # 1:

94C/32E/A-4 - Felony COCAINE, TRAFFICKING IN 18 GRAMS OR MORE, LESS THAN 36 GRAMS c94C §32E(b)

- Original Charge
- 94C/32E/A-4 COCAINE, TRAFFICKING IN 18 GRAMS OR MORE, LESS THAN 36 GRAMS c94C §32E(b) (Felony)
- Indicted Charge
-
- Amended Charge
-




Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
08/29/2024 04:09 PM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Conference to Review Status	Bryan, Abigail	Held as Scheduled
09/11/2024 09:00 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Arraignment	Bryan, Abigail	Not Held
09/11/2024 03:00 PM	Criminal 1	BOS-7th FL, CR 704 (SC)	Arraignment	Hallal, Hon. Mark A	Held as Scheduled
10/16/2024 09:00 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Pre-Trial Hearing	Curley, Edward J	Held as Scheduled
12/09/2024 09:00 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Pre-Trial Conference	Curley, Edward J	Held as Scheduled
01/09/2025 09:00 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Filing of Motions	Curley, Edward J	Held as Scheduled
02/27/2025 09:00 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Pre-Trial Hearing	Ellis, Hon. Sarah Weyland	Held as Scheduled
04/29/2025 09:00 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression	Gant, Hon. Ira	Held - Under advisement
07/10/2025 02:00 PM	Criminal 7	BOS-9th FL, CR 907 (SC)	Final Pre-Trial Conference	Campbell, Hon. Cathleen E.	Held as Scheduled
07/16/2025 09:00 AM	Criminal 7	BOS-9th FL, CR 907 (SC)	Jury Trial	Campbell, Hon. Cathleen E.	Canceled
10/16/2025 02:00 PM	Criminal 7	BOS-9th FL, CR 907 (SC)	Conference to Review Status	Rayburn, Hon. Katie	Rescheduled
01/08/2026 02:00 PM	Criminal 7	BOS-9th FL, CR 907 (SC)	Conference to Review Status	Squires-Lee, Hon. Debra A	
02/09/2026 09:00 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Bail Hearing	Ellis, Hon. Sarah Weyland	





Ticklers










<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	10/16/2024	02/28/2025	135	02/27/2025
Final Pre-Trial Conference	10/16/2024	06/27/2025	254	07/10/2025
Case Disposition	10/16/2024	07/11/2025	268	
Under Advisement	04/29/2025	05/29/2025	30	05/05/2025









Docket Information



<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/27/2024	Attorney appearance On this date 08/28/2024 Addady, Esq., Daniel added for Suffolk County District Attorney		
08/27/2024	Indictment(s) returned	1	
08/27/2024	Commonwealth 's Motion for issuance of a summons filed.	2	 

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/27/2024	Endorsement on Motion for issuance of a summons , (#2.0): ALLOWED		
08/29/2024	Issued this date: Summons to Defendant Sent On: 08/29/2024 16:11:10		Image
08/29/2024	Defendant not present in court. Status held. Commonwealth oral motion to schedule the arraignment hearing in 9-11-24 made and allowed. Summons issued on this date. Case is continued to 9-11-24 at 9am in courtroom 705 for an arraignment. Event Result:: Conference to Review Status scheduled on: 08/29/2024 04:09 PM Has been: Held as Scheduled Edward J Curley, Presiding Staff: Michelle Muriph, Acting Assistant Clerk D. Addady, ADA XXX, Atty FTR: 4:09pm		
09/11/2024	Issued: Straight Warrant issued on 09/11/2024 for Wheeler, Lovant E		
09/11/2024	Defendant not present in court. Arraignment not held. Defendant not in court, previously re-summonsed for today's date. Defense counsel not present but did contact the court. Commonwealth requests warrant. Straight Warrant Issued. Event Result:: Arraignment scheduled on: 09/11/2024 09:00 AM Has been: Held as Scheduled Edward J Curley, Presiding Staff: Kristina Zanini, Assistant Clerk ADA: D. Adaddy, Live Atty: A. Stockewell-Alpert, Not-present FTR: 9:03AM, 10:17AM		
09/11/2024	Recalled: Straight Warrant cancelled on 09/11/2024 for Wheeler, Lovant E		
09/11/2024	Attorney appearance On this date William Roa, Esq. added as Appointed - Indigent Defendant for Defendant Lovant E Wheeler Appointment made for the purpose of Case in Chief by Judge Hon. Mark A Hallal.		
09/11/2024	Legal Counsel Fee Waived. Judge: Hallal, Hon. Mark A		
09/11/2024	Findings and Order of Statutory Fees \$150.00 LCF Waived \$50.00 Warrant Recall Fee Waived Judge: Hallal, Hon. Mark A	3	 Image
09/11/2024	Notice of Warrant Cancellation	4	 Image
09/11/2024	Defendant Brought into Court. Arraignment held. Case Continued by Agreement to 10/16/2024 at 9:00am re: Pre Trial Hearing (Ctrm 705)(Non Custody). Event Result:: Arraignment scheduled on: 09/11/2024 03:00 PM Has been: Held as Scheduled Hon. Mark A Hallal, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate James Oliver, Assistant Clerk Magistrate D. Addady, ADA W. Roa, Atty. FTR 3:35pm		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/11/2024	Defendant arraigned before Court.		
09/11/2024	Defendant waives reading of indictment		
09/11/2024	Plea of not guilty entered on all charges.		
09/11/2024	Court inquires of Commonwealth if abuse, as defined by G.L. c. 209A, § 1, is alleged to have occurred immediately prior to or in connection with the charged offense(s).		
09/11/2024	Court finds NO abuse is alleged in connection with the charged offense. G.L. c. 276, § 56A.		
09/11/2024	Bail set at \$10,000.00 Surety, \$1,000.00 Cash. Said Bail having been met posted and verified, is order transferred from South Boston District Court Docket #2403CR00195		
09/11/2024	Bail warnings read		
09/11/2024	Defendant informed of right to request a drug exam. G.L. c. 111E, § 10		
09/11/2024	Finding and Order on Bail: Judge: Hallal, Hon. Mark A	5	 Image
09/11/2024	Commonwealth files the statement of the case.	6	 Image
09/11/2024	Transfer of Bail Form	7	 Image
10/16/2024	Defendant comes into court. Pre-Trial Hearing held as scheduled. Case is set as a Track B in session 7 (courtroom 907) After hearing case is continued to the following dates: Pre trial conference is scheduled for 12-9-24 at 9:00am in (courtroom 705) (non-custody live or zoom) Pre trial hearing is scheduled for 2-27-25 at 9:00am in (courtroom 704) (Live hearing for all parties) (non-custody live or zoom) final pre trial hearing set for 7-10-25 at 2:00pm in (courtroom 907) Trial set scheduled for 7-16-25 at 9:00am in (courtroom 907) Event Result:: Pre-Trial Hearing scheduled on: 10/16/2024 09:00 AM Has been: Held as Scheduled Edward J Curley, Presiding Staff: Michelle Pierce, Assistant Clerk D. Addady, ADA- Live W. Roa, Atty- Live FTR- 9:30		
10/16/2024	Case assigned to: DCM Track B - Complex was added on 10/16/2024		
10/16/2024	Scheduled: Event: Jury Trial Date: 07/16/2025 Time: 09:00 AM Result: Canceled		
10/16/2024	ORDER: Procedural order regarding discovery, Filed. Judge: Wall, Hon. Joshua	8	 Image
12/09/2024	Defendant came into court via Zoom. Pre-Trial Conference Held. Case continued by agreement to 1/9/25 for Filing of Motions in CTRM 705 at 9am Mag Session (Non-Custody, Live or Zoom) Event Result:: Pre-Trial Conference scheduled on: 12/09/2024 09:00 AM Has been: Held as Scheduled Edward J Curley, Presiding Staff: Michelle Pierce, Assistant Clerk D. Addady, ADA (Zoom) W. Roa, ATTY (Zoom) FTR: 9:21am		
01/09/2025	Defendant comes into court via Zoom. Filing of Motions held. Case has a next date of 2/27/25 at 9:00 AM in First Session (Courtroom 704) for Pre-Trial Hearing (Non-Custody, Live for all parties)		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	<p>Event Result:: Filing of Motions scheduled on: 01/09/2025 09:00 AM Has been: Held as Scheduled Edward J Curley, Presiding Staff: Michelle Pierce, Assistant Clerk D. Addady, Assistant District Attorney (Live) W. Roa, Attorney (Live)</p> <p>FTR: 9:40 AM</p>		
01/09/2025	Commonwealth 's Notice of Discovery filed	9	
02/27/2025	<p>Defendant Comes Into Court. Pre Trial Hearing Held.</p> <p>Case Continued By Agreement To:</p> <p>4/29/25 9AM, RE: Motion To Suppress (Crtrm 713) (Live Non Custody)</p> <p>Event Result:: Pre-Trial Hearing scheduled on: 02/27/2025 09:00 AM Has been: Held as Scheduled Hon. Sarah Weyland Ellis, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate James Pardi, Assistant Clerk Magistrate M. Tomasini, ADA W. Roa, ATTY FTR- 10:18 AM</p>		Image
02/27/2025	Commonwealth 's Notice of Appearance of Counsel, Filed	10	
02/27/2025	Attorney appearance On this date Daniel Addady, Esq. dismissed/withdrawn for Prosecutor Suffolk County District Attorney		Image
02/27/2025	Attorney appearance On this date Michael R Tomasini, Esq. added for Prosecutor Suffolk County District Attorney		
02/27/2025	Commonwealth 's Notice Regarding Expert Testimony, Filed	11	
02/27/2025	Commonwealth 's Notice of Discovery II, Filed	12	
04/24/2025	Commonwealth 's Memorandum in opposition to the defendant's motion to suppress filed	13	
04/28/2025	Defendant 's Motion to suppress evidence filed	14	
04/28/2025	Defendant 's Memorandum in support of defendant's motion to suppress evidence filed	15	
04/29/2025	List of exhibits filed	16	
04/29/2025	Witness List filed	17	
04/29/2025	<p>Defendant comes into court, non-custody.</p> <p>Evidentiary hearing on suppression held as scheduled.</p> <p>Commonwealth calls witness.</p> <p>Testimony from one sworn Commonwealth witness received by the Court.</p> <p>Exhibits entered by the Commonwealth and defendant, received and marked by the court.</p> <p>Commonwealth rests.</p> <p>Defendant rests.</p> <p>Arguments heard from both parties by the court.</p> <p>After hearing, defendant's motion to suppress taken under advisement.</p> <p>Case continued to previously scheduled date of 7/10/2025 RE: Final Pre-Trial Conference at 2 PM in Courtroom 907 (live non-custody)</p>		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Gant, J. J. Oliver, Deputy Assistant Clerk M. Tomasini, ADA (Live) W. Roa, Atty (Live) FTR - 9:11 AM, 9:30 AM		
05/05/2025	MEMORANDUM & ORDER: Findings of Fact, Rulings of Law, and Order of Gant J. on Defendant's Motion to Suppress Issued and filed (ADA M.Tamasini and Atty W.Roa each notified with copy via electronic mail) Attest. D.Sheehan, ACM Judge: Gant, Hon. Ira	18	 Image
05/05/2025	Endorsement on Defendant 's Motion to suppress evidence, (#14.0): ALLOWED "5/5/25 Motion Allowed. See Order" - Gant J.		 Image
06/02/2025	Commonwealth 's Verified Motion Pursuant to Mass. R. Crim. P. 15 (b) (1) for 29-Day Enlargement of Time to File Application for Leave to Appeal Allowance of Motion to Suppress, filed. (notice, copy of motion and docket sheets sent to Gant, J.)	19	 Image
06/02/2025	Notice of appeal filed by the Commonwealth regarding the order of this Court (Gant, J.) dated may 5, 2025, allowing the defendant's motion to suppress.	20	 Image
06/02/2025	Endorsement on Motion pursuant to Mass. R. Crim. P. 15(b)(1) for 29-day enlargement of time to file application for leave to appeal allowance of motion to suppress, (#19.0): ALLOWED (Copy of endorsement sent to parties via electronic mail)		 Image
06/25/2025	CD of Transcript of 04/29/2025 09:00 AM Evidentiary Hearing on Suppression received from Jennifer Burke.		
07/10/2025	Event Result:: Jury Trial scheduled on: 07/16/2025 09:00 AM Has been: Canceled For the following reason: Joint request of parties Hon. Cathleen E. Campbell, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
07/10/2025	Event Result:: Final Pre-Trial Conference scheduled on: 07/10/2025 02:00 PM Has been: Held as Scheduled Hon. Cathleen E. Campbell, Presiding Staff: Rourke Donnelly, Assistant Clerk Magistrate		
07/10/2025	Commonwealth 's Motion to Continue, filed & allowed Judge: Campbell, Hon. Cathleen E.	20.1	 Image
08/07/2025	Notice of docket entry received from Supreme Judicial Court ORDER: Interlocutory appeal allowed; to Appeals Court. (Wendlandt, J.)	21	 Image
08/07/2025	Attorney appearance On this date Kenneth E Steinfield, Esq. added for Prosecutor Suffolk County District Attorney		
08/07/2025	Appeal: Statement of the Case on Appeal (Cover Sheet).	22	 Image
08/07/2025	Notice to Clerk of the Appeals Court of Assembly of Record		 Image
08/07/2025	Notice of assembly of record sent to Counsel		 Image
08/08/2025	Appeal entered in Appeals Court on 08/07/2025 docket number 2025-P-0964	23	 Image
10/15/2025	Event Result:: Conference to Review Status scheduled on: 10/16/2025 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Comments: Due to status of appeal, the Court has re-scheduled the matter to 1/8/26 at 2pm. Parties are in agreement with next date. Attest: Moira Daly, ACM Hon. Katie Rayburn, Presiding Staff: Moira Daly, Assistant Clerk		Image
12/10/2025	Bail set on 09/11/2024 revoked. Notice/Order received from South Boston District Court, that Velez, J. pursuant to MGL Chapter 276 Sec 58 has revoked bail on docket number 2484CR00436 and orders the defendant held without bail for a period of 60 days. -Said bail revocation order expires on 2/9/2026. -This matter is schedule by Order of the Court for 2/9/2026 for a Bail Hearing at 9am in courtroom		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	704. (jail list, live) -Notice sent to ADA Tomansini, Atty Roa, and Surety D. Blake.		
12/10/2025	Commonwealth 's Motion to Revoke the Defendant's Bail/Recognizance, filed and allowed in South Boston District Court 2503CR001006. copy of endorsed motion received via fax from South Boston District Court	24	 Image
12/10/2025	The defendant\petitioner is committed without bail for the following reason: Bail has been revoked C.276 § 58. Bail revoked by Judge Velez for 60 days. Bail revocation to expire on 2/9/2026. mittimus faxed to Suffolk County Jail, confirmation in file.	25	 Image
12/11/2025	The following form was generated: Notice to Appear Sent On: 12/11/2025 09:03:08		

Case Disposition

Disposition	Date	Case Judge
Active	09/11/2024	

Due to the system maintenance, MassCourts.org (including the Attorney Portal) will be unavailable on Saturday, December 13, from 8:00 AM to 3:00 PM. All case search, calendar functionality, and ePay, will be unavailable during this time. ✕

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with rules 11 and 20 of the Massachusetts Rules of Appellate Procedure. The application is set in 14-point Athelas and the argument section contains 1,953 words, as determined by using the “Word Count” feature in Microsoft Word for Office 365.

/s/ Caroline H. Howe
Caroline H. Howe
BBO #706151

CERTIFICATE OF SERVICE

I hereby certify that I have today served Lovant Wheeler's Application for Direct Appellate Review on the Commonwealth by directing a copy via email to:

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(617) 619-4191
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/s/ Caroline H. Howe
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December 12, 2025