

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss.

2021 SITTING

SJC-13086

COMMONWEALTH

V.

ZAHKUAN BAILEY-SWEETING

ON APPEAL FROM A JUDGMENT OF THE
BRISTOL COUNTY SUPERIOR COURT

COMMONWEALTH'S BRIEF

Respectfully submitted,

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ISSUE PRESENTED

Where a passenger in a lawfully stopped car was not himself observed to engage in any suspicious conduct, could the police nonetheless order him out and frisk him for officer safety, where another passenger had gotten out of the car and angrily confronted the officers in a manner that they reasonably inferred was intended to direct their attention away from the car and its occupants, and where all three passengers had present gang affiliations and recent histories with firearms?

STATEMENT OF THE CASE

On March 15, 2018, the Bristol Grand Jury handed up Indictment No. 1873CR00090, charging the defendant, Zakhuan Bailey-Sweeting,¹ with: 1) unlicensed possession of a large-capacity firearm (G.L. c. 269, § 10(m)); 2) unlicensed possession of a large-capacity feeding device (G.L. c. 269, § 10(m)); 3) carrying a firearm without a license (G.L. c. 269, § 10(a)) when he "had been previously found delinquent in Juvenile Court of one or more violent crimes, as defined by

¹ Also referred to in the record as Zakhuan Sweeting-Bailey and Zakhuan Bailey.

G.L. Chap. 140, Sec. 121" (G.L. c. 269, § 10G)²; and 4) carrying a loaded firearm without a license (G.L. c. 269, § 10(n)) [R.3-5,9-17].³ He was arraigned in the Superior Court on April 6, 2018, and held as a danger pursuant to G.L. c. 276, § 58A [R.5].

On June 12, 2018, the defendant filed a Motion to Suppress Evidence Seized Without A Warrant [R.5, CRA.3-7]. In his motion, he asserted that "said evidence was 1) not seized pursuant to a lawful arrest, 2) it was not in plain view, 3) there was no probable cause, 4) no warrant, 5) no exigent circumstances, 6) not pursuant to a lawful stop-and-frisk, 7) not consented to, 8) in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article 14 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts and G.L. c.276" [R.18].

² Specifically, the Grand Jury found that he, "[o]n or about February 22, 2016, was adjudicated delinquent in the New Bedford Juvenile Court of the crime: Of Assault and Battery by Means of a Dangerous Weapon, to wit: Firearm, said crime committed on or about September 30, 2015, a violent crime as defined by G.L. Chap. 140, Section 121" [R.15].

³ Record references will be cited as follows: Defendant's Record Appendix, [R.#]; Commonwealth's Record Appendix, [CRA.#]; transcripts of the three-day evidentiary hearing on the Motion to Suppress, [T#:#]; Plea Transcript, [P.#].

An evidentiary hearing on the motion was held on June 20 and 22, 2018, before Yessayan, J. [R.5-6]. On June 29th, the defendant filed a supplemental memorandum of law arguing that *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833 (2010), which the Commonwealth had cited at the hearing, was distinguishable from his case on its facts [R.6, CRA.8-10].⁴

At a hearing on July 20, 2018, Judge Yessayan denied the motion to suppress, reading his findings and rulings into the record [R.6,24-46].

On August 30, 2018, the defendant, again before Judge Yessayan, entered a conditional plea, preserving his right to appeal from the denial of his motion to suppress [R.7-8,21-23]. Judge Yessayan accepted the plea and agreed-upon sentence - two concurrent sentences of 2½-4 years in state prison - which he observed was an appropriate sentence for "a 19-year-old young man with his first adult offense" [P.34].

⁴ In its entirety, the defendant's argument asserted: "In this case - none of the preliminary facts are here. There are no observations of animosity, there are no furtive movements in the car, there are no tinted windows concealing any of activity [*sic*] within the car. We have a minor traffic violation and nothing more. But for the actions of the passenger - Paris - who was being uncooperative - but found not to be concealing anything, all three officers testified that the occupants of the vehicle would not have even been removed and searched" [CRA.10].

The defendant timely appealed [R.8]. On December 2, 2020, an expanded panel of the Appeals Court issued an opinion affirming the denial of the motion to suppress, with two justices dissenting. *Commonwealth v. Sweeting-Bailey*, 98 Mass. App. Ct. 862 (2020). The defendant sought further appellate review, which this Court granted on March 11, 2021.

STATEMENT OF FACTS⁵

At approximately 7:05 p.m. on February 26, 2018, a red Chevrolet traveling east on Kempton Street toward the intersection with County Street in the West End of New Bedford switched lanes in front of another car, causing that car to slam on its brakes to avoid a collision [T1.7-8,28, 2.5]. Behind both cars was an unmarked cruiser occupied by three detectives from the New Bedford Police Department Gang Unit, Kory Kubik, Gene Fortes, and Roberto DaCunha [T1.6-7, 3.6]. Kubik,

⁵ The following account derives from the testimony of the three police witnesses, "all of whom were found by the judge to be 'credible in all relevant respects.'" *Sweeting-Bailey*, 98 Mass. App. Ct. at 863. Their testimony accords with the judge's own findings and rulings [R.28-45], but provides a greater level of detail. C.f. *Commonwealth v. Torres-Pagan*, 484 Mass. 34, 35 (2020), quoting *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015) ("We present the facts as found by the motion judge, supplemented by uncontroverted facts from the record that have been 'explicitly or implicitly credited' by the motion judge[.]")

who was driving, pulled the cruiser into the right lane, behind the car the Chevy had cut off, and two cars behind the Chevy itself [T1.8, 3.6-7]. Within 60 feet of where the officers had seen the lane violation, the Chevy turned into the parking lot of a Kentucky Fried Chicken at the corner of Kempton and County Streets, and Kubik turned on the cruiser's blue lights (but not siren) to effect a traffic stop [T1.8, 29, 3.7]. At that time, Kubik could not see how many people were in the car, or recognize them [T1.9].

After Kubik turned on the blue lights, the Chevy "continued into the parking lot and parked in a parking space," facing the building's entrance [T1.9, 3.7]. The front passenger door opened, and Raekwan Paris stepped out [T1.9].

One of the jobs of a detective in the gang unit was "to be familiar with the various gangs and gang members of New Bedford," "[k]eeping tabs on local gangs: who they are, new members . . . , any potential issues or beefs with other gangs" [T1.7, 3.4]. The West End of New Bedford was particularly associated with the United Front gang, who were involved in "[c]rimes of violence; low-level drug dealing" [T3.4]. They were "[b]itter rivals" with the Monte's Park gang

in the South End of New Bedford; the type of interactions that had occurred between the two gangs included "[c]rimes of violence, from simple assaults up to and including homicides" [T1.11-12, 3.5].

Raekwan Paris was known to all three detectives as a member of the United Front gang, and the United Front area itself was "very close" to the KFC [T3.8].⁶ Kubik and Dacunha had participated in an investigation in June 2016 where the police had received reports from a confidential informant that two males, one of whom was United Front gang member Shazan Gilmette, had gone down to the Monte's Park area in a particular car, "pointed a firearm at some parties in the south end of New Bedford," and then left [T1.10-12, 3.9-10]. Some of the officers went to the United Front in the hope of intercepting the car; when they arrived, it was parked, and Paris was walking away from its front door [T1.10, 3.10]. An officer stopped him and brought him back to the car, and police searched the car and found a firearm [T1.12-13, 3.10]. At booking, Paris said that "had he just parked around the corner with

⁶ The judge refers to it as the United Front Housing Development [R.30]; it was previously known as United Front Homes, and in 2011 was renamed Temple Landing. <https://www.poah.org/property/massachusetts/temple-landing>.

the windows up, we would have never found [the firearm]" [T3.11].

Paris's interaction with Monte's Park gang that day in June 2016 was captured on surveillance video:

The surveillance footage was on -- I believe it was city cameras pointing at the Central Kitchen. There was a video of him and Shazan getting out, and he -- I believe he asked for a fight or something along those lines with the Monte's Park gang members. There was just him and Shazan, and there was about six or seven Monte's Park. You could see that Paris didn't have a firearm at that time, but Shazan was holding his waistband the entire time of the video, and then they go back, get into a vehicle, the same vehicle that we locate in United Front that he's walking away from, and you can see Paris in the vehicle lean and point the firearm out across the passenger window. The video quality is not very good. You can see that it's a metallic object [T1.41-42].

At the time of the 2018 stop, Paris was out on bail on the 2016 firearm charge, and he was subsequently convicted of possessing that firearm [T1.13,42, 3.11].⁷

According to Kubik, Paris's demeanor when interacting with the police in June 2016 had been "[c]alm, not very talkative, but he was responding to anything we would ask him" [T1.12]. Dacunha, who

⁷ In July 2020, the Appeals Court overturned Paris's conviction on the ground that the police had lacked reasonable suspicion for an investigatory stop at the time Paris was initially seized. *Commonwealth v. Paris*, 97 Mass. App. Ct. 785 (2020).

arrested him, recalled his demeanor as "cordial"
[T.3.11,28-29].

Kubik had also interacted with Paris at two traffic stops, where his demeanor had been "[c]ooperative, calm" [T1.13].⁸ Dacunha testified that "in the course of my duties as a -- as a Gang Unit detective, we've dealt with him numerous times on the streets" [T3.12]. He did not know "if I've ever stopped him in a car. I -- definitely on the street numerous times" [T3.12].⁹ On those occasions, Paris's

⁸ The Appeals Court opinion, apparently drawing on Kubik's testimony, states that the February 2018 stop "was the fourth time that Paris had been involved in a police stop," and that "[o]n two of those occasions, Paris had been fully cooperative and no gun was recovered." 98 Mass. App. Ct. at 863. To the extent that this phrasing implies that firearms were sought unsuccessfully on other occasions when Paris was stopped, this is not supported by the record. Kubik and defense counsel had the following exchange:

Q Okay. And in the other two occasions that you had to deal with Mr. Paris, did those also involve firearms, or did they not?

A No.

Q Just his involvement with gangs?

A There was another incident other than that, yes, but -- it was two other traffic stops and a search warrant [T1.35].

⁹ The record in this case is silent on what was involved in these stops: the purpose behind them, whether they were based on a proportionate level of suspicion, the degree of intrusion that resulted, and whether that intrusion was commensurate with the purpose of the stop.

behavior had been "[n]ormal -- cordial. Not -- never very engaging, but he would -- he would speak to us" [T3.12].

Fortes, meanwhile, had known Paris "since he was a young kid"; he had worked as a School Resource Officer, and when Paris "was in school, I would see him at school events" [T2.6]. "Through the years," they "had always had a good rapport" [T2.7]. Asked whether, as a detective in the Gang Unit, he had had prior encounters with Paris "as far as car stops or other interactions," he replied, "Yes, we have. We've had numerous encounters with him" [T2.7]. Asked about his demeanor towards Fortes and the other detectives on these occasions, Fortes replied, "It's always been pretty much the same. He's been respectful. We've always had like I said a good rapport, him and I" [T2.7].

But when Paris got out of the front passenger door of the Chevy on February 26, 2018, he was not calm or cordial. Dacunha testified:

As soon as he came out of the car, he began arguing as he's taking steps away from the vehicle; something to the effect of "Why you guys stopping us? You're harassing us."

I asked him to get back into the car. He continued to take an additional couple of steps.

I asked him again; he wouldn't do it. He did not go back towards the car and kept on arguing, asking us why we stopped him; again, saying that we had - were harassing him [T3.12].

Paris's voice was "was louder than normal. I wouldn't say it was a shout, but it was definitely an authoritative type of voice" [T3.12-13]. In Fortes's description, he was "just like flaring his arms. He kept on going back and forth close in, away from the car, questioning the, you know, why, the reason for the stop" [T2.8]. Fortes described his behavior as "[v]ery uncharacteristic of him" [T2.9]. Kubik recalled, "One of the detectives informed him that it was a traffic stop¹⁰ and to sit back in the vehicle. He didn't want to get back in" [T1.13-14].

Dacunha asked Paris twice to get back in the car, "neither of which time he complied," so Dacunha "thought better of it and I -- I walked towards him, I closed the gap, and I escorted him to rear of the car" [T3.13]. Kubik recalled him asking three times, and observed that as Dacunha kept asking, Paris "began

¹⁰ The motion judge found: "the officers . . . were ordering him to get back into the vehicle, and they weren't trying to search him or anything of that nature. They were ordering him to get back into the vehicle as they were simply conducting a motor vehicle stop for a motor vehicle violation, and he refused to get back in the car" [R.32].

becoming more angry towards us" [T1.14]. Fortes, like Dacunha, had his whole attention on Paris: "his behavior was so agitated you could say and different that all my focus was -- was really on him" [T2.9].

At some point while Dacunha and Fortes were preoccupied with Paris at the back of the car, Kubik went to the driver's window to speak to the driver [T1.16,18-19]. He was prevented from doing so by the escalating situation with Paris, but did see who was inside the car: the female driver, whom he did not recognize, and two backseat passengers, whom he recognized as "Zahkuan Bailey and Carlos Cortes" [T1.16,18]. The defendant was in the rear driver's-side seat, and Cortes in the rear passenger's-side seat [T1.17]. The two of them were "just sitting there" [T1.19].

Kubik knew the defendant "[j]ust from being around"; the defendant was "[a]ssociated with some other parties that I've spoke with" [T1.17]. He knew him to be a member of the Bloods, who were associated with "[s]everal portions" of New Bedford [T1.17].

Paris was "dually validated"¹¹ as a Blood gang member" in addition to his membership in the United Front gang [T1.38].

With regard to Cortes, the New Bedford Police gang unit had recently been "informed by Boston gang unit that he posted a video on some form of social media while in possession of a firearm. He made some kind of reference to 40 Block [sic] Gang, which is a gang based out of Fall River, in that video" [T1.18].¹²

Before he could speak to the driver, Kubik's attention was drawn to the back of the car, where the situation was "escalating" [T1.19]. Paris was "becoming more angry towards Detective Fortes, questioning the stop, accusing us of harassing him" [T1.19]. Kubik walked over to Paris and "decided to place him in handcuffs" for officer safety [T1.20]. He grabbed Paris by the wrist, informing him "that he wasn't arrested, that I was just placing him in handcuffs" [T1.20]. As he did so, he observed that Paris's fists were clenched [T1.20].

¹¹ What it means to be a validated gang member in this context is discussed below at pp. 19-20; essentially, it is a police designation based on a points system.

¹² Kubik agreed with defense counsel that Cortes was "identified as someone . . . [f]rom a gang from Fall River" [T1.38].

In Fortes's recollection, Paris had initially "calmed down a little" after he was brought to the back of the car, "but he continued asking, you know, why we had stopped them and so on and so forth" [T2.10]. At some point, Paris "just appeared to be different" to Fortes: "And what I mean by that is he -- he took kind of like a bladed stance and it appeared like it -- it, you know, I wasn't -- I wasn't sure if he was -- he was getting ready to - to attack me or -- or not" [T2.10]. A "bladed stance," with one leg in front of the other, was one people in martial arts or boxing take because "it's a more comfortable stance to -- to make an assault" [T2.10]. Paris appeared to Fortes as if he was "kind of like sizing me up, you know. He looked me and down [sic], kind of sized me up. Like I said, very uncharacteristic of him because we've always had a good rapport" [T2.11]. This led Fortes to step closer to Paris, "close enough where if he threw a punch, he wasn't going to have any power on it" [T2.11]. In Fortes's recollection, what brought Kubik over at that point was that he "noticed something that I -- I didn't pick up. He stated to me later that -- that he had a closed, clenched fist. So

he came over and that's when we handcuffed" Paris [T2.11].

Paris's demeanor after being handcuffed was essentially the same: "he pretty much continued talking about, you know, the legalities of the stop and why we stopped him; that he mustn't did anything for a while" [T2.12]. Fortes thought that he "didn't look high or drunk" [T2.20]. Paris was pat-frisked at this time, and nothing was found on him [T2.14].

At this point, the officers were able to turn their attention to the occupants of the car for essentially the first time [T1.21, 2.12, 3.16].

Kubik "went to go speak with" the driver, and "while speaking with her, I asked her to step out of the vehicle" [T1.21]. He did this because "[d]ue to the uncharacteristic behavior of Raekwan Paris, I believed that he was trying to distract us from the vehicle; that there was some kind of illegal activity going on that he wanted to redirect us from" [T1.21]. He was concerned for his safety, "Based upon the fact that I have caught him with a firearm in the past, and his behavior was concerning me that there may be a

weapon in that vehicle" [T1.21].¹³ Kubik escorted the driver to the back of the car and pat-frisked her: "I believe that was me that pat frisked her the initial time" [T1.22]. He did not recall if she was put in handcuffs [T1.22]. The officers did not find anything on her [T1.22].

At some point the defendant and Cortes were also asked to step out for reasons of officer safety [T1.22]. In Fortes's recollection, the reason for the exit order was "[o]nce we realized that Carlos Corte[s] was in the car, we had -- we had received information that from another Gang Unit that he had -- he had pictures of -- had posted pictures of a firearm on -- on social media" [T2.14]. Fortes had "heard about" Cortes, but had "never had a face to face with

¹³ At the motion hearing, defense counsel asked Kubik whether his "actions and the actions of the other detectives" from the point when Paris got out of the car on "were - it's fair to say were entirely based on a hunch?" [T1.32]. Kubik replied, "It was more of a fear, yes" [T1.33]. She asked, "A fear?" and he replied, "For officer safety" [T1.33].

A few transcript pages later, counsel asked Kubik, "Okay. And your whole suspicion about this vehicle, your whole fear about this vehicle was as a result of Mr. Paris?" [T1.36]. He replied, "Yes." [T1.36]. Counsel then asked, "And his getting out of that vehicle and wanting to know what was going on?" [T1.36]. He replied, "It led us to believe that he was using tactics to distract us, yes" [T1.36]. Counsel then asked, "Again, you had a hunch about him using tactics?" and Kubik replied, "Yes" [T1.36].

him. So I didn't really know him" [T2.13]. Meanwhile, Fortes had recognized the defendant immediately, because he had "had more encounters with him" [T2.13]. These encounters involved "[j]ust hanging around the north end area where I usually see him" [T2.13]. Fortes knew that the defendant "and his family have ties to the Blood Gang" [T2.13].

Dacunha knew Cortes, who was "a New Bedford resident who spends a lot of time in Fall River" [T3.16]. He recalled that the message from the Boston Police Youth Violence Strike Force, with a link to a YouTube music video in which Cortes had "was observed with what we suspect to be authentic firearms," had been within a month of the traffic stop [T3.16]. Based on that information and Paris's behavior, Dacunha was concerned that "either within that vehicle or Mr. Cortes could have a firearm" [T3.16-17].

Dacunha also knew the defendant, "[a]gain, from my prior dealings with him as a member of the Gang Unit," and knew he "was validated as a Blood gang member" [T3.17]. He also knew that "he was charged with a - I believe it was an armed robbery,¹⁴ a

¹⁴ An indictment in the present case specifies a prior charge of assault and battery with a dangerous weapon

firearms offense, in 2015," for which he had been committed to the Department of Youth Services [T3.18]. Seeing the defendant in the car gave Dacunha a concern "[t]hat either - again, within the vehicle or on his person, there may be a firearm" [T3.18].

Meanwhile, as Dacunha recalled, Paris "really didn't stop his -- his demeanor. He kept on being argumentative, stating that we had no reason to stop him; again, demanding to speak to his lawyer like he spoke with his -- his girlfriend, . . . the operator, a few times" [T3.18]. Dacunha was concerned: "It felt to me that he was trying to distract us for -- for something within that vehicle" [T3.18].

Dacunha asked Cortes to step out of the car; he was frisked and found to have a large sum of money,¹⁵ but no weapons [T1.22-23]. Kubik then asked the defendant to step out of the car, and pat-frisked him [T1.23]. In the defendant's front waistband, Kubik felt "[t]he grip portion of a firearm" [T1.24]. He gained control of the defendant's hands, placed them

[R.15]; at the plea colloquy, the judge described the underlying incident as, "But then you got involved in an incident as a juvenile where there was a gun and a robbery" [P.25]. The gun was never recovered [P.26-27].

¹⁵ Fortes testified that this "wasn't suspicious" [T2.18].

behind his back, and told the other officers he had a firearm [T1.25].

The defendant was handcuffed and placed in the police cruiser [T1.25]. As Kubik was escorting him to the cruiser, he told the defendant, "good thing it was on him and not on the floor, because everyone would be getting arrested" [T1.25]. The defendant "stated, 'I'm not like that, and it was mine'" [T1.25-26]. As the defendant was being handcuffed, Cortes had asked him why he was getting arrested, and the defendant replied, "I had that blicky," a term Kubik knew to be "a term used for a firearm" [T1.26].

At the time Cortes and the defendant had been removed from the car, Kubik still had not had an opportunity to identify the driver or check her license [T3.20]. Dacunha attributed this to, "Just the ruckus that Mr. Paris was causing. There was four of them and only three of us, so best to have all hands on deck, given the behavior he was exhibiting and past dealings with both him and Mr. Bailey[-Sweeting]" [T3.20]. From the time Paris had gotten out of the car to the time the defendant was asked to get out of the car, a minute and a half had elapsed [T3.20].

Following the defendant's arrest, the driver was issued with a citation for the unsafe lane change, and the car and its remaining occupants - including Paris - were allowed to leave [T1.26-27, 3.21].

Without Paris's activity, Kubik would "[a]bsolutely not" have removed the others from the car [T1.39]. Fortes agreed that but for Paris's actions no one would have been taken out of the car, notwithstanding the defendant's and Cortes's being recognized as gang members [T2.16]. And Dacunha ultimately agreed with counsel that "but for Mr. Paris, none of them would have been taken out of that car" [T3.28].

Defense counsel cross-examined Dacunha about what it meant to be "validated" as a member of a particular gang [T3.21-26]. The New Bedford Police Gang Unit used the term to mean individuals who matched certain criteria on a checklist, with different numbers of points allotted for different factors; scoring more than ten points would indicate that a person was a validated gang member [T3.22]. At the time of the stop, factors relating to the defendant were: contact with known gang members (2 points); a "[g]roup-related photograph" (4 points); and "use and/or possession of

group paraphernalia or identifiers" (4 points) [T3.23].¹⁶ With regard to the first factor, there were "documented reports" of the defendant in contact with Brent Lagoa, "another validated Blood gang member"; this documented contact included, "Pictures; we've seen them together outside of Tilia's, which is an establishment in the city" [T3.23-24]. The "[g]roup-related photograph" was a photograph of the defendant with several other Bloods members [T3.24]. With regard to the "use and/or possession of group paraphernalia or identifiers," the police had "several photos of Mr. Bailey[-Sweeting] with red bandannas either on his head or on his neck, and several photographs of Mr. Bailey throwing up well-known, documented Blood hand signs" [T3.25].

SUMMARY OF THE ARGUMENT

The United States Supreme Court recognized in *Terry v. Ohio, infra*, that a patfrisk for weapons during the course of an ongoing police encounter implicates two important and conflicting interests: a person searched in this manner is subjected to a severe intrusion upon cherished personal security,

¹⁶ At booking, the defendant admitted to being a member of the Bloods, adding an additional eight points to his checklist score [T3.23,25].

while the officer has an interest in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. With regard to whether a patfrisk is justified, the standard set forth in *Terry*, and recently reemphasized by this Court in *Commonwealth v. Torres-Pagan, infra*, is that an officer must have a reasonable suspicion, based on specific articulable facts, that the person frisked is both dangerous and has a weapon. Whether such a suspicion exists is assessed from the perspective of a reasonable person in the officer's circumstances (pp.27-30).

An officer may take into account include his personal knowledge of the defendant, such as prior history of gun possession and gang affiliations. Gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, but is part of the totality of the circumstances the police confront and must assess (p.30-31).

Here, while the defendant had a three-year-old juvenile adjudication for armed robbery and was known to the officers as a member of the Bloods, in this

instance their concern that he might be armed and dangerous did not arise from anything that he was personally observed to do. The car he was in was stopped for unsafe driving by officers who did not know who was in it. All three officers agreed that what began as a traffic stop would have continued as a traffic stop, even once they became aware that all three of the car's passengers had gang affiliations and relatively recent histories with firearms, had it not been for Raekwan Paris's conduct.

Paris had had numerous encounters with all three officers, and had always behaved calmly and politely, even on an occasion in 2016 when he had just been to a rival gang's territory and pointed a gun at members of that gang, and where, when he encountered the police, he was walking away from the driver's side door of the car that had been used in that errand, which still contained the gun he had used. This time, in 2018, he got out of the front passenger seat of the car, began forcefully questioning the purpose of the stop and claiming harassment, and, despite being told that this was a traffic stop, progressed within the course of a minute to the point of appearing about to punch an officer. This uncharacteristic conduct appeared

calculated to draw - and succeeded in drawing - the attention of all three officers to him and away from the other occupants in the car. Until he was handcuffed, none of them was able to get more than a brief glimpse inside the car, or pursue the original purpose of the stop.

All three officers were concerned that Paris was seeking to distract them from something in the car. Two of the car's three occupants had firearms histories known to the officers, as well as gang associations, and the officers could not know what they had been doing during the time the officers had been unable to observe them. Two of the officers had been involved in Paris's 2016 arrest for possessing a gun in a car that he had just used for gang activity. And the officers were outnumbered four to three, and it had already taken the full attention of all three to deal with just one person. In the totality of the circumstances, the officers' evident conclusion that by that point anyone in the car might have a gun was based in specific reasonable inferences which they were entitled to draw from the facts in light of their experience (pp.31-34).

The fact that the defendant himself was not observed engaging in any suspicious behavior is certainly important, but cannot be dispositive. First, the officers were entitled to be concerned that Paris's apparent efforts to distract them from something inside the car were made in concert with one or more of the people in the car. This made what they knew about the people in the car relevant to assessing the scope of the concern. The gang affiliations and firearms histories of the passengers, *in that context*, made it reasonable for them to be concerned that what Paris was seeking to distract them from was a firearm (pp.34-35).

Second, while it will likely be rare that police develop a particularized suspicion that a person may be armed and dangerous without that person's being seen to do anything, the *Terry* standard is, by its nature, centered on the perspective of a reasonable person in the officer's circumstances. Given this, there is no way that any individual, particularly one traveling in a car full of other people, can wholly immunize himself from a *Terry* frisk simply by virtue of his own conduct at the time of the stop. If, for instance, one occupant of a car that has been stopped

for a traffic violation got out and began loudly informing the police - spuriously but convincingly - that a particular other passenger was armed and dangerous, the police might well arrive at a point where they were legally entitled to frisk that other passenger, through no fault of that person. There is simply no way to formulate a rule that completely insulates the actions of one passenger from those of the others, in this sort of analysis (pp.36-37).

And to the extent that Paris was seeking to distract the officers from something inside the car, he was more likely to be seeking to distract them from an action, such as movement to hide an object, than from an object that was already hidden. Thus, his conduct reasonably suggested that he was acting jointly with somebody inside the car (pp.37-38).

While Paris's dramatic demeanor was susceptible to multiple interpretations, it was reasonably concerning, even alarming, in the fast-moving context of the stop. As motion defense counsel noted, Paris did not fight with police on the occasion of the 2016 encounter because he was "not a dummy." Where the officers had known him to behave with what could be described as a savvy level of politeness in their past

interactions with him, they were entitled to be concerned that he was behaving strategically now as well, rather than simply feeling too upset to think strategically. And he was not simply expressing an opinion about policing: he was functionally derailing what he had been told was a traffic stop, by escalating within a period of a minute from complaining forcefully of harassment to appearing to be about to punch an officer (pp.38-40).

In assessing the significance of the defendant's three-year-old juvenile delinquency finding for armed robbery, the officers were entitled to consider it in combination with everything else they knew about the defendant - including his present gang affiliation, and the gang affiliations and firearms histories of the other people he was in the car with. And while the defendant's firearm history was the most distant in time of the three passengers', he was also the only one with an adjudication, and had committed the most serious offense. It was reasonable to take all of this into consideration in assessing the totality of the circumstances (pp.40-41).

While recent opinions of this Court have noted potential issues with the accuracy and evidentiary

value of gang databases, the overall validity and accuracy of the New Bedford Police Gang Unit validation system was not an issue in the case - possibly because the defendant, the only person for whom such validation information was elicited, confirmed on arrest that he was indeed a member of the Bloods. The judge properly treated the evidence of gang membership as part of the totality of the circumstances the police confront and must assess, rather than as an independent basis for concluding that there was a danger to the officers (pp.41-43).

Finally, while the motion judge noted that the stop occurred in a high-crime area - a fact that this Court has emphasized must be treated with caution - all of the testimony of crime in the area of the stop concerned the United Front gang in general and Paris's 2016 firearm arrest in particular. Every reference in the judge's findings to the stop's taking place in a high-crime area is accompanied by mention of Paris's nearby arrest. In this circumstance, it is unlikely that the fact that the stop occurred in a 'high-crime area' played a significant independent role in the judge's conclusions (pp.43-44).

ARGUMENT

THE JUDGE PROPERLY DENIED THE MOTION TO SUPPRESS.

In reviewing a ruling on a motion to suppress, this Court "accept[s] the judge's subsidiary findings of fact absent clear error but conduct[s] an independent review of his ultimate findings and conclusions of law." *Commonwealth v. Tremblay*, 480 Mass. 645, 652 (2018), quoting *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012). The Court's "duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." *Clarke*, 461 Mass. at 340, quoting *Commonwealth v. Bostock*, 450 Mass. 616, 619 (2008). "It is well established that in reviewing the denial of a motion to suppress, an appellate court may not consider evidence outside the factual record that was put before the motion judge." *Commonwealth v. Johnson*, 481 Mass. 710, 726 n.14 (2019).

As set out in the seminal case of *Terry v. Ohio*, 392 U.S. 1, 30 (1968), and emphasized by this Court in its recent opinion in *Commonwealth v. Torres-Pagan*, 484 Mass. 34 (2020), a patfrisk, "a 'carefully limited search of the outer clothing of a person to discover

weapons' for safety purposes," is "a 'serious intrusion on the sanctity of the person that is not to be undertaken lightly.'" *Torres-Pagan*, 484 Mass. at 36, quoting *Terry*, 392 U.S. at 30, and *Commonwealth v. Almeida*, 373 Mass. 266, 270-271, S.C., 381 Mass. 420 (1980) (some internal punctuation and formatting omitted). "A lawful patfrisk" requires that "police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous." *Id.* at 38-39. "The protection provided by the Massachusetts Declaration of Rights is coextensive with that of the United States Constitution in this regard." *Id.* at 36-37.

As the Supreme Court explained in *Terry*:

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable

inferences which he is entitled to draw from the facts in light of his experience.¹⁷

Terry, 392 U.S. at 27 (internal citations omitted).

Officers are "entitled to consider their personal knowledge of the defendant," *Commonwealth v. Dasilva*, 66 Mass. App. Ct. 556, 561 (2006), and to consider a defendant's prior history of gun possession, with greater weight given to indictments and convictions over arrests. *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833, 841-842 (2010).¹⁸ Contrast *Commonwealth v. Hooker*, 52 Mass. App. Ct. 683, 687 (2001) (officer's knowledge of defendant's prior arrests, one for

¹⁷ Kubik agreed to a question including the word "hunch" on one of the occasions on cross-examination where defense counsel sought to get him to do so [T1.32-33,36]. Regardless of whether this can reasonably be said to constitute evidence that Kubik considered himself to be acting on a hunch, it cannot be taken as a concession that the information and inferences available to him did not rise to the level of reasonable suspicion. That is a question of law, and assessed under an objective standard.

¹⁸ "While knowledge of an arrest and an indictment or conviction - something not shown on this record - would provide a stronger basis for a belief in prior possession of firearms, these arrests are one factor that may be considered by police in assessing the circumstances confronting them." *Elysee*, 77 Mass. App. Ct. at 841-842 (internal citation omitted). While Paris had, at the time of the February 2018 stop, not been convicted of gun possession in the June 2016 event and had only been complained of rather than indicted, the officers' belief in his possession of a firearm on the previous occasion was presumably rooted in Kubik and Dacunha's direct personal observations.

domestic violence, did not create reasonable apprehension of danger, where officer's experience with defendant never involved weapon). "While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess." *Elysee* , 77 Mass. App. Ct. at 841.

Here, the officers had some degree of familiarity with everyone in the car except the driver, and two of them had been personally involved in Paris's 2016 arrest for possession of a firearm in a car. This time, in 2018, Paris behaved in a way that was fundamentally inconsistent with their prior experiences of him, and that appeared calculated to draw ± and succeeded in drawing ± the attention of all three officers to him and away from the other occupants in the car. Until he was handcuffed, none of them was able to get more than a brief glimpse inside the car, or pursue the original purpose of the stop.

