

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPREME JUDICIAL COURT
NO. FAR-

APPEALS COURT
NO. 2017-P-1248

COMMONWEALTH
(Appellant)

v.

MANUEL TORRES-PAGAN
(Appellee/Defendant)

ON APPEAL FROM A JUDGMENT OF THE
SPRINGFIELD DISTRICT COURT

DEFENDANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

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September 4, 2018

TABLE OF CONTENTS

REQUEST FOR LEAVE.....	3
STATEMENT OF PRIOR PROCEEDINGS.....	3
SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL.....	4
STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT.....	7
REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE.....	8
I. Further appellate review is necessary to clarify whether the standard for a patfrisk of a motorist who exits their car, unprompted, in a traffic stop is the same as for a Terry-type stop - "reasonable suspicion that the defendant is armed and dangerous" - or whether the standard is the same as if the officer had first issued an exit order - "reasonable suspicion of danger to police or others" - relied upon by the Appeals Court in this case.....	8
A. <u>The Appeals Court's decision muddies the facts in this case: There was a patfrisk but no exit order.....</u>	9
B. <u>The standard for a patfrisk of a person on the street is different from the standard for a patfrisk following an exit order in a motor vehicle stop.....</u>	10
C. <u>The Appeals Court applied the wrong standard to determine if the patfrisk of Torres-Pagan was justified.....</u>	15
CONCLUSION.....	18

REQUEST FOR LEAVE

Manuel Torres-Pagan hereby petitions this Court, pursuant to Mass. R. App. P. 27.1, for leave to obtain further appellate review.

STATEMENT OF PRIOR PROCEEDINGS

On May 4, 2017, Manuel Torres-Pagan was charged with operating a motor vehicle without a valid inspection sticker, G.L. c. 90, § 20; operating a motor vehicle with license suspended, G.L. c. 90, § 23; carrying a loaded firearm without a license, G.L. c. 269, § 10(n); and, improper storage of a firearm, G.L. c. 140, § 131L(a)&(b). Comm. App. 3-4.¹ The Commonwealth later added a charge of carrying a firearm without a license, G.L. c. 269, § 10(a). Comm. App. 5.

On June 29, 2017, the defendant's Motion to Suppress Evidence and Statements was heard by Hadley, J. Tr. 1; Comm. App. 10. On July 28, 2017, the motion judge allowed the motion (decision attached). Comm. App. 10, 14, 16. The Commonwealth appealed and the

¹ Citations to the Commonwealth's appendix in the Appeals Court will take the following form: "Comm. App. [page #]". Citations to the transcript will be in the form "Tr. [page #]". Citations to the unpublished memorandum opinion of the Appeals Court will be in the form "Mem. Op."

case proceeded in the Appeals Court. Comm. App. 14, 34, 37.

On August 14, 2018, the Appeals Court reversed the order allowing the motion to suppress and remanded to the trial court for further proceedings consistent with the order in an unpublished opinion (attached).

SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

The following facts are taken from the decision of the motion judge (Hadley, J.) and supplemented with uncontroverted testimony from the record. *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015).

On May 3rd, 2017, at approximately 5:11 PM, Springfield police officers Chad Joseph and Anthony Kelliher were on patrol in a marked police car. Comm. App. 16; Tr. 16-17. It was still light out. Tr. 18. While driving on Keith Street, a residential side street, Joseph noticed a Cadillac SUV going in the opposite direction with cracks in the windshield, one of which was more than 12 inches long. Comm. App. 17; Tr. 19, 50. He also noticed that the car had an inspection rejection sticker which had expired according to his onboard computer. Comm. App. 17; Tr. 19-20. The car was driving slowly and normally. Tr. 19, 50. It was properly registered. Tr. 65. Joseph saw

only that the driver was a Hispanic male, unknown to him. Tr. 51, 65.

Joseph turned around and followed the car. Comm. App. 17; Tr. 20. He followed it continuously as it travelled to the end of Keith Street, turned left onto Belmont Avenue for one block, and then turned left again onto Hall Street. Comm. App. 17; Tr. 20. He did not activate his blue overhead lights until the final turn from Belmont Avenue onto Hall Street. Comm. App. 17; Tr. 21, 52, 56-57.

The SUV parked in a residential driveway in the rear of 283 Belmont Ave., 8-10 car lengths down Hall Street from Belmont Ave. Comm. App. 17; Tr. 21, 56-58, 77, 96. Joseph had been assigned to the area for approximately two years and had made arrests for both violent and non-violent crimes in the area. Comm. App. 16; Tr. 12-16.

Joseph parked at the top of the driveway and both officers immediately got out of their car. Comm. App. 17; Tr. 22-23, 81. The driver of the SUV, later identified as Manuel Torres-Pagan, also exited. Comm. App. 17; Tr. 23-24, 82. Joseph identified himself as a police officer and ordered him to stay where he was and Torres-Pagan complied. Comm. App. 17; Tr. 25, 60,

65, 69. Torres-Pagan stood with the car door open, about a foot from the car, facing Joseph. Comm. App. 17-18; Tr. 24-25, 39, 59, 65, 78. He looked back at the car more than once. Comm. App. 18; Tr. 24-25, 39, 59, 61-62, 65.

Joseph then immediately handcuffed Torres-Pagan. Comm. App. 18; Tr. 27, 67-68. Joseph patfrisked his outer clothing for weapons and simultaneously asked Torres-Pagan, "do you have a driver's license?". Comm. App. 18; Tr. 27, 30, 60-61, 67-68, 70. He did not give Torres-Pagan any *Miranda* warnings. Tr. 68. Torres-Pagan replied that it was suspended. Comm. App. 18; Tr. 27-29.

While conducting the patfrisk, Joseph felt an object that he recognized to be a knife. Comm. App. 18; Tr. 30, 60-61. He removed it and asked Torres-Pagan if he had any other weapons on him. Comm. App. 18; Tr. 31-32, 71-72. Again, he did not give Torres-Pagan any *Miranda* warnings. Tr. 72. Torres-Pagan responded, "I'm going to keep it one hundred. I got shot at the other day. I have something in my car." Comm. App. 18; Tr. 32, 86.

Joseph put Torres-Pagan, in handcuffs, in the back of the cruiser. Comm. App. 18; Tr. 33, 87. While

he did so, Kelliher "checked" the vehicle, Tr. 73-76, and Joseph did not see everything Kelliher did, Tr. 76. Joseph went back to Torres-Pagan's car and saw a handgun sitting on the floor by the driver's side. Comm. App. 18; Tr. 33-35, 72, 87-88. He went back to Torres-Pagan and demanded a license to carry firearms. Comm. App. 18; Tr. 36. Torres-Pagan responded that he did not have one and said, "I'm going to keep it one hundred. I had it because of the other day." Comm. App. 18; Tr. 36-37. Joseph then arrested Torres-Pagan. Comm. App. 18; Tr. 37.

**STATEMENT OF POINTS WITH RESPECT TO WHICH
FURTHER APPELLATE REVIEW IS SOUGHT**

1. Whether the Appeals Court used the correct legal standard to determine whether the patfrisk of the defendant was an unconstitutional search.

REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

- I. Further appellate review is necessary to clarify whether the standard for a patfrisk of a motorist who exits their car, unprompted, in a traffic stop is the same as for a *Terry*-type stop - "reasonable suspicion that the defendant is armed and dangerous" - or whether the standard is the same as if the officer had first issued an exit order - "reasonable suspicion of danger to police or others" - relied upon by the Appeals Court in this case.

This case presents the question of whether a motorist who exits their car unprompted in a traffic stop is more like a person on the street who police approach because they suspect the person may have committed a crime, as in a *Terry* stop, or whether the motorist is more like a person who the police ordered to exit their car due to safety concerns in a traffic stop.

The Appeals Court conflates the two tests and uses the lower, more permissive standard, for an exit order and patfrisk, to justify the patfrisk of Torres-Pagan. The Appeals Court is wrong as a matter of fact and of law, as there was no exit order in this case and would have been no justification for any exit order.

This Court should accept further appellate review to apply the *Terry*-stop standard, requiring reasonable

suspicion that a person is armed and dangerous before a patfrisk may be conducted, reverse the order of the Appeals Court, and affirm the motion judge's order allowing the motion to suppress.

A. The Appeals Court's decision muddies the facts in this case: There was a patfrisk but no exit order.

The police suspected Torres-Pagan of two minor motor vehicle infractions: operating with an expired inspection sticker and operating with a cracked windshield. Comm. App. 17; Tr. 19-20, 50. Police had no prior knowledge of Torres-Pagan. Tr. 51, 65. They saw only that the Cadillac SUV he was driving was operated by a Hispanic male. Tr. 51. He was driving slowly and normally on a residential side street. Tr. 19, 50. There was no problem with the SUV's registration. Tr. 65. Police turned around and followed Torres-Pagan's SUV for a short distance and then turned on their blue lights to initiate a stop. Comm. App. 17; Tr. 20-21, 52, 56-57.

Torres-Pagan parked in a residential driveway and immediately got out of his car. Comm. App. 17; Tr. 21, 23-24, 56-58, 77, 82, 96. Police parked at the end of the driveway, blocking the SUV in. Comm. App. 17; Tr. 22, 81. Two officers simultaneously exited their

cruiser and ordered Torres-Pagan to stop. Comm. App. 17; Tr. 22-23, 25, 60, 65, 69, 81. Torres-Pagan was the only occupant of the SUV. Tr. 22-23. The two officers were not outnumbered. Torres-Pagan followed their order and stayed where he was, approximately a foot away from his open car door, facing the officer, and looked back into the car on more than one occasion. Comm. App. 17-18; Tr. 24-25, 39, 59, 61-62, 65, 78. Police then immediately pushed Torres-Pagan against the car, handcuffed him, patfrisked him, and asked him if he had a driver's license. Comm. App. 18; Tr. 27, 30, 60-61, 67-68, 70. Torres-Pagan did not attempt to run away or flee. Tr. 81-82. He was cooperative with police. Tr. 66.

B. The standard for a patfrisk of a person on the street is different from the standard for a patfrisk following an exit order in a motor vehicle stop.

It is a familiar rule that police may not patfrisk a person subject to a brief detention to investigate if they are committing or having committed a crime unless police have a reasonable belief that the person may be armed and dangerous. *Terry v. Ohio*, 392 U.S. 1 (1968). The "armed and dangerous" standard to justify a patfrisk has deep and persistent roots

under both the Fourth Amendment and Article 14. See *Terry*, 392 U.S. at 24-25; *Commonwealth v. Fraser*, 410 Mass. 541, 544 (1991). See also *Knowles v. Iowa*, 525 U.S. 113, 118 (1998); *Arizona v. Johnson*, 555 U.S. 323, 326 (2009); *Commonwealth v. Gonsalves*, 429 Mass. 658, 666 (1999); *Commonwealth v. Martin*, 457 Mass. 14, 19 (2010); *Commonwealth v. Narcisse*, 457 Mass. 1, 7 (2010); *Commonwealth v. Douglas*, 472 Mass. 439, 444-45 (2015). The plain meaning of "armed and dangerous" is that there must be reasonable suspicion that the person is not only dangerous but also armed with a weapon.

In contrast, when police stop a car for a traffic infraction, they may order an occupant out of the car if a reasonable person would believe that the occupant poses a danger to the police or others, and if police are justified in ordering the occupant out of the car, they may patfrisk them. *Commonwealth v. Ferrara*, 376 Mass. 502, 505 (1978). "Danger to the safety of police or others", since it does not require any indication that the person is armed with a weapon, is therefore a lower, more permissive standard.²

² The lower standard for an exit order makes good sense. In a typical traffic stop, police approach the

Commonwealth v. Gonsalves, 429 Mass. 658 (1999), is frequently cited as setting forth the Massachusetts standard for an exit order and subsequent patfrisk. See Mem. Op. at 2, quoting *Commonwealth v. Meneide*, 89 Mass. App. Ct. 448, 452 (2016) (quoting *Gonsalves*, 429 Mass. at 661), and *Commonwealth v. Robinson*, 83 Mass. App. Ct. 419, 428 (2013) (quoting *Gonsalves*, 429 Mass. at 664).

However, *Gonsalves* is only an exit order case: a taxi is stopped for a traffic violation; a rear passenger appears nervous; police order the rear passenger from the taxi; police find drugs in the backseat where the passenger was seated. See *Gonsalves*, 429 Mass. at 659-660. The issue in *Gonsalves* was whether Massachusetts law would follow Federal law as then-recently-announced in *Maryland v. Wilson*, 519 U.S. 408, 415 (1997), which held that police could issue an exit order to a passenger in a routine car stop without any reasonable suspicion of

suspect car on foot to make contact with the occupants, demand a license and registration from the driver, and issue a citation. The car itself can be used in a way dangerous to police: the driver may attempt to hit police with the car or speed away and flee. Cf. *Commonwealth v. Papadinis*, 23 Mass. App. Ct. 570, 571 (1987), S.C., 402 Mass. 73 (1988) (police officer dragged by defendant's car when defendant attempted to flee from traffic stop).

danger. *Gonsalves*, 429 Mass. at 659. The SJC reasoned that Massachusetts law had long departed from federal law, see *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), to require that "police must have a reasonable suspicion of danger before compelling a driver to leave his motor vehicle". *Gonsalves*, 429 Mass. at 661-662, citing *Commonwealth v. Santana*, 420 Mass. 205, 212-213 (1995) ("to determine whether an exit order is justified we ask whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger.") (internal quotation and punctuation omitted).

Therefore, the SJC held that since "a police officer, in a routine traffic stop, must have a reasonable belief that the officer's safety, or the safety of others, is in danger before ordering a driver out of a motor vehicle," Article 14 was more protective in auto stops than the 4th Amendment and would similarly require a reasonable suspicion of danger to order a passenger to exit a vehicle. *Id.* at 662-663.

However, the reasoning and holding of *Gonsalves* have frequently been lost when it is used, as here by

the Appeals Court, see Mem. Op. at 1-2, to represent the legal standard for a patfrisk following an exit order. Despite the erroneous creep of its holding, *Gonsalves* is nevertheless crystal clear about the standard for a patfrisk without an exit order: "Under *Terry*, a police officer is permitted to patfrisk a person stopped under suspicion of criminal activity where the police officer has reason to believe he is dealing with an armed and dangerous individual." *Gonsalves*, 429 Mass. at 666, citing *Terry*, 392 U.S. at 24-25.

Indeed, even *Mimms* considered a patfrisk of the defendant following an exit order to require exactly what *Terry* requires: reasonable suspicion that the person was "armed and dangerous". *Mimms*, 434 U.S. at 112. Thus, while Article 14 provides greater protections to motorists than the 4th Amendment in an exit order situation, the 4th Amendment is more protective of motorists in a subsequent patfrisk. The end result is the same: police must have a reasonable suspicion that a person is armed and dangerous before they patfrisk that person after an exit order or in a normal *Terry* stop.

C. The Appeals Court applied the wrong standard to determine if the patfrisk of Torres-Pagan was justified.

The Appeals Court in this case purported to use the lower, more permissive exit order standard to justify the patfrisk in this case, reasoning that following a justified exit order, no further justification is needed to conduct a patfrisk. See *Mem. Op. at 2-3 & n.1*, citing *Commonwealth v. Hernandez*, 77 Mass. App. Ct. 259, 269 (2010), and *Commonwealth v. Torres*, 443 Mass. 669, 676 (2001).

But, again, there was no exit order in this case. Torres-Pagan had exited his vehicle and was standing still in a private driveway. The Appeals Court therefore implicitly decided that a patfrisk here required only a reasonable suspicion of danger. It refused to apply the traditional requirement for patfrisks of pedestrians: reasonable suspicion that the defendant was armed with a weapon.

Like *Gonsalves*, neither *Hernandez* or *Torres* stand for such a proposition though the Appeals Court cited them as such. Both *Hernandez* and *Torres* involved an exit order followed by a patfrisk. *Torres*, 433 Mass. at 675-676; *Hernandez*, 77 Mass. App. Ct. at 268-269. And both implicitly found a reasonable suspicion that

the defendant was armed with a weapon in addition to posing a danger to police or others. *Torres*, 433 Mass. at 674, 676; *Hernandez*, 77 Mass. App. Ct. at 261, 268-269. They are inapposite to this case.

Other cases have assumed that a patfrisk does not flow, without further justification, from an exit order, but instead requires the additional finding that the defendant is armed to justify the patfrisk. *Commonwealth v. Douglas*, 472 Mass. 439, 444-445 (2015) (while an exit order is justified if police have a "reasonable belief that their safety... is in danger," police "may conduct a patfrisk of an individual ordered to leave the vehicle only if the officer has a reasonable basis to suspect that the individual is likely to be armed and dangerous.")(emphasis added), citing *Commonwealth v. Johnson*, 454 Mass. 159, 162 (2009) (patfrisk case, although not in the context of a car stop and exit order).

Indeed, no exit order would have been justified before Torres-Pagan got out of his car of his own accord. At that point, all that was known to police was that a Hispanic man who they had no prior knowledge of was driving an SUV slowly and normally on a residential street in the middle of the day with a

crack in his windshield and an expired inspection sticker in a "high crime area". Comm. App. 17; Tr. 19-20 When they turned on their lights to signal for him to stop, he parked in a residential driveway. Comm. App. 17; Tr. 21-22. These facts do not give rise to any reasonable belief that the operator may be a danger to the police or others. And police had no subjective suspicion of danger before Torres-Pagan exited his car. Tr. 42. No exit order or patfrisk would have been justified before Torres-Pagan got out of his car.

The equation is not tipped when Torres-Pagan then got out of his car. Torres-Pagan lawfully parked in a residential driveway. Comm. App. 17; Tr. 77, 96. When he got out of the car, he stood facing Joseph. Comm. App. 18; Tr. 65. He did not move urgently or attempt to run away. Tr. 81-82. His entire body was visible to Joseph, including his hands, and he was not holding anything in his hands or against his body. Comm. App. 18; Tr. 65.

The Appeals Court was wrong as a matter of fact and a matter of law and the order allowing the motion to suppress should have been affirmed. This Court should grant further appellate review in order to

clarify the appropriate legal standard for judging whether a patfrisk of a person who has exited their car after a traffic stop is justified under Article 14 and the 4th Amendment.

Conclusion

The Court should grant further appellate review and affirm the order of the trial court suppressing the evidence.

Respectfully Submitted,
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Certificate of Service

I hereby certify under the pains and penalties of perjury that I have today made service on counsel for the Commonwealth by sending a copy of the Defendant's Application for Further Appellate Review via E-Service to ADA Benjamin Shorey, Benjamin.shorey@state.ma.us.

/s/ Claire Ward
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Addendum

Findings of Fact and Decision on Motion to Suppress.....Add. 1

Memorandum and Order Pursuant to Rule 1:28.....Add. 6

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF THE COMMONWEALTH

Hampden, ss.

Springfield District Court
Docket Nos. 1723CR3306 &
1723CR3532

COMMONWEALTH

v.

MANUEL TORRES PAGAN

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Findings of Fact and Decision on Motion to Suppress

On May 13, 2017, at approximately 5:11 PM, Springfield Police Officers Chad Joseph and Anthony Kelliher were in uniform and were traveling in a marked police cruiser. They were patrolling an area in the City of Springfield that includes several public ways, including Keith Street, Belmont Avenue, and Hall Street.

Officer Joseph was very familiar with the area, as he had been assigned there for approximately two years. He had made a number of arrests in that area for firearms violations, narcotics violations, traffic offenses and violent crimes. He had responded to and had assisted at numerous calls for domestic violence in the area. He personally had recovered over thirty firearms in the area. There had been numerous reports of shots fired, individuals being shot, and gang activity in the area. His unit of five police officers had made approximately 300 arrests in the past two years there. He personally had participated in approximately 150 of these arrests. Some of

these arrests, including arrests for violent crimes had been made within one week of May 3, 2017.

As the officers were proceeding on Keith Street, Officer Joseph saw a Cadillac SUV headed in the opposite direction. He noted that the windshield had several large cracks in it, one was more than 12 inches long. He also noted that on the windshield there was a sticker indicating the vehicle had not passed a state inspection. Officer Joseph used his onboard computer to make an inquiry of the Registry of Motor Vehicle records regarding the license plate on the Cadillac SUV. He learned that the rejection sticker on the vehicle had expired, indicating that the vehicle was being operated unlawfully at the time.

The officers reversed the direction in which they were traveling and decided to stop the Cadillac SUV to issue a citation to the operator. The operator, later identified as the defendant, Manuel Torres-Pagan, turned left onto Belmont Street and then made another left turn onto Hall Street. Officer Joseph activated the blue emergency lights on the police cruiser. The defendant pulled into a residential driveway at 283 Belmont Avenue and came to a stop. Officer Joseph and Officer Kelliher stopped at the top of the driveway and exited their police vehicle.

As the officers walked toward the Cadillac SUV, the defendant, who was the only occupant of the vehicle, opened the driver's side door and got out of the Cadillac. Officer Joseph directed him to stay where he was, and the defendant did so. He remained standing between the open door and the vehicle's front

seat, approximately a foot from the body of the vehicle. He was facing the two officers, but on more than one occasion, he turned his head and/or torso and looked back into the front seat area.

Officer Joseph decided to patfrisk the defendant for weapons. He placed the defendant in handcuffs and patted down his clothing. As he did so, Officer Joseph asked the defendant if he had a driver's license. The defendant said his license had been suspended. While patting down the defendant's pants, Officer Joseph felt what he believed, based on his experience, to be a knife inside the defendant's pants pocket. He removed the knife, and asked the defendant if he had any other weapons on him. The defendant replied by stating "I'm going to keep it one hundred. I got shot at the other day. I have something in my car."

The officers placed the defendant on the rear seat of their police cruiser and returned to the Cadillac SUV to search the interior compartment. Officer Joseph approached on the driver's side. The driver's side door was still open. While standing outside the Cadillac SUV, Officer Joseph saw what he immediately recognized as a handgun sitting on the car floor below and in front of the right side of the driver's seat, near the center console. He then approached the defendant and demanded a license to carry firearms. The defendant said he did not have one. He also said "I'm gone I keep it one hundred. I had it because of the other day." The defendant was arrested and charged with carrying a firearm without a license in violation of G.L.c. 269, § 10 (a). He was also charged with violations of chapter 90, sections 20 and 23, and a violation of 540 CMR 4.04

The defendant now seeks an order prohibiting the Commonwealth from introducing the firearm that was found in the Cadillac SUV and any statements he made to the police in evidence. The defendant does not assert that the stop of the Cadillac SUV was unlawful, but contends that the decision to patfrisk him was unjustified. The Commonwealth argues that based on the circumstances when the defendant stepped out of the vehicle the police had a heightened awareness of danger justifying a patfrisk.

Police officers are often in ambiguous and swiftly developing situations. When officers approach an automobile they are entitled to take reasonable precautions for their safety. At the same time, handcuffing an individual and patting down his outer clothing is clearly a significant intrusion on the individual's liberty. Consequently, following a traffic stop, a patfrisk must be based on reasonable suspicion supported by specific and articulable facts that the individual poses a danger. A number of factors must be considered in evaluating the propriety of a patfrisk. These include the type of activity being investigated; the observation of a weapon; furtive gestures; time of day; location; and whether an officer is alone or outnumbered.

In this case, the Commonwealth has demonstrated that the stop and the patfrisk occurred in a high crime neighborhood, and it was somewhat unusual for the operator to step out of his vehicle and be looking back to his vehicle after he was stopped. At the same time, the investigation arose from the operation of a vehicle after it failed inspection; there was no observation of any weapon before the patfrisk was conducted; there were no

furtive gestures that could be construed as an attempt to reach for or to conceal a weapon; it was late afternoon; and the officers were not outnumbered.

Weighing all of these considerations objectively, I find that the Commonwealth has failed to meet its burden to demonstrate that the decision to patfrisk the defendant was justified by a reasonable concern for officer safety. As the evidence obtained thereafter was the product of the patfrisk, the Defendant's Motion to Suppress must be allowed.

7/27/17
Dated

WPHadL
William P. Hadley, Justice

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-1248

COMMONWEALTH

vs.

MANUEL TORRES-PAGAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from an order of a District Court judge suppressing the fruits of a patfrisk of the defendant, Manuel Torres-Pagan. Concluding that the defendant's exiting the motor vehicle without being asked to do so and then looking repeatedly into the front seat area provided the police officer with reasonable suspicion to issue an exit order and conduct a patfrisk, we reverse and remand for further proceedings to consider the defendant's other ground for suppression.

In reviewing a decision on a motion to suppress, we adopt the subsidiary findings of fact of the motion judge, "which we accept absent clear error, reserving for independent review his ultimate findings and his conclusions of law." Commonwealth v. Charley, 91 Mass. App. Ct. 223, 224 (2017). See Commonwealth v. Anderson, 461 Mass. 616, 619 (2012). Among other reasons, "an

officer is justified in issuing an exit order to a driver or a passenger when 'a reasonably prudent [person] in the [police officer's] position would be warranted in the belief that the safety of the police or that of other persons was in danger.'" Commonwealth v. Meneide, 89 Mass. App. Ct. 448, 452 (2016), quoting from Commonwealth v. Gonsalves, 429 Mass. 658, 661 (1999). "[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." Commonwealth v. Robinson, 83 Mass. App. Ct. 419, 428 (2013), quoting from Gonsalves, 429 Mass. at 664. See Commonwealth v. Rosado, 84 Mass. App. Ct. 208, 213 (2013), quoting from Commonwealth v. Robbins, 407 Mass. 147, 152 (1990) ("The police are 'not required to gamble with their personal safety'"). "Where an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest." Commonwealth v. Amado, 474 Mass. 147, 152 (2016).¹

¹ It is true, as the defendant contends, that where an exit order is properly issued for a reason other than a reasonable suspicion of danger -- for example, because of suspicion of criminal activity, a patfrisk must be justified by reasonable suspicion that the defendant was armed and dangerous. See, e.g., Commonwealth v. Greenwood, 78 Mass. App. Ct. 611, 616 (2011). Here, however, the exit order was justified only by a reasonable suspicion of danger, and thus "[t]he standard for a patfrisk is the same as the standard required to justify an order to the occupants of a vehicle stopped for traffic violations to leave the vehicle." Commonwealth v. Hernandez, 77

Here, the defendant exited his motor vehicle without being asked to do so and only once the officers approached. This by itself was an indicator of danger. See Commonwealth v. Douglas, 472 Mass. 439, 446 (2015) (defendant's "getting out of the vehicle unasked" was factor suggesting defendant "was attempting to conceal a weapon, either on his person or in the vehicle"). Then, in the short time of the officers' approach, he turned to "look[] back into the front seat area" on "more than one occasion." This provided the officer with reason to suspect the presence of contraband within the defendant's wingspan. That the contraband could have been narcotics as easily as it could have been a weapon is of no moment for reasonable suspicion purposes. "The officer was not required to know the exact nature of the object being concealed in order to have an objectively reasonable concern for his safety." Meneide, 89 Mass. App. Ct. at 452. See Commonwealth v. Goewey, 452 Mass. 399, 409 (2008) (possibility that defendant's actions have innocent explanation does not negate reasonable suspicion).

Furthermore, because this was a motor vehicle stop for a cracked windshield and absence of an inspection sticker, "the defendant here was being detained for traffic violations and it was therefore likely that he would soon return to his car."

Mass. App. Ct. 259, 269 (2010), quoting from Commonwealth v. Torres, 443 Mass. 669, 676 (2001).

Commonwealth v. Haynes, 83 Mass. App. Ct. 903, 905 (2013).

Accordingly, it was necessary for the officer to dispel the possibility of a weapon before allowing the defendant to reenter his motor vehicle. See id. at 905-906. Finally, the stop occurred in an area in which the officer "had made a number of arrests . . . for firearms violations" and "personally had recovered over thirty firearms." See Commonwealth v. Young, 78 Mass. App. Ct. 548, 555 (2011) (high crime area contributes to reasonable suspicion). Accordingly, the motion judge erred in allowing the motion to suppress on the ground that the officers lacked reasonable suspicion to pat frisk the defendant.

The motion judge had no occasion to rule on the defendant's other ground for suppression, that the defendant was exposed to custodial interrogation without being provided with his Miranda rights.² Accordingly, we are without the benefit of the motion judge's analysis or factual findings specifically addressing

² The defendant makes no argument, on appeal or at the motion hearing, that the use of handcuffs invalidated the patfrisk. See Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 556 (2015), quoting from Commonwealth v. Williams, 422 Mass. 111, 117 (1996) ("'An officer is entitled to take reasonable steps to ensure his safety. Such steps do not automatically turn a stop into an arrest.' The use of handcuffs is also not dispositive") (citation omitted). The defendant, however, has fully preserved his argument that use of handcuffs is a factor that would support a finding of custodial interrogation.

this issue. We entrust the resolution of this issue to the motion judge on remand.

The order allowing the motion to suppress is reversed, and the matter is remanded for further proceedings consistent with this memorandum and order.

By the Court (Meade, Desmond & Ditzkoff, JJ.³),



Clerk

Entered: August 14, 2018.

³ The panelists are listed in order of seniority.