No. SJC-13248

# Commonwealth of Massachusetts

## Supreme Judicial Court

COMMONWEALTH

*vs.*

DAVID PRIVETTE

ON THE DEFENDANT'S INTERLOCUTORY APPEAL FROM
AN ORDER OF THE SUFFOLK COUNTY SUPERIOR COURT

**BRIEF FOR THE APPELLANT**

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2. Whether the collective knowledge doctrine can properly be applied by an appellate court where the motion judge did not find the necessary predicate facts.
3. Whether the horizontal collective knowledge doctrine, which permits the post-hoc aggregation of uncommunicated bits of information in the probable cause analysis, violates the Fourth Amendment and Article Fourteen.

## STATEMENT OF THE CASE

On October 10, 2018, David Privette was charged in the Suffolk County Superior Court with the following offenses: armed robbery, G.L. c. 265, §17; possession of a firearm in the commission of a felony, G.L. c. 265, §18B; possession of a firearm as an armed career criminal, G.L. c. 269, §§10(a), 10G(b); possession of ammunition without an FID

card, G.L. c. 269, §10(h); and carrying a loaded firearm, G.L. c. 269, §10(n) (R17-22).[1]

Mr. Privette filed a motion to suppress evidence on May 3, 2019, and a hearing on that motion was held on October 10, 2019 (R11, 13). The judge (Buckley, J.) denied the motion on October 15, 2019 (R13). The defendant timely filed a notice of appeal (R14, 52) and an application for leave to pursue an interlocutory appeal in the Supreme Judicial Court for Suffolk County, pursuant to Mass. R. Crim. P. 15(a)(2). A single justice (Lenk, J.) allowed the application on December 19, 2019, and ordered that the case proceed in the Appeals Court, where it was entered on February 20, 2020.

Oral argument was held before a panel of that court (Massing, Sacks & Singh, JJ.) on June 3, 2021. On September 14, 2021, the panel issued a published opinion affirming the denial of the motion to suppress. *See Commonwealth v. Privette,* 100 Mass. App. Ct. 222 (2021). Further appellate review was granted and the case was entered in this Court on March 18, 2022.

## STATEMENT OF FACTS

Two witnesses testified at the motion to suppress hearing regarding the stop and search of Mr. Privette: Boston Police Officer

[1] The record appendix is cited as "(R__)." The addendum is cited as "(A__)", the transcript of the hearing on the motion to suppress as "(T__)", and the exhibits as "(Exh. __)."

Brian Doherty and Lieutenant Daryl Dwan[2] (R41/A55). The motion judge credited each witness's testimony (R42/A56). This recital of the evidence is taken from the judge's written findings of facts and the uncontested testimony. See *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 431 (2015).

On August 12, 2018, Officer Doherty was working the midnight shift out of District C-11 in Dorchester (T10-11; R42/A56). He was in plain clothes and driving an unmarked car (T10; R42/A56). At 3:35 a.m., Boston Police received a 911 call reporting the armed robbery of the Shell gas station on Morrissey Boulevard (T11, 18, 44; R42/A56). One minute later, at 3:36 a.m., Doherty received a radio broadcast regarding the robbery that included a description of the suspect (T18, 39). The dispatcher stated, "655 Morrissey Boulevard. The Shell gas station. Armed robbery at gunpoint" (T38; Exh. 5, channel 6 at 3:36:00 a.m.; R42/A56), and then, "So far I've got a Black male, late 20s, medium build, 5'7", blue hoodie and blue jeans on foot toward CVS"[3]

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[2] A third officer, Officer Luis Lopez, testified regarding the identification procedure, but that testimony is omitted here because the denial of the motion to suppress identification is not challenged in this interlocutory appeal. Lopez also testified that he searched for the suspect in the Victory Road area but did not see anyone (T72-73). There was no evidence that results of his search were communicated to any other officer. For the reasons discussed below, this information cannot be imputed to Doherty.

[3] As the Appeals Court stated, although the motion judge found that the broadcast described "dark" jeans (R43/A57), "Doherty's testimony and the recorded transmission make clear that the report said the

(T38; Exh. 5, channel 6 at 3:36:30 a.m.; R42-43/A56-57). As the judge found, "[t]here was no mention in the original broadcast about facial hair or a red plaid backpack" (R43 n.4/A57 n.4).[4]

Doherty began searching for the suspect while other units responded directly to the gas station (T13; R43/A57). Doherty was familiar with this area, which is called Clam Point,[5] because he grew up nearby (T12; R42/A56). Along one side of Morrissey Boulevard, the side where the Shell gas station is located, is a residential neighborhood, and then, moving farther away from the gas station, there are some businesses including a CVS pharmacy and a Chinese restaurant (T58, 59; Exh. 4). Radio transmissions between officers suggest that the CVS was open at the time. *Privette*, 100 Mass. App. Ct. at 233, n.17 (Exh. 5). On the opposite side of Morrissey Boulevard from the gas station, there are two large car dealerships (T58, 60; Exh. 4). A fence separates Morrissey Boulevard from the residential neighborhood, and Doherty knew there was a gap in the fence at Ashland Street close to the location of the robbery (T12, 14; R43/A57).

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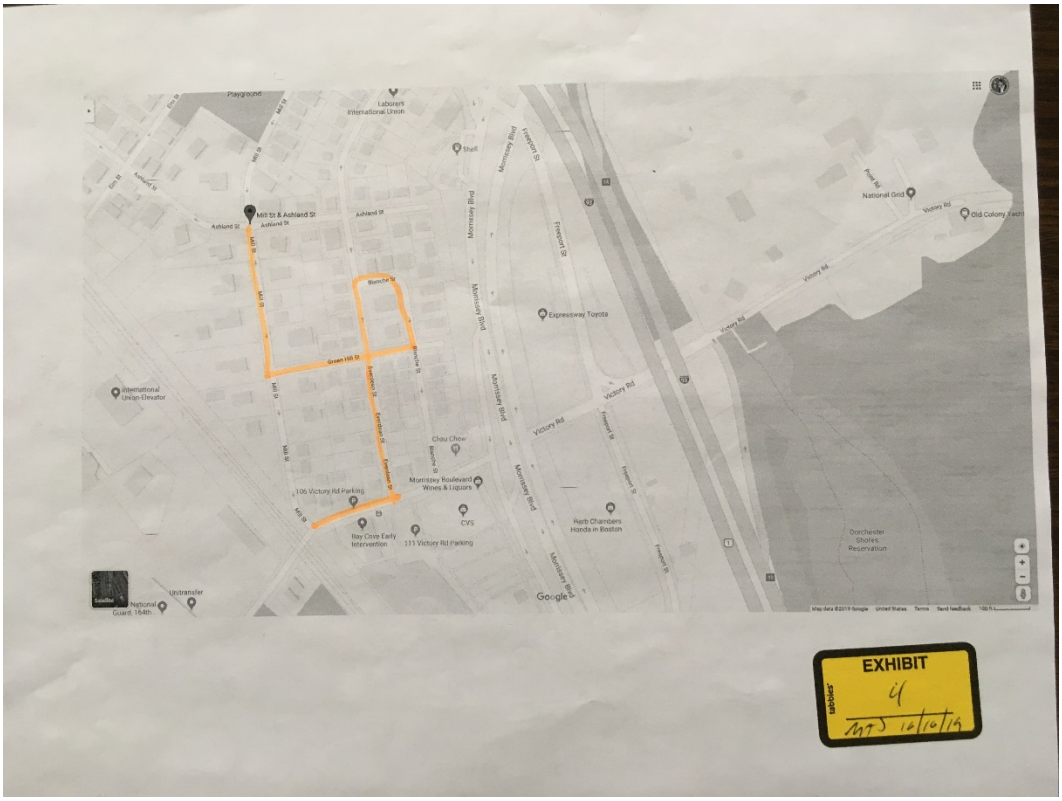
jeans were blue." *Privette,* 100 Mass. App. Ct. at 223, n.3; T20, 30, 46; Exh. 5).

[4] Doherty first testified that the description included a beard (T20). But on cross examination, he acknowledged that the 3:36:30 a.m. transmission (which does not mention a beard) was "all of the information [he] had about the [suspect]" before he stopped Mr. Privette (T38-39). And the judge so found (R42-43/A56-57).

[5] The transcript mistakenly refers to this area as "Kleine Point."

Doherty turned into the neighborhood and "canvassed most of the four streets" (T16) in Clam Point.[6] A map introduced in evidence shows his route (T32-33; Exh. 4).




Doherty reached the corner of Mill Street and Ashland Street at 3:43 a.m., seven minutes after Boston Police received the 911 call regarding the robbery (T18, R43/A57). This location is two streets away from the Shell gas station, a distance of about 700 feet.[7] When he

[6] As the Appeals Court stated, Doherty "drove around four side streets in the Clam Point area." *Privette,* 100 Mass. App. Ct. at 223. Although the judge found that Doherty "canvassed an area of about nine streets" (R43 n.5/A57 n.5), this finding conflicts with both Doherty's testimony (T16) and the map of his route that was admitted as Exhibit 4. As such, this finding is clearly erroneous.

[7] This is the distance shown by Google maps, which is source of the map introduced as an exhibit below (T32-33; Exh. 4). See

reached the intersection, he saw an individual, later identified as Mr. Privette, walking on Ashland Street (T16, 34; R43/A57). Mr. Privette was walking at a normal pace and heading in the direction of Mill Street, toward Doherty (T16; R43/A57).

Doherty noticed that the individual was a Black male with a large beard, wearing a green sweater with no hood and black[8] jeans, who appeared to be roughly the same age as the suspect described in the broadcast[9] (T20; 29; R43/A57). The individual was 5'11" tall and carried a red plaid backpack (T27; R43 n.3/A57 n.3). 7At the time Doherty encountered Mr. Privette, it was raining and the area was dark (T16; R43/A57). He had not seen any other pedestrians in the area (T20; R43/A57). Doherty parked his car and approached Mr. Privette on foot (T18-19; R43/A57).

Dwan was working a detail nearby when he heard the radio transmission regarding the armed robbery (T44). He drove up

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*Commonwealth v. Warren*, 87 Mass. App. Ct. 476, 488 n.9 (2015) (Agnes, J. dissenting) (taking judicial notice of "the measurement of the distances between landmarks in Roxbury," as depicted on map "taken from the same source as the exhibits"), *S.C.*, 475 Mass. 530 (2016).

[8] As the Appeals Court noted, although the judge found that Mr. Privette was wearing blue jeans (R43/A57), this finding conflicts with Doherty's ultimate testimony. *Privette,* 100 Mass. App. Ct. at 224, n.4. Doherty first testified that Mr. Privette was wearing "blue jeans" (T20), then testified that he did not remember the color of the jeans (T20) and ultimately, after his recollection was refreshed with the booking sheet, testified that Mr. Privette was wearing black jeans (T27). Mr. Privette "asserts, and the Commonwealth does not contest, that the finding that the jeans were blue was clearly erroneous." *Id*.

[9] Mr. Privette was 32 years old at the time (T27).

Morrissey Boulevard to Freeport Street, turned around, and drove back down Morrissey Boulevard to Victory Road before entering the residential neighborhood (T45-46). He did not drive on Freeport Street between Victory Road and Morrissey Boulevard (T60). He did not search the areas around the two large car dealerships located across the street from the gas station, the nearby CVS parking lot or the area around the Chinese restaurant (T58, 60). Dwan proceeded into the residential neighborhood and saw a man in dark clothing, wearing a backpack, walking away from him on Ashland Street (T46-47). The man was later identified as Mr. Privette. Dwan parked on Ashland Street and got out of his car (T47). At the same time, Dwan saw Doherty approaching Mr. Privette from the other end of the street (T47).[10]

As Doherty approached Mr. Privette, he identified himself by announcing "Boston Police" and ordered Mr. Privette to show his hands (T19; R43/A57). Mr. Privette complied and made no attempt to flee or evade Doherty (T19, 34-35; R43/A57). Nor did he make any furtive movements (T35).

Doherty patfrisked Mr. Privette and discovered a wad of cash in his pocket, but no weapons (T21; R43-44/A57-58). Dwan

[10] Dwan testified that he received updates on the radio call, including a description which, he "believe[d]," included "facial hair of some sort" (T46). The specific timing as to when he received that information was not established. For the reasons discussed below, this testimony cannot be relied upon in assessing reasonable suspicion.

approached Mr. Privette from behind (T48; R44/A58). Dwan frisked the backpack and discovered a silver firearm (T22; R44/A58). A blue sweatshirt and other pieces of clothing were also found inside the backpack (T25, 63; R44, 45 n.13/A58, 59 n.13).

After the stop, Mr. Privette was identified by the alleged victim in a show-up identification procedure (T25; R45/A59). Mr. Privette was placed under arrest and subsequently made statements to the police (T25; R49/A63). As a result of his arrest, the Commonwealth learned that Mr. Privette was wearing a GPS device and eventually retrieved his GPS location data (T89-90).

## SUMMARY OF ARGUMENT

The motion judge erred in denying the motion to suppress. There was no reasonable suspicion to stop Mr. Privette because his appearance varied from the suspect's description in six major respects. *Infra* at 24-29. Mr. Privette's mere presence near the scene of the robbery was insufficient, *infra* at 21-23, particularly because he did not engage in any furtive or evasive behavior that would have heightened police suspicion. *Infra* at 30-31.

The motion judge made factual findings about the contents of the description, but she did not find that the description included facial hair. Under these circumstances, it was impermissible for the Appeals Court to supplement the judge's findings with Dwan's testimony that he heard a later description which included facial hair. *Infra* at 31-34.

Employing the horizontal variant of the collective knowledge doctrine, the Appeals Court erroneously imputed Dwan's knowledge of the facial hair to Doherty even though Doherty was unaware of this information, and it played no role in Doherty's decision to stop Mr. Privette. The collective knowledge doctrine originated as a vertical rule allowing officers to make an arrest or search at the direction of a fellow officer without learning all the facts supporting probable cause. *Infra* at 35-36. In some jurisdictions, it has morphed into a horizontal rule permitting a post hoc aggregation of unshared information across multiple officers. *Infra* at 36-45. Article Fourteen requires that Massachusetts reject the horizontal variant for an important reason—because it is antithetical to the deterrent purpose of the exclusionary rule. *Infra* at 46-52.

## Argument

### I. The defendant's motion to suppress should have been allowed because, due to the conspicuous discrepancies between the description of the robber and the defendant's appearance, the police lacked a reasonable basis to suspect that the defendant was the perpetrator, and therefore lacked a lawful justification for the stop.

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968), quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). This sacred right is secured by the Fourth

Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. These constitutional provisions prohibit police interference with an individual's autonomy absent "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. The Commonwealth bears the burden of proving that such an intrusion met these constitutional standards. See *Commonwealth v. Antobenedetto*, 366 Mass. 51, 56-57 (1974).

Mr. Privette filed a motion to suppress contending that the police lacked reasonable suspicion for the stop. Mr. Privette argued that the description actually heard by Doherty prior to the stop was not sufficiently similar to Mr. Privette's appearance to justify the intrusion. The judge denied the motion, relying on the following factors: the defendant's location "in the locus of the robbery and within minutes of its occurrence"; the defendant "fit the general description of the initial bulletin of the robbery"; and the "early morning hour and the fact that the Defendant was the only person observed by any police surveillance in the area" (R46/A60).

The motion judge erred.[11] Although "the Defendant's appearance was similar to the description on the dispatch" (R44/A58), a

[11] In reviewing a judge's order on a motion to suppress, this Court accepts the judge's subsidiary factual findings absent clear error, but independently applies the relevant constitutional principles to those facts. *Commonwealth v. Mauricio*, 477 Mass. 588, 591 (2017).

passing similarity is insufficient to establish reasonable suspicion. There were significant differences between the description of the robber and Mr. Privette's appearance. The robber was 5'7" tall, and wore a blue hooded sweatshirt and blue jeans (T38; Exh. 5, channel 6 at 3:36:30 a.m.; R42-43/A56-57). Mr. Privette, however, is 5'11", and wore a green sweater with no hood and black jeans (T20, 27, 29; R43/A57). Moreover, absent from the description were the most striking aspects of Mr. Privette's appearance — a large beard and a red plaid backpack (R43 n.4/A57 n.4).

The Appeals Court affirmed, but only after supplementing the motion judge's findings with Dwan's testimony that he heard an "updated description" including facial hair and then imputing this knowledge to Doherty. *Privette*, 100 Mass. App. Ct. at 224.

This was error. The motion judge specifically *did not* include facial hair in her factual findings regarding the description. This factual finding, which is binding absent clear error, forecloses the Appeals Court's supplementation. The order denying the motion to suppress should have been reversed.

### A. *Mr. Privette was seized when Officer Doherty ordered him to show his hands.*

A seizure in the constitutional sense occurs when a reasonable person would believe that an officer "would compel him or her to stay." *Commonwealth v. Matta*, 483 Mass. 357, 363 (2019). Here, as the motion judge ruled, (R47/A61), Mr. Privette was seized when Doherty

ordered him to show his hands (T19; R43/A57). The Commonwealth agreed. *Privette*, 100 Mass. App. Ct. at 226. Reasonable suspicion was therefore required to justify this constitutional intrusion.

B. *At the time he stopped Mr. Privette, Officer Doherty had no reasonable suspicion that he was involved in the robbery.*

1. Mr. Privette's mere presence in Clam Point after the robbery did not suggest that he was the robber.

In concluding that Doherty had a reasonable suspicion that Mr. Privette was the robber, the judge relied heavily upon Mr. Privette's presence in Clam Point in the early morning hours, shortly after the robbery was reported to police (R46/A60). However, geographical and temporal proximity to a crime scene, even while matching a general description, is insufficient to justify a stop. *Commonwealth v. Cheek*, 413 Mass. 492, 496 (1992).

Here, the probative value of Mr. Privette's proximity to the crime scene was particularly limited. Mr. Privette was found only two blocks away from the gas station, a distance of about 700 feet, seven minutes after the Boston Police received the 911 call reporting the robbery (T32-33; R43/A57; Exh. 4). Although the robber might not have gotten farther away by the time of the stop, it is much more likely that someone fleeing the scene of a serious crime would have gone a greater distance over the course of seven minutes. See *Warren*, 475 Mass. at 537 (geographical proximity factor undermined where the defendant "would have likely reached that location well before" the encounter with the police).

The motion judge also relied on the fact that Mr. Privette was the only person in the area at that early morning hour (R46/A60). This factor, while appropriate, is not at all dispositive. See, e.g., *Warren*, 475 Mass. at 537-538 (finding no reasonable suspicion even where the defendant and his companion were the only two people in the area on a cold winter night); *Commonwealth v. Martinez*, 74 Mass. App. Ct. 240, 242 (2009) (finding no reasonable suspicion even where officers had not seen any pedestrians or cars prior to encountering the defendant around 5:00 a.m.).

That the police did not observe anyone else in the area is less compelling here, because the officers had not canvassed large swaths of the area in the immediate vicinity of the robbery. Doherty only surveilled four short blocks in the Clam Point neighborhood (T16), and Dwan essentially drove up and down one segment of Morrissey Boulevard before entering the residential neighborhood (T46). Neither officer searched the stretch of Freeport Street between Morrissey Boulevard and Victory Road, the two large car dealerships with ample space to hide a fleeing suspect, the CVS parking lot or the area around the Chinese restaurant (T58, 60).

In each prior case where the absence of other people in the area contributed to reasonable suspicion, there were other notable factors present. These plus factors include suspicious or evasive behavior, *Commonwealth v. Doocey*, 56 Mass. App. Ct. 550, 553 (2002) (the defendant repeatedly looked over his shoulder and "appeared

uneasy"); inclement weather,[12] *Commonwealth v. McKoy*, 83 Mass. App. Ct. 309, 310 (2013)(officers "did not expect to see, and had not seen, anyone out during the adverse weather conditions: a cold windy, wet night filled with snow and slush"); a deserted commercial zone, *Commonwealth v. White*, 44 Mass. App. Ct. 168, 172 (1998); a description that was narrowed by the inclusion of multiple people or another distinguishing feature, *Commonwealth v. Acevedo*, 73 Mass. App. Ct. 453, 454 (2009) (two Black men walking together, one of whom was wearing the white Converse sneakers described by victim); or some combination of these additional factors, *Commonwealth v. Gunther G.*, 45 Mass. App. Ct. 116, 118-119 (1998) (police responding to a report of a fight involving three men and a dog attack observed three men walking with a dog, and one man fled unprovoked upon seeing the police).

None of these additional factors is present here. Without any of these plus factors, the mere presence of a single individual in a residential area near a crime scene cannot be said to establish reasonable suspicion. And that is particularly so where, as discussed below, the individual matches only the most general components of a detailed description and fails to meet the more distinctive elements.

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[12] Although it was raining here (T16; R43/A57), there was no suggestion that the rain was so severe that it would be surprising or suspicious to see a pedestrian.

2. Mr. Privette did not match the description of the robber.

Police may stop an individual based on a reported description only if "the description of the suspect conveyed by the dispatch had sufficient particularity that it was reasonable for the police to suspect a person matching that description." *Commonwealth v. Depina*, 456 Mass. 238, 243 (2010). The description of the robber here may well have been sufficiently particular to justify the stop of an individual who matched it. But Mr. Privette did not.

i. *Mr. Privette matched only the most general elements of the description, and he differed from the description in distinctive ways.*

The motion judge found that Mr. Privette "fit the general description" (R46/A60) and that his "appearance was similar to the description" (R44/A58). A mere similarity, however, is woefully inadequate to justify a constitutional intrusion. Mr. Privette did match the most basic aspects of the description, race and gender, but he failed to match its more detailed components.[13] As a result, the

[13] There was no evidence presented as to the demographic composition of the area, or that it would be unusual for a Black man to be in this particular neighborhood. Census data released in 2019 showed Dorchester to be 45.4% Black/African-American. See Boston Planning and Development Agency, *Boston in Context: Neighborhoods, 2013-2017 American Community Survey* (January 2019), at p. 9, available at http://www.bostonplans.org/getattachment/8349ada7-6cc4-4d0a-a5d8-d2fb966ea4fe.

Commonwealth failed to sustain its burden to establish reasonable suspicion.

Mr. Privette is 5'11", not 5'7" (T27; R43/A57). He wore a green shirt without a hood, not a blue hoodie (T29; R43/A57). And he wore black jeans, not blue jeans (T27). Furthermore, the two most distinctive elements of his appearance – "noticeable facial hair consisting of a large beard" (R43/A57) and a red plaid backpack – were not included in the description heard by Doherty prior to the stop (T20, 27-28; R43 n.4/A57 n.4). These are certainly the type of conspicuous features that one would expect to be included in a physical description.

A description cannot reasonably generate suspicion of a person who does not match it. "[T]o the extent the defendant's 'match' to the general description had any value, it was largely offset by the aspects of his appearance tending to exclude him from the description." *Commonwealth v. Jones*, 95 Mass. App. Ct. 641, 646 (2019).

In *Jones*, the description was that of a Black man in a white t-shirt and khaki pants. *Id*. at 643. There was no reasonable suspicion for the stop, in part, because "the defendant wore shorts, not pants," and though he wore a white t-shirt, it bore "a distinctive unicorn graphic that was not mentioned in the initial description." *Id*. at 646. A large, noticeable beard is far more notable and memorable than a graphic on a T-shirt. If the T-shirt graphic in *Jones* was a critical omission, so too is the beard here, as well as the red plaid backpack. See also *Commonwealth v. Meneus*, 476 Mass. 231, 237 (2017) (witness's

omission of defendant's distinctive jacket detracted from reasonable suspicion).

This is not a case where the 911 caller offered only a general description. The caller provided a fulsome physical description including the robber's age, height, build, both the style and color of his sweatshirt, and both the color and style of his pants. Further, the caller was able to describe the direction of the robber's flight and his mode of travel. The inclusion of these details establishes that the caller had ample opportunity to observe the robber during and immediately after the robbery. And because the witness was able to observe the robber from behind as he fled the gas station, he would have seen any backpack worn by the robber. Given the witness's extensive ability to observe and then report these myriad details, the omission of both a large beard and an obvious red plaid backpack was particularly deleterious to the reasonableness of any suspicion that Mr. Privette was the robber.

Another case, *Commonwealth v. Martinez*, 74 Mass. App. Ct. 240, 245-247 (2009), similarly involved a detailed description that varied from the defendant's appearance. The suspect was described as a 24-year-old white man wearing jean shorts and a gray shirt featuring orange stripes and some writing. *Id.* at 245. The defendant was a 20-year-old Hispanic man with "light colored skin", wearing long pants, and a blue and gray shirt with orange stripes and no writing. *Id.* at 246. The defendant also had an arm cast and was accompanied by his

girlfriend, two noticeable facts not included in the description. *Id*. at 246. The defendant complied with the officer's request to produce identification, but then retreated into a building, abandoning his identification and leaving the police standing on the porch. *Id*. at 243, 247.

In *Martinez*, then, the defendant's age, skin tone and the colors of his clothing were quite similar to the description, but the specific type of clothing varied. The combination of these variances plus the presence of two undescribed distinctive features were fatal to reasonable suspicion — even though the defendant and his companion were the only people in a deserted area at 5:00 a.m. and the defendant took rather drastic measures to avoid further interaction with police. *Id*. at 245-246.

Here, as in *Martinez*, Mr. Privette was in a deserted area in the early morning, and he generally met some of the least distinguishing facets of the description, but his clothing varied in style and color from the description and he possessed two obvious, but undescribed, features: a noticeably large beard and a red plaid backpack. And unlike in *Martinez*, Mr. Privette engaged in no evasive behavior. Just as the presence of two undescribed distinctive features was fatal to reasonable suspicion in *Martinez*, even when bolstered by the defendant's suspicious behavior, so too is it fatal to reasonable suspicion here.

Reasonable suspicion does not require a "full match up of all parts of the description" because police "must be allowed to take account of the possibility that some descriptive facts supplied by victims or witnesses may be in error." *Commonwealth v. Emuakpor*, 57 Mass. App. Ct. 192, 198 (2003) (internal quotations omitted). One or two minor discrepancies may be attributed to witness error. See *id.* at 197 (the number of doors on the getaway vehicle, and the number of occupants); *Commonwealth v. Lopes*, 455 Mass. 147, 158 (2009) (precise location of Cape Verdean flag in van). But here, there were discrepancies in virtually every detail provided - height, type of shirt, color of shirt, color of pants – in addition to the omission of two very striking details. To dismiss all six of these discrepancies as witness error and approve the stop of Mr. Privette – especially where nothing about his conduct suggested involvement in a crime – would render the requirement of particularity in a description meaningless.

ii. *Matching only the race and gender of a description is insufficient to establish reasonable suspicion.*

Once the more detailed elements of the description, which Mr. Privette did not meet, are excised, the remainder – Black male, late 20's, medium build – obviously lacks the particularity required to justify a constitutional intrusion. "Unparticularized racial descriptions, devoid of distinctive or individualized physical details … cannot by themselves provide police with adequate justification for stopping an individual member of the identified race who happens to be in the

general area." *Commonwealth v. Grinkley*, 44 Mass. App. Ct. 62, 67 (1997).

The motion judge found that Mr. Privette "fit the general description" (R46/A60), but that was wholly insufficient. "[A] general description such as 'a group of young black males' falls far short of the particularity necessary to establish individualized suspicion." *Meneus*, 476 Mass. at 236-237, citing *Warren*, 475 Mass. at 535.

Similarly, in *Commonwealth v. Cheek*, 413 Mass. 492, 493 (1992), the police investigating a stabbing received a description of "Black male with a black three-quarter length goose" coat. The defendant – who matched the physical description – was found about one-half mile from the scene. *Id*. But the court noted that this general description could fit a large number of men in the Grove Hall section of Roxbury. So, without some additional physical description, or some evidence that the jacket was uncommon, the description did not sufficiently distinguish the suspect from any other Black male in the area. *Id*. at 496. Here, once the dissimilar components of the description are excised, all that remains is an unparticularized racial description, and, as in *Cheek*, that is insufficient.

The facts here are actually weaker than in *Cheek*. There, the defendant met the description in all respects, but the description itself was too general to generate reasonable suspicion. *Id*. Here, there is an extensive description, but Mr. Privette did not match that description in significant respects. The cumulative effect of these many

discrepancies rendered it even less likely that Mr. Privette was the robber than if, as in *Cheek*, the witness had provided a general description that he met fully.

3. Mr. Privette did not engage in any conduct that could give rise to a reasonable suspicion that he was the robber.

Where there is a variance between the description given and the defendant's appearance, evasive or furtive behavior can tip the scale toward reasonable suspicion. See, e.g., *Depina*, 456 Mass. at 247 ("less than distinctive physical description" supplemented by suspect reversing direction in an "obvious effort to avoid encountering the police"); *Commonwealth v. Mercado*, 422 Mass. 367, 371 (1996) (suspects retreated into a store upon seeing police).

None of Mr. Privette's behavior could be described as suspicious, furtive or evasive. When Doherty first saw Mr. Privette, he was simply walking at a normal pace (T16; R43/A57). He made no attempt to conceal himself. Contrast *Commonwealth v. Johnson*, 88 Mass. App. Ct. 705, 712 (2015). He did not react to the police presence in any way: he did not change direction, quicken his pace, or make any attempt to hide or flee (T34; R43/A57). See *Jones*, 95 Mass. App. Ct. at 647. Nor did he betray any nervousness: he did not scan the area, sweat profusely or breathe heavily (T35). Nor did he make any furtive gestures that would suggest he was carrying a weapon. *Id*. To the contrary, he complied with Doherty's order to show his hands (T19, 35; R43/A57).

"Nothing about the defendant's appearance or behavior at the time of the stop gave any reason to think that he was connected to the crime, fleeing from it, or attempting to conceal himself." *Jones*, 95 Mass. App. Ct. at 647. That being the case, and since the information possessed by the police was otherwise insufficient, the information as a whole fell short of reasonable articulable suspicion. The motion to suppress therefore should have been allowed.

## II. The collective knowledge doctrine cannot be applied for the first time on appeal where the predicate facts not only were not found by the motion judge, but are actually incompatible with her findings.

In affirming the denial of the motion to suppress, the Appeals Court relied on facts not found by the motion judge. The Court improperly supplemented the motion judge's findings with Dwan's testimony that he heard an "updated description" including facial hair, and then imputed this knowledge to Doherty under the collective knowledge doctrine. *Privette*, 100 Mass. App. Ct. at 224. The Appeals Court was correct in concluding, implicitly, that the description Doherty *did* hear did not suffice to establish reasonable suspicion. But the supplementation in which it indulged was impermissible.

To deploy the collective knowledge doctrine, or any other rule of search and seizure, the predicate facts must first be credited by the motion judge. See generally *Jones-Pannell*, 472 Mass. at 436-38. Compare *Commonwealth v. Gullick*, 386 Mass. 278, 283 (1982) (applying

collective knowledge doctrine where the motion judge expressly "found" that three troopers "were engaged in a cooperative effort") with *Commonwealth v. King*, 67 Mass. App. Ct. 823, 828 (2006) (declining to apply collective knowledge doctrine "under the facts as found by the motion judge"). The prohibition on appellate fact-finding is dispositive here.

The motion judge did not find any of the facts that would be necessary to invoke the doctrine: she did not find that Dwan, or any other officer, heard the subsequent broadcast of the description, which included facial hair, prior to the stop. To the contrary, the judge specifically *did not* include facial hair in her factual findings regarding the description (R42-43/A56-57). This factual finding precludes the supplementation engaged in by the Appeals Court.

In her prefatory statement, the motion judge did credit Dwan's testimony (R41-42/A55-56), but his testimony left it unclear what exactly Dwan knew prior to the stop. He testified that that heard a description, which he "believe[d]" included "facial hair of some sort" (T46), but the specific timing as to when he received that information was not established. Critically, there were multiple broadcasts, each containing different pieces of the description. The fact that the supplemented broadcast was *transmitted* before the stop does not mean that Dwan (or Doherty) actually *heard* it before the stop. Indeed, Doherty admitted that he had not (T38-39).

Clearly, at some point after the subsequent transmission and before the motion hearing, the officers learned of the complete description, but the relevant inquiry is whether any officer actually received that information *prior to* the stop. The Appeals Court stated that "Doherty gave contradictory testimony regarding whether, when he stopped the defendant, he was aware that the suspect had been described as having facial hair, and the judge did not resolve that conflict." *Privette*, 100 Mass. App. Ct. at 226. This is incorrect. The judge did resolve the conflict in her factual findings: she specifically did not include the beard in her findings, demonstrating her conclusion that the officers did not know about the beard prior to the stop. See *Jones-Pannell*, 472 Mass. at 433 ("although the officer's testimony characterized the defendant's pace in a number of ways, the judge's factual findings resolve the differences").

In a footnote, the Appeals Court mischaracterized and then dismissed this critical issue. The Appeals Court stated that "the judge's finding, in discussing Doherty's knowledge, that '[t]here was no mention in the original broadcast about facial hair' in no way excludes the possibility that the judge found that Dwan heard the subsequent description prior to the stop. The two facts are independent of each other." *Privette*, 100 Mass. App. Ct. at 227 n.10 (cleaned up). That statement is correct, of course, but it wholly misses the point. The issue is whether the judge's *deliberate* omission of facial hair in her findings

regarding the description constituted a binding finding of fact. It did.[14] If the motion judge *had* found that Dwan heard the subsequent transmission prior to the stop, she would have included facial hair in her findings regarding the description.

Given the judge's findings as to the content of the description, she clearly did not find that Dwan heard the dispatch mentioning facial hair prior to the stop. However, even if this Court views these findings as ambiguous, that ambiguity is still fatal. Without findings as to what exactly Dwan knew and when, there is an insufficient factual basis upon which to apply the collective knowledge doctrine. Further, imputing Dwan's knowledge to Doherty would represent an application of the horizontal variant of the doctrine, which should not be permitted.

## III. The horizontal collective knowledge doctrine, as applied in this case, is an unwarranted and unexplained departure from the original fellow officer rule.

### A. *The development of the collective knowledge doctrine*.

This Court has never expressly considered the two forms of the collective knowledge doctrine extant in other jurisdictions: the original "vertical" form and the later "horizontal" variant. The two forms

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[14] Contrary to the Appeals Court's assertion, "supplementing" the judge's findings with testimony that she deliberately excluded from her findings does "detract from the judge's ultimate findings." *Privette*, 100 Mass. App. Ct. at 227. It was therefore impermissible.

of the doctrine are described in §A below. As explained in §B, the vertical form is by far the sounder as a matter of policy and is the only form that this Court should permit under Article Fourteen.

1. The origin of the doctrine: the vertical imputation rule.

At its inception, the collective knowledge doctrine – also known as the fellow officer rule – "allow[ed] for the imputation of knowledge between officers when one officer, having acquired probable cause, instructs another to conduct a search or arrest and does not explain why." Stern, *Constructive Knowledge, Probable Cause and Administrative Decisionmaking*, 82 Notre Dame L. Rev. 1085, 1086 (2007) [hereinafter "Stern"]. The doctrine originated in *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971), where the Court noted that police officers are "'entitled to act' upon the strength of a communication through official channels directing or requesting that an arrest or search be made." 2 W. LaFave, Search and Seizure §3.5(b), at 333 (6th ed. 2020), quoting *Whiteley*, 401 U.S. at 568. In *U.S. v. Hensley*, 469 U.S. 221 (1985), the Court reaffirmed *Whiteley*, holding that when evidence is recovered during a search made in reliance on a directive or request, "its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance." *Id*. at 231.

This original – and uncontroversial – rule is known as the "vertical" collective knowledge doctrine. *U.S. v. Chavez*, 534 F.3d 1338, 1345 (10th Cir. 2008). Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. Rev. 663, 672 (2014) [hereinafter "Fettig"]. In its original iteration, "th[e] rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction." *Hensley*, 469 U.S. at 231. "Because the precondition for the rule is that probable cause must already exist," the rule "increases the efficacy of policing without tipping the Fourth Amendment balance." Stern, at 1100.

The "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct." *Commonwealth v. Lora*, 451 Mass. 425, 438 (2008), quoting *U.S. v. Calandra*, 414 U.S. 338, 347, 348 (1974) (internal citations omitted). The vertical collective knowledge doctrine does not "tip[] the Fourth Amendment balance", Stern, at 1100, because a reviewing court can "trace the action of the arresting officer back to some other specific person ... and show that the latter *individual* had brought together a sufficient collection of underlying facts to add up to probable cause." W. LaFave, supra, at 339. [15] The vertical rule does

[15] "[A]n officer's reliance on a radio bulletin without asking further questions is the basis of the efficiency rationale used to justify the collective knowledge doctrine." Fettig, at 685. "The ability to trace the source of probable cause information to an identifiable officer, and

not modify the substantive legal analysis, it "simply directs [courts] to substitute the knowledge of the *instructing officer or officers* for the knowledge of the *acting officer*." *U.S. v. Massenberg*, 654 F.3d 480, 493 (4th Cir. 2011). Accordingly, the vertical rule does not diminish the deterrent effect of the exclusionary rule.

2. The expansion: the horizontal aggregation variant.

In Massachusetts and elsewhere, however, the doctrine "has undergone a dramatic expansion" and "has strayed from its original efficiency rationale." Fettig, at 669, 663. It made an unacknowledged leap from a rule allowing for the direct, vertical, imputation of one officer's knowledge to another, to a rule permitting the horizontal aggregation of uncommunicated knowledge across multiple officers. Compare *Commonwealth v. Lanoue*, 356 Mass. 337, 340 (1969) (when an officer is instructed to stop a vehicle "it is unnecessary for the detaining officer to know all the information pertaining to the incident") with *Commonwealth v. Rivet*, 30 Mass. App. Ct. 973 (1991) (even in the absence of a directive, uncommunicated observations may be aggregated when officers are "engaged in a cooperative effort").

Under the "horizontal" rule, Fettig, at 672, no one officer needs to assess the totality of the information and determine whether it amounts to probable cause. Instead, this "new supercharged version

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the assumption by that officer's colleague that she may act lawfully on the officer's direction, thus forms the 'constitutional moorings' of the collective knowledge doctrine." *Id*.

of the rule," Stern, at 1090, permits uncommunicated information possessed by multiple officers to be pooled and analyzed after the fact. That is precisely what the Appeals Court did here: it aggregated bits and pieces of unshared information scattered across different officers merely because they were "cooperating" in the robbery investigation. *Privette*, 100 Mass. App. Ct. at 227-228.[16]

3. The fallout: the split among federal circuits and states.

The expansion of the collective knowledge doctrine into the horizontal rule has resulted in a split among both the federal circuits and the states. Three federal circuits adhere to the original vertical collective knowledge doctrine, and the others have adopted some version of the horizontal doctrine. The Second, Fourth and Tenth Circuits have refused to aggregate uncommunicated knowledge among officers. See *U.S. v. Hussain*, 835 F.3d 307, 316 n.8 (2d Cir. 2016) ("we decline to extend the collective knowledge doctrine to cases where, as here, there is no evidence that an officer has communicated his suspicions with the officer conducting the search, even when the officers are working closely together at a scene"); *U.S. v. Massenberg*, 654 F.3d

[16] At times, Massachusetts courts have stressed the close physical proximity of officers when invoking the doctrine. See, e.g., *Rivet*, 30 Mass. App. Ct. at 975 (officers "worked in concert within arm's length of each other"); *Commonwealth v. Wooden*, 13 Mass. App. Ct. 417, 422 (1982) (same). But it does not appear that such immediate proximity is a prerequisite. See, e.g., *Commonwealth v. Montoya*, 464 Mass. 566, 576 (2013).

480 (4th Cir. 2011) (discussed *post,* at 44-46); *U.S. v. Chavez*, 534 F.3d 1338, 1345 (10th Cir. 2008) ("the court must consider whether the individual officers have communicated the information they possess individually, thereby pooling their collective knowledge to meet the probable cause threshold").

The circuits adopting the horizontal rule do so on the basis that it is appropriate to impute knowledge among officers working as a team. See, e.g., *U.S. v. O'Connell*, 841 F.2d 1408, 1419 (8th Cir. 1988) (when officers "worked closely together" in an investigation, "we presume that the officers have shared relevant knowledge which informs the decision to seize evidence or to detain a particular person, even if the acting officer is unable to completely and correctly articulate the grounds for his suspicion at the time of the search"); *U.S. v. Edwards,* 885 F.2d 377, 382, 383 (7th Cir. 1989) (imputing knowledge when officers "made the arrest together").[17]

[17] Among the circuits that subscribe to the horizontal doctrine, "there is not a consensus among, or even within, those circuits as to how broadly aggregation should be applied." Fettig, at 677. Most circuits require at least "a minimal level of communication" among officers as a prerequisite to aggregation. *U.S. v. Willis*, 759 F.2d 1486, 1494 (11th Cir. 1985). But this is an exceedingly low bar – it is only "a limited requirement that there be a communication but not necessarily the conveyance of any actual information among officers." *U.S. v. Ramirez*, 473 F.3d 1026, 1032-1033 (9th Cir. 2007). Other circuits have aggregated knowledge without any evidence of communication at all. See, e.g., *U.S. v. Wright*, 641 F.2d 602, 606 (8th Cir. 1981).

The states are also split as to whether to adhere to the vertical rule or adopt the broader horizontal rule. Among the states that have reached issue, most have adopted some form of the horizontal doctrine.[18] But at least fifteen jurisdictions have refused to aggregate unshared information including California,[19] Delaware,[20] Florida,[21]

[18] See, e.g., *Willet v. State*, 298 Ark. 588, 592 (1989); *State v. Butler*, 296 Conn. 62, 75 (2010); *In re M.E.B.*, 638 A.2d 1123, 1133 (D.C. 1993); *People v. Davis*, 660 N.W.2d 67, 71 (Mich. 2003); *Doleman v. State,* 107 Nev. 409, 415 (1991); *Woodward v. State*, 668 S.W.2d 337, 355 (Tex. Crim. App. 1984).

[19] *People v. Ford*, 150 Cal. App. 3d 687, 700 (1984) ("California has not adopted the doctrine that the collective information of law enforcement officers working together as a closely coordinated team is sufficient to establish probable cause").

[20] *State v. Cooley*, 457 A.2d 352, 355-356 (Del. 1983) ("To say in the abstract that probable cause is to be evaluated on the basis of the collective information of the police ignores the underlying assumption—and factual reality—that there is some communication between those officers, who do know facts amounting to probable cause, and those who do not").

[21] *Montes-Valeton v. State*, 216 So. 3d 475, 479 (Fla. 2017)("the fellow officer rule does not allow an officer to assume probable cause for an arrest or a search and seizure from uncommunicated information known solely by other officers"). But see *State v. Smith*, 719 So. 2d 1018, 1023 (Fla. Dist. Ct. App. 1998) (communication not required "when officer who does possess probable cause is in a close time-space proximity").

Georgia,[22] Hawaii,[23] Illinois,[24] Indiana,[25] Kansas,[26] North Carolina,[27] North Dakota,[28] Oregon,[29] Pennsylvania,[30] Rhode Island,[31]

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[22] *State v. Fischer*, 230 Ga. App. 613, 614 (1998), rev'd on other grounds by *Workman v. State*, 235 Ga. App. 800 (1998) ("Application of the 'collective knowledge' rule has been limited in this State to factual situations where the collective knowledge of law enforcement officers has been relayed to and used by officers actually making or implementing a detention or seizure").

[23] *State v. Crowder,* 1 Haw. App. 60, 67-68 (1980).

[24] *People v. Creach,* 69 Ill. App. 3d 874, 882 (1979), aff'd in part, rev'd in part, 79 Ill. 2d 96 (1980), cert. denied, 449 U.S. 1010 (1980) ("presumption that for purposes of probable cause the knowledge of one officer is imputed to the others involved in the cause does not apply" where "[t]here was no evidence that the additional information cited by the State was communicated to the officers") (internal citations omitted);

[25] *Salter v. State,* 163 Ind. App. 35, 38 (1975) (collective knowledge doctrine inapplicable where there was "no evidence in the record tending to show a police channel communication or any communication between [o]fficers").

[26] See, e.g., *State v. Miller*, 49 Kan. App. 2d 491, 497 (2013) ("under the collective-knowledge doctrine, the officer taking action must have acted in objective reliance on some information received from another").

[27] *State v. Battle*, 109 N.C. App. 367, 371 (1993) ("Where there is no request from the first officer that the second officer stop a vehicle, the collective knowledge of both officers may form the basis for reasonable suspicion by the second officer, if and to the extent the knowledge possessed by the first officer is communicated to the second officer").

[28] *State v. Rahier*, 849 N.W.2d 212, 217-218 (N.D. 2014).

[29] *State v. Mickelson*, 18 Or. App. 647, 650 (1974), adopted in *State v. Groda*, 285 Or. 321, 324 (1979).

[30] *Commonwealth v. Gambit*, 274 Pa. Super. 571, 578 (1980) ("Information scattered among various officers in a police department cannot substitute for possession of the necessary facts by a single officer related to the arrest"). See also *Commonwealth v. Yong*, 644 Pa. 613, 634 (2018) (adopting a "modified" vertical doctrine).

Vermont,[32] and Virginia.[33] The competing rationales offered by states echo those offered in the federal circuits. The states that have adopted the horizontal doctrine explain it, to the extent that they do justify it, on the basis that officers working together can be considered "part of a single investigative team working in close concert." See, e.g., *State v. Weber*, 139 So. 3d 519, 521 (La. 2014).[34] More often, though, "courts will simply aggregate information horizontally under the guise of applying the collectively knowledge rule in a traditional vertical-imputation context." Fettig, at 686.

The main rationale in jurisdictions that reject aggregation is simple and compelling: the horizontal rule undermines the deterrent purpose of the exclusionary rule. For instance, the Oregon Court of Appeals concluded:

> To hold the search in this case justified would encourage police officers to search on the hope that the total knowledge of all those officers involved in a case will later be found to constitute probable cause if the search is challenged. We think it better to require that an arresting officer reasonably believe that his fellow officers have probable cause before he arrests or searches on the basis of their knowledge.

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[31] *State v. Brennan*, 526 A.2d 483, 485 (R.I. 1987) (probable cause "mosaic" "may reflect the collective knowledge of the police department, as long as the arresting officer relied on that knowledge").
[32] *State v. Phillips*, 140 Vt. 210, 216 (1981).
[33] *McArthur v. Commonwealth*, 72 Va. App. 352, 366 (2020).
[34] See also *Grassi v. People*, 320 P.3d 332, 338 (Colo. 2014); *State v. Goff*, 129 S.W.3d 857, 863 (Mo. 2004); *People v. Gittens*, 211 A.D.2d 242, 245 (N.Y. 1995); *State v. Ojezua*, 50 N.E.3d 14, 25 (Ohio Ct. App. 2016).

*State v. Mickelson*, 18 Or. App. 647, 650 (1974), adopted by the Oregon Supreme Court in *State v. Groda*, 285 Or. 321, 324 (1979).[35]

Other states have not explicitly rejected aggregation but have suggested that arresting officers must actually receive the information necessary to probable cause or reasonable suspicion.[36]

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[35] See also *State v. Rahier*, 849 N.W.2d 212, 217-218 (N.D. 2014) ("the information must actually be communicated to the acting officer in advance of the police action" to "prevent[] unjustified police action from being taken in the hopes it is later validated by tallying the knowledge of every officer and agency involved in the case"); *McArthur v. Commonwealth*, 72 Va. App. 352, 366 (2020) ("The expansion of the collective knowledge doctrine ... to allow for 'horizontal' aggregation of knowledge not only fails to deter future Fourth Amendment violations but may well encourage them"); *People v. Looby*, 65 V.I. 84, 93–95 (V.I. Super. Ct. 2016), rev'd on other grounds by *People v. Looby,* 68 V.I. 683 (2018) ("under the horizontal collective knowledge doctrine, it is possible for an officer to knowingly and purposely conduct a *Terry* search without reasonable suspicion but then have that unlawful search sanitized by another officer's prior or concurrent investigation. This scenario is antithetical to the Fourth Amendment's purpose of deterring unreasonable searches").

[36] See, e.g., *State v. Ochoa*, 131 Ariz. 175, 177 (Ct. App. 1981) (the doctrine "does not allow officers to make arrests without probable cause simply because some other officer, somewhere, has probable cause to arrest"); *State v. Amstutz*, 492 P.3d 1103, 1107 (Idaho 2021) ("While officers can rely on information they are told ... an arresting officer must be personally aware of that information, rather than simply having it at his disposal in a State-created document or database"); *State v. Coleman*, 10 Neb. App. 337, 342 (2001) ("When the collective knowledge of the law enforcement agency for which an officer acts provides the basis for a search and seizure, some communication of that knowledge to the officer conducting the search and seizure is required").

The issue is a contentious one; some jurisdictions adopting the broader horizontal rule have done so over spirited dissents. See, e.g., *Woodward v. State*, 668 S.W.2d 337, 355 (Tex. Crim. App. 1984) (Teague, J., dissenting) ("we might as well rip out of our law the provisions of the Fourth Amendment to the Federal Constitution and Art. I, Section 9, of the Texas Constitution, as well as cease using in our legal vocabulary the phrase 'probable cause'").[37]

*U.S. v. Massenburg*, 654 F.3d 480 (4th Cir. 2011), provides perhaps the most thorough, and frequently cited, analysis of the dangers of the horizontal variant. The *Massenburg* Court noted that, under a horizontal rule, "the legality of the search would depend solely on whether, after the fact, it turns out that the disparate pieces of information held by different officers added up to reasonable suspicion or probable cause." *Id*. at 493. See also *McArthur v. Commonwealth*, 72 Va. App. 352, 365 (2020) (same).

*Massenburg* ultimately held that "the collective-knowledge doctrine ... does not permit us to aggregate bits and pieces of information

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[37] Other examples include *In re M.E.B.*, 638 A.2d 1123, 1134-35 (D.C. 1993) (Ferren, J., dissenting) ("the majority holding in this case stretches [the collective knowledge] doctrine to the breaking point ... This holding disregards a prior opinion of this court and goes well beyond established precedent in this or any other jurisdiction") and *Willet v. State*, 298 Ark. 588, 597 (1989) (Hays, J., dissenting) ("The danger in the method approved in this case is quite obvious. It encourages arrests and searches where there is an insufficient basis, in hopes that an after-the-fact inquiry will turn up additional information to support the police action").

from among myriad officers, nor does it apply outside the context of communicated alerts or instructions." 654 F.3d at 493. The court explained that the vertical doctrine increased "law enforcement efficiency and responsiveness" because "officers would learn that they need not relay the information justifying an alert when issuing one nor wait for such information upon hearing one." *Id*. at 494, citing *Hensley*, 469 U.S. at 231. But the aggregation of unshared knowledge "serves no such ends." *Massenburg*, 654 F.3d at 494. Because "an officer will never know *ex ante* when the aggregation rule might apply, the rule does not allow for useful shortcuts when an officer knows an action to be legal, as *Hensley* did." *Id*.

Not only does the horizontal doctrine fail to serve the efficiency rationale of the vertical doctrine, it actually creates a perverse incentive for officers to conduct questionable searches and seizures. "[A]n officer who knows she lacks cause for a search will be more likely to roll the dice and conduct the search anyway, in the hopes that uncommunicated information existed." *Id*. "As the … aggregation rule would do nothing but redeem searches or seizures that the acting officers should have *believed at the time* to be unlawful, it would serve only to erode … deterrence." *Id*.

The *Massenburg* Court reviewed the other federal circuit cases adopting an aggregation rule but could "find no convincing defense of it." *Id*. at 495.

> Most courts to have adopted the rule appear to have done so simply on the grounds that officers working closely together are 'a team,' or, as one court put it, 'on the theory that officers working closely together during a stop or an arrest can be treated as a single organism.' But why? We must frame the question in terms of deterrence, and for the purposes of deterrence we look to each individual officer's decision-making process as she considers executing a search or effecting a seizure. Where officers working closely together have *not communicated* pertinent information, the acting officer weighs the costs and benefits of performing the search in total ignorance of the existence of that information—it is not known to her, so it cannot enter into the calculus. Therefore, for purposes of the exclusionary rule, that additional information must be irrelevant.

*Id*. (emphasis original, citations omitted). "No court has explicitly articulated a rationale for use of the aggregation rule that address the critiques put forth by the Fourth Circuit." Fettig, at 686.

B. *Article Fourteen requires the rejection of the horizontal variant.*

"[B]ecause [the horizontal rule] appears to have arisen through a misinterpretation of the collective-knowledge rule, and has so far been treated as an instance of that rule, there has been little effort to articulate an independent rationale for this new doctrine." Stern, at 1088. Indeed, Massachusetts courts have never acknowledged this doctrinal leap. This Court should now correct course.

The reasoning of *Massenburg* is sound. This Court should join the Fourth Circuit and the numerous other jurisdictions rejecting the horizontal variant of the collective knowledge doctrine. The vertical doctrine provides more guidance to police about what conduct is permissible, deters unlawful intrusions, and encourages more careful

police work. Accordingly, adherence to the vertical application of the doctrine is required by Article Fourteen.

1. Horizontal aggregation of uncommunicated information violates the more expansive protections of Article Fourteen.

"[T]he Massachusetts Constitution may not provide less protection to defendants than the Federal Constitution." *Commonwealth v. DeJesus*, 489 Mass. 292, 296 (2022). As the federal circuit court split makes clear, there is debate as to whether the horizontal application of the collective knowledge doctrine comports with the Fourth Amendment. If it is questionable whether the doctrine even satisfies the federal constitution, then it certainly cannot pass muster under the Massachusetts Declaration of Rights.

This Court has "conclude[d] that art. 14 provides more substantive protection to criminal defendants than does the Fourth Amendment in the determination of probable cause." *Commonwealth v. Upton*, 394 Mass. 363, 373 (1985) (adhering to *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964) rather than adopting the new, more permissive federal standard). See, e.g., *Commonwealth v. Gonsalves,* 429 Mass. 658, 662-663 (1999) (unlike the Fourth Amendment, Article Fourteen forbids exit orders in routine traffic stops); *Commonwealth v. Stoute,* 422 Mass. 782, 789 (1996) (rejecting the federal definition of a "seizure" in favor of a more expansive standard under Article 14); *Commonwealth v. Maingrette*, 86 Mass. App. Ct. 691, 695 n.3 (2014) ("Massachusetts has not adopted the 'good faith' exception for

purposes of art. 14"). See generally Cordy, *Criminal Procedure and the Massachusetts Constitution*, 45 New Eng. L. Rev. 815, 818-826 (2011).

Although the horizontal doctrine has become the majority rule in other jurisdictions – largely without articulation or justification – there are a significant number of jurisdictions that reject it. In any event, this Court has never shied away from staking out a minority position when fidelity to the Declaration of Rights requires it. Indeed, Massachusetts is one of only eight states to continue to adhere to *Aguilar-Spinelli*. Of our seven sister states, six have addressed the propriety of the horizontal doctrine.[38] Hawaii, Oregon, and Vermont have refused to permit aggregation of uncommunicated knowledge.[39] Tennessee appears to require that the information must actually be

[38] Alaska has not reached the issue. *Hurlbert v. State*, 425 P.3d 189, 196 (Alaska App. 2018).

[39] *State v. Crowder,* 1 Haw. App. 60, 67-68 (1980) ("We cannot impute the information received by any other officer to the arresting officer. The testimony of all of the witnesses is totally devoid of any indication that any of the officers present communicated with each other or exchanged information prior to [the] arrest"); *Mickelson*, 18 Or. App. at 650; *Phillips*, 140 Vt. at 216 (information communicated after the initial detention cannot be considered).

shared.[40] Of the six, only New York[41] and perhaps Washington[42] have endorsed a rule permitting aggregation of uncommunicated knowledge. These cases indicate that the horizontal rule is disfavored among states, like Massachusetts, with strong protections against unreasonable searches and seizures.

2. The horizontal variant is irreconcilable with the deterrent purpose of the exclusionary rule.

"[T]he stated goal of the exclusionary rule is to encourage police officers to conform their conduct to the dictates of the Constitution." *Commonwealth v. Crawford*, 410 Mass. 75, 80 (1991). But the horizontal rule flips the incentives: "an officer who knows she lacks cause for a search will be more likely to roll the dice and conduct the search

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[40] The leading Tennessee case holds that information may only be considered within the collective knowledge of the police "if there exists a sufficient nexus of communication between the arresting officer and another officer with knowledge of the information in question. Such a nexus may be found when one officer relays information to another officer or when an officer directs or requests that another officer take action." *State v. Echols*, 382 S.W.3d 266, 278 (Tenn. 2012). There do not appear to be any Tennessee cases in which unshared knowledge was aggregated.

[41] *People v. Gittens*, 211 A.D.2d 242, 245 (N.Y. 1995).

[42] Although the leading Washington case involves the vertical application of the doctrine, see *State v. Maesse*, 29 Wash. App. 642 (1981) (arrest order disseminated via radio broadcast), adopted in *State v. Ortega*, 177 Wash. 2d 116, 131 (2013), there is one published case that suggests, in dicta, a broader rule. *State v. Wagner-Bennett*, 148 Wash. App. 538, 542 (2009) (citing *Maesse* for the proposition that information "not expressly communicated" may still considered part of the collective knowledge).

anyway, in the hopes that uncommunicated information existed." *Massenburg*, 654 F.3d at 494. See also *Rahier*, 849 N.W.2d at 217-218; *Mickelson*, 18 Or. App. at 650; *McArthur*, 72 Va. App. at 366; *Looby*, 65 V.I. at 93–95. This reversal is antithetical to the Fourth Amendment and Article Fourteen.

To effectuate the deterrent function of the exclusionary rule, courts must "look to each individual officer's decision-making process as she considers executing a search or effecting a seizure." *Massenburg*, 654 F.3d at 495. If the goal is to motivate officers to avoid illegal intrusions, the only way to accomplish that is to limit the inquiry to the information *actually possessed* by the officer. Indeed, Professor LaFave commends a narrow rule "so as not to encourage the dissemination of arrest orders based upon nothing more than the hope that unevaluated bits and pieces in the hands of several different officers may turn out to add up to probable cause." W. LaFave, *supra,* at 340.

Expanding the doctrine to situations "where the knowledge was isolated in the mind of one of the investigating officers at the time of seizure and had zero bearing on the seizure itself—is both wholly unsupported by the law and repugnant to the Fourth Amendment." *U.S. v. Holmes*, 36 F. Supp.3d 970, 980 (D. Mont. 2014).[43] In this case,

[43] See also *In re M.E.B.*, 638 A.2d at 1136 (Ferren, J., dissenting) ("the government cannot justify a seizure by relying on facts that never played any part in the chain of reasoning that led to the seizing officers' decision to make the stop").

Doherty was unaware that a later description included facial hair; that critical information had "zero bearing on the seizure itself." *Id*. Imputing that knowledge to Doherty, even when he expressly disclaimed it (T38-39), violates both the Fourth Amendment and Article Fourteen. See *Creach*, 69 Ill. App. 3d at 882 (improper to impute information when officer "was specifically asked" whether the information he had described at that hearing was all the information he possessed).

3. The vertical doctrine offers better guidance to police, fosters more communication among officers and results in more careful police investigations.

The vertical doctrine offers more direction to police officers – "a police officer can trust that his fellow officers are competent at determining if reasonable suspicion exists and he can use their instructions to guide his decisions." *Looby*, 65 V.I. at 94. However, under the horizontal rule, "an officer *neither* has reasonable suspicion himself *nor* is he relying on the belief that a fellow officer has reasonable suspicion." *Id*. (emphasis added). Instead, the horizontal doctrine "provides an officer with no direction on what police conduct is acceptable under [the] Fourth Amendment because it does not rely on his awareness of facts or his reliance on someone else's knowledge." *Id*. See also *Massenburg*, 654 F.3d at 494 ("officers would have no way of knowing *before* a search or seizure whether the aggregation rule would make it legal").

Adhering to the vertical rule will incentivize more communication among police officers and more conscientious police investigations. In situations where no one officer has enough information to justify a seizure, it is eminently reasonable to require that officer to confer with colleagues prior to initiating a potentially illegal intrusion. "When officers are 'working closely together,' the time and resources needed to exchange information are insignificant, but the value of that exchange is enormous." Stern, at 1088. This is especially true today when officers can communicate instantaneously over the police radio and cell phones.

In deciding to adhere to *Aguilar-Spinelli*, this Court opined: "We believe it has encouraged and will continue to encourage more careful police work and thus will tend to reduce the number of unreasonable searches conducted in violation of art. 14." *Upton*, 394 Mass. at 376. This rationale applies with full force here: strict adherence to the vertical rule will encourage officers to share more information, be more deliberate in their decisions to detain citizens and ultimately, it will deter more unlawful searches and seizures.

## Conclusion

"[D]eterring unlawful police conduct ... is the foundation of the exclusionary rule." *Commonwealth v. Wilkerson*, 436 Mass. 137, 142 (2002). But the horizontal rule "perversely reward[s] officers acting in *bad faith* according to the result of an after-the-fact aggregation inquiry that is simply academic." *Massenburg*, 654 F.3d at 494. The

horizontal collective knowledge doctrine "seriously erode[s] the efficacy of the exclusionary rule's deterrence purposes and serves none of the legitimate ends of law enforcement." *Id*. at 495. This Court must reject it.

In this case, once the improperly supplemented facts are excised from the reasonable suspicion analysis, the question becomes this: Were the police were justified in stopping a black man who happened to be out walking in Dorchester even though he wore different clothing than the robber, stood at a different height and, unlike the robber, had a large beard and carried a red plaid backpack. Given the obvious differences between Mr. Privette's appearance and the description of the robber, reasonable suspicion was lacking. The order denying the motion to suppress therefore must be reversed.

Respectfully submitted,
DAVID PRIVETTE
By his attorney,

*/s/ Anne Rousseve*
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May 27, 2022

ADDENDUM

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**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS** **SUPERIOR COURT NO.: 1884CR816**

# COMMONWEALTH

**v.**

# DAVID PRIVETTE

## FINDINGS OF FACT AND RULINGS OF LAW ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE and IDENTIFICATION

The Defendant, David Privette ("Privette) is charged with four (4) felony counts arising out of an incident which occurred on August 12, 2019 at the Shell Gas Station in Dorchester, MA. Specifically, Privette is charge with: armed robbery (Count I) , use of a firearm in a felony (Count II) , carrying a firearm without a license (Count III), carrying a firearm, loaded, without a license (Count V) . He is also charged with one misdemeanor count, carrying a firearm without a license or FID card. (Count IV).

By his Motion, Privette seeks to suppress the evidence seized on August 12, 2019 and the show up identification of him conducted by the police. Privette contends that the evidence seized from the search of his person and backpack was gathered as a result of a warrantless search. Specifically, he contends that the police did not have reasonable suspicion or probable cause to stop and size him and that the stop and pat- frisk conducted at Ashland and Mill Streets in Boston, was not constitutionally justified. Further he contends that the show up identification conducted by the police was impermissibly suggestive and conducive to irreparable misidentification.

The Court conducted an evidentiary hearing on October 10, 2019 and received testimony form BPD Police Officer Brian Doherty, BPD Lt. Darryl Dwan and BPD Officer Luis Lopez. The Court also received 8 Exhibits consisting of photographs, locus map, CAD sheet and CD containing dispatch and police communications. On the basis of the evidence as determined to be credible

by this Court and in consideration of motions and memoranda of counsel, Privette's Motion to Suppress Evidence and Show Up Identification is **DENIED.**

## FINDINGS OF FACT

I credit and accept the testimony of BPD Officers Brian Doherty and Luis Lopez as well as BPD Lt. Daryl Dwan regarding the events they observed and participated in during the early morning hours of August 12, 2019. I find that all BPD members who testified had successfully completed the BPD training academy and that in the case of Lt. Dwan[1], he has had additional police training when he obtained the rank of Sergeant which he held for seven (7) years before obtaining his recent rank of Lt.

BPD Officer Doherty is a five (5) year veteran police officer who has been assigned to the C-11 Dorchester area for the last three (3) years. He is extremely familiar with the specific area of Dorchester and knows it intimately, not just from his work experience as a police officer assigned in that district, but also as he grew up living blocks of the area where the investigation occurred on the morning of August 12, 2019. Equally, Officer Lopez is sixteen (16) year veteran of the Boston Police Department who has had multiple assignments, but most recently has been assigned to the City Drug Control Unit (DCU) for the last three (3) years. Over his career he has participated in many "show up identifications".[2]

On August 12, 2019, Office Doherty was working the midnight shift in the C-11, Dorchester area of the city. He was in plain clothes and driving an unmarked car. At approximately 3:35 a.m. he received a radio transmission that there was an armed robbery of a Shell Gas Station on Morrissey Boulevard and that the suspect was a "black male, late 20's

[1] At the time of the events at issue, Lt. Dwan held the rank of Sergeant.

[2] On the morning of the events at issue, Officer Lopez was working an overtime detail. He did not have on his person his "card" that had the specific cautions to be given to victims when bringing them back for a show up identification. However the officer testified, and I credit, that from his past experience he was able to recall those cautions and provide them to the victim prior to the identification.

between 5'7 and 5'8 in height[3] and wearing dark jeans and blue hoodie".[4] The suspect was thought to be fleeing toward the CVS on Morrissey Boulevard. Upon hearing the call, Officer Doherty did not respond to the gas station as other police were enroute, but rather surveilled the area for the suspect. Intimately familiar with the locus, Officer Doherty headed towards the "Clam Point" area which is in proximity to the CVS and gas station. From his personal experience he was aware of a large gap in a fence that separated Morrissey Boulevard and Ashland Street close to the robbery at the Shell Gas station. He traveled the various streets within that area, including Everdeen Street, Banche Street, Greenhill Street[5] for approximately 4-6 minutes. During that time, he observed no individuals walking about on the streets.

As he turned onto Ashland Street, Officer Doherty observed an individual, later identified as the Defendant Privette, walking in a normal pace in the direction of his un-marked car. It was raining at the time and the area was poorly lit[6]. Officer Doherty observed that the person walking towards him was a black male, of the same approximate age[7] as on the broadcast and that he had noticeable facial hair consisting of a large beard. He was wearing a green colored sweater[8] and blue jeans.

Officer Doherty parked his car and approached the Defendant on foot. As he neared the Defendant he immediately identified himself as Boston Police and commanded the Defendant to "show me your hands". Defendant complied; he did not attempt to run or evade Officer Doherty. Officer Doherty, concerned that the alleged crime that had occurred within the hour and given the nature of the call (armed robbery) and the fact that the Defendant was the sole black male walking about in the area of the flight path of the robber, properly determined that a pat-frisk of the Defendant was necessary. Officer Doherty felt the front pocket of the Defendant's jeans,

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[3] Privette is 5'11 inches in height

[4] There was no mention in the original broadcast about facial hair or a red plaid backpack.

[5] He canvassed an area of about nine streets.

[6] Officer Lopez credibly testified that when he returned to the area with the victim for the "show up" identification, that it was dark and that he turned on all of the lights of his cruiser which illuminated the area.

[7]

[8] At hearing the Defendant was attired in a green sweater of the same color as the Defendant was wearing at the time he was stopped by Officer Doherty.

and located a large wad which he instructed the Defendant to remove. Once out of the pocket, it was realized that the wad represented case and Officer Doherty instructed the Defendant to return the wad to his pocket. The officer's pat-frisk of the Defendant did not recover any weapons upon his person.

Contemporaneously, Lt. Dwan arrived at the scene from the opposite direction[9]. He alighted his vehicle and approached the Defendant from behind. As he approached the Defendant, he observed that the Defendant was wearing a red plaid backpack upon. Lt. Dwan assisted the Defendant in removing the pack. Thereafter, given the nature of the call which involved a gun and his concern that there could be a weapon, Lt. Dwan pat-frisked the backpack. He began the process by squeezing its contents from the bottom to the top. He did not open the backpack during this process.[10] While he was manipulating the closed backpack to get a feel of what was inside, Lt Dwan felt a hard object near the top of the backpack which, in his experience and training, he recognized as potentially a weapon[11]. He then placed the backpack on the ground, opened it and observed a silver gun that was towards the top of the backpack. Various articles of clothing were also in the backpack. Lt. Dwan did not remove any of the items; rather, he zipped up the backpack and gave it to another officer at the scene who brought it to the police station. Lt. Dwan has had no further involvement with the backpack which was taken to the police station.

Because the Defendant's appearance was similar to the description on the dispatch call a decision was made for a show up identification of the Defendant. Office Lopez who was working an overtime shift in the area and who responded to the radio broadcast for the robbery, was tasked to bring the victim to the area where Lt. Dwan and Officer Doherty remained with the Defendant. Officer Lopez was driving a marked cruiser and gathered the victim and placed him

[9] Lt. Dwan was working an overtime detail as part of the National Grid Strike detail on Victory Road, Dorchester. Victory Road is in close proximity to the locus where the robbery occurred and where Officer Doherty located the Defendant.
[10] This was corroborated by Officer Doherty who was standing in front of the Defendant, facing Lt. Dwan and who testified that he observed Lt. Dwan pat frisk the backpack
[11] In his police career, he has recovered more than a dozen or more guns while performing a Pat Frisk and is well familiar with the feel of a weapon inside of a bag/ backpack.

in the front seat of the cruiser. While en route Officer Lopez instructed[12] the victim that the BPD had an individual who might/ might not be the person involved in the robbery; that they wanted him to view the person. He cautioned the victim that it was important not to accuse an innocent person of a crime and that the police would continue their investigation even if he cannot make the identification of the individual the police were holding.

Driving his cruiser, Officer Lopez approached the police officers and the Defendant. The officers, both white males were standing on either side of the Defendant who was handcuffed. The street was dark and Officer Lopez turned on the flood lights of his cruiser to illuminate the area which brightened the area considerably. Officer Lopez drove with the victim within 10-12 feet of the Defendant and the officers. Officer Lopez asked the victim if he recognized the Defendant to which the victim responded that he was 99% sure that the individual was the perpetrator but he couldn't be a 100% sure because the person did not have a blue hoodie on at the time of the show up.[13]

## RULINGS OF LAW

### A. THE POLICE HAD REASONABLE SUSPISCION TO STOP PRIVETTE

The investigatory stop of the Defendant by BPD Officer Doherty was lawful and based upon reasonable suspicion that the Defendant was the suspect they were searching for. "To justify a police investigatory stop under the Fourth Amendment or art. 14, the police must have 'reasonable suspicion' that the person has committed, is committing, or is about to commit a crime." Commonwealth v. Costa, 448 Mass. 510, 514 (2007), quoting Commonwealth v. Lyons, 409 Mass. 16, 19 (1990). Whether reasonable suspicion exists for the police to conduct an investigatory stop is determined by (1) whether the initiation of the investigation by the police is

[12] He did not have his laminated instruction card on the warnings to give to victims being brought for show up identifications. However, he has done numerous of these in his sixteen- year police career and knew the instructions from memory. While the victim was in his cruiser, Officer Lopez

[13] A blue hoodie sweatshirt was located within the backpack.

permissible under the circumstances and (2) whether the scope of the search was justified by the circumstances. See, Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 313 (2013). It is well settled that reasonable suspicion must be based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" an intrusion. Terry v. Ohio, 392 U.S. 1, 21-22 (1968); See also,

Commonwealth v. Gomes, 453 Mass. 506, 511 (2009), quoting Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) (holding "We view the 'facts and inferences underlying the officer's suspicion . . . as a whole when assessing the reasonableness of his acts.'"). Whether the facts and circumstances known to the police constitute reasonable suspicion is measured by an objective standard. Commonwealth v. Mercado, 422 Mass. 367, 369 (1996). The evidence to establish a reasonable suspicion, while less than that necessary to show probable cause, requires information supporting the officer's suspicion have an indicia of reliability. Commonwealth v. Pinto, 476 Mass. 361, 364 (2017). Here, the investigatory stop of the Defendant on Ashland Street was permissible and justified in the circumstances then existing. Specifically, the Defendant was located in the locus of the robbery and within minutes of its occurrence and fit the general description of the initial bulletin of the robbery. Given the early morning hour and the fact that the Defendant was the only person observed by any police surveillance in the area, the police had specific, articulable facts, which when viewed in their totality create a rational inference that the Defendant was the suspect they were seeking. See Commonwealth v. Johnson, 88 Mass. App. Ct. 705, 712 (2015), quoting Commonwealth v. Stoute, 422 Mass. 782, 791 (1996). ("test for determining reasonable suspicion should include consideration of the possibility of the possession of a gun, and the government's need for prompt investigation.").

Assessing all of the circumstances known to the police at the time, I find and rule that there were specific and articulable facts from which, objectively considered, a reasonable suspicion existed that Privette was involved in the robbery and illegally in possession of a firearm. Thus, Officer Doherty's stop of Privette was entirely proper and constitutionally as he had suspicion that Privette had committed a crime. See, Commonwealth v. Narcisse, 457 Mass. 1, 9 (2010).

Equally, the seizure of the Defendant on Ashland Street, within minutes of the robbery was lawful. I find that the Defendant was seized on Ashland Street by Officer Doherty when he was commanded by the officer to "show his hands". At that time, a reasonable person would have believed that he was not free to leave. Id. This contact "had a compulsory dimension to it" and no reasonable person would have felt that he was free to leave. See Commonwealth v. Barros, 435 Mass. 171, 173-74 (2001) (ruling that police have seized a person in the constitutional sense, 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'"). At the time he was seized, Officer Doherty had reasonable suspicion to believe that Privette was the suspect in the recent robbery.

**B. THE PAT FRISK OF THE DEFENDANT AND BACKPACK WAS LAWFUL**

The pat-frisk of the Defendant and his backpack was constitutionally permissible as Officer Doherty and Lt. Dwan had reasonable beliefs that the Defendant was armed and dangerous and posed a risk to the officers and public at large. The standard by which the permissibility of a frisk is determined is set forth in Terry v. Ohio, 392 U.S. 1 (1968), as whether, under the totality of the circumstances, a reasonably prudent person would be warranted in believing the suspect might be armed and present a danger to the Officer or others. Id. at 27. The reasonable belief that the safety of Officers or others is in danger requires that there be specific and articulable facts that the individual being frisked is armed and dangerous. Commonwealth v. Silva, 366 Mass. 402, 405-06 (1974); Commonwealth v. Gutierrez, 26 Mass. App. Ct. 42, 47 (1988). Massachusetts law recognizes that, "Two questions arise in connection with a determination whether a police officer had a sufficient, reasonable basis to conduct a pat frisk: (1) was the officer rightfully in the presence of the party who was ultimately frisked; and (2) did the officer have a reasonable basis to suspect that this party was likely to be armed and dangerous." Commonwealth v. Johnson, 454 Mass. at 162. In the case at bar the police were rightfully in the presence of the Mr. Privette

when they ordered him to put his hands up and submit to a pat frisk. Additionally, based on the facts known to the police at the time, they had a reasonable basis to suspect that the Defendant was likely to be armed and dangerous. While not every stop justifies a frisk, one is permissible when, viewed objectively, there is a reasonable apprehension of danger to the police or others. See Commonwealth v. Gomes 453 Mass. 506 (2009); Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997).

In this case, the pat-frisk of the Defendant was limited in scope and constitutionally permissible. Under the facts credited by the Court, a reasonably prudent person would have been warranted in believing that Privette might have been armed and have presented a danger to Officer Doherty, Lt. Dwan or others. Here, the crime under investigation was a crime of violence (armed robbery) and involved the possession or use of a dangerous weapon which occurred in the early morning hours. See Commonwealth v. Desna San, 63 Mass. App. Ct. 189, 193 (2005) (given the crime under investigation, police are entitled to determine whether individuals were armed and posed a danger). Here, the police had received a report of the use of a firearm in a crime and, as such, a reasonably prudent man, in Officer Doherty's position, would be warranted in his belief that the safety of the police and or public is in danger. See, Commonwealth v. McKoy, 83 Mass. App. Ct. 309 (2013); Commonwealth v. Fraser, 410 Mass. 541, 546 (1991); Commonwealth v. Foster, 48 Mass. App. Ct. 671, 676-677 (2000).

Equally, the pat frisk of the Defendant's backpack by Lt. Dwan was reasonable in scope and constitutionally permissible as it was intended to ascertain whether the Defendant had a firearm in the backpack which could pose a danger to the officer and others. Com v. Pagan, 440 Mass. 62 (2003 ). Initially, Lt. Dwan, did not originally open the pack. Rather, he searched it from the outside squeezing the contents from the bottom to the top in an endeavor to locate whether a weapon was present. It was only when Lt. Dwan felt a hard object which, by his training and experience he recognized as a weapon, did he open the backpack. At that time, he confirmed his tactile information; he observed a silver gun located at the top of the backpack.

The Defendant further moves to suppress the items within the backpack, the GPS worn by the Defendant and the data mined therefrom[14], the gun, the money found on the Defendant's person, the blue hoodie, backpack, sweatpants as well as statements that the Defendant made to the booking officer "you got the gun, but the stop was wrong" during the booking process. As the Court has found that the police had reasonable suspicion to stop the Defendant and that the pat frisk thereafter conducted was lawful, the items recovered by the police are not fruits of the poisonous tree but rather, is evidence gathered lawfully by the police, produced in the booking process and will not be suppressed for all reasons set forth previously in this decision. Regarding the GPS and data from the GPS, it is well settled that a defendant who consents to being tracked by a GPS device as a condition of pre-trial release has no expectation of privacy in the data emitted from the GPS and stored. See, *Commonwealth* v. *Johnson*, 91 Mass. App. Ct. 296, 302-304 (2017).

**C. THE SHOW UP IDENTIFICATION WAS LAWFUL AND DONE WITHIN MINUTES OF THE CRIME AND THE POLICE HAD GOOD CAUSE FOR THE IDENTIFICATIOIN**

In order to suppress an identification, the defendant must prove by a preponderance of the evidence that the procedure used was so unnecessarily suggestive and conducive to misidentification as to deny the defendant due process of law. *Commonwealth v. Botelho*, 369 Mass. 860, 867 (1976). Suggestiveness alone is not sufficient. *Crayton,* 470 Mass. at 235. The defendant must prove that the identification procedure was unnecessarily suggestive. Id. If the defendant carries his burden to demonstrate that a particular identification procedure was unnecessarily suggestive, the Supreme Judicial Court has declared that the evidentiary results of such procedure will be excluded from trial – regardless of their overall reliability. See *Johnson*, 420 Mass. at 462-465; Botelho, 369 Mass. at 865-869.

[14] Defendant did not brief or argue regarding any collection of data by the police from the GPS which was fitted upon the Defendant as part of his pre-trial release.

The court looks at the totality of the circumstances surrounding the identification. *Commonwealth v. Miles*, 420 Mass. 67, 77 (1995). One-on-one show-up identifications are generally disfavored because of their inherently suggestive nature. Commonwealth v. Johnson, 420 Mass. 458, 461 (1995). However, "one-on-one confrontations are not per se excludable". Id. However, "Show ups have been permitted when conducted in the immediate aftermath of a crime and in exigent circumstances." Id. Indeed, "show-ups of suspects to eyewitnesses of crimes have been regularly held permissible when conducted by the police promptly after the criminal event." Commonwealth v. Barnett, 371 Mass. 87, 92 (1976). In evaluating whether an identification must be suppressed, the Court examines "'the totality of the circumstances attending the confrontation to determine whether it was unnecessarily suggestive.'" Silva-Santiago, 453 Mass. at 795 (citations omitted).

"The question raised by a motion to suppress identification testimony is not whether the witness might have been mistaken, but whether any possible mistake was the product of improper suggestions by the police." Watson, 455 Mass. at 251. The inquiry with respect to unnecessary suggestiveness focuses on whether the police had "good reason" to employ the particular suggestive procedure they did. Johnson, 473 Mass. at 597; Commonwealth v. Crayton, 470 Mass. 228, 235-236 (2014). Here, the police were searching for a robbery suspect with a gun who had robbed a gas station in the locality and whose description as given by the victim was similar to the Defendant. A show up identification was necessary so that the police could promptly determine if the individual they were holding was the suspect of the violent crime and, if not, they could exclude him and continue their investigation. As such, good cause existed for the police to use a show up identification of the Defendant. See, Com. v. Bresilla, 470 Mass. 422 (2015). Further, the fact that the Defendant was in handcuffs and buttressed by police officers on either side, is not sufficient alone to establish, without more, that the show up was unduly suggestive so as to exclude the identification.

Here, the court finds that the defendant has not sustained his burden of showing by a preponderance of the evidence in light of the totality of the circumstances that the identification

procedure used by the Boston Police Department was so unnecessarily suggestive and conducive to irreparable misidentification that its admission would deprive the defendant of his right to due process due process under article 12 of the Declaration of Rights and the Fifth and Fourteenth Amendments to the United States Constitution. See Borgos, 464 Mass. at 32.

Having carefully considered the totality of the circumstances, the court concludes that Privette's eyewitness identification was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to require suppression of that evidence.

## ORDER

For the foregoing reasons, Defendant's Motion to Suppress Evidence is DENIED. The Defendant's Motion to Suppress Identification is also **DENIED**.

Elaine M. Buckley, Justice

Massachusetts Superior Court

Dated: October 15, 2019.

KeyCite Yellow Flag - Negative Treatment
Review Granted by Commonwealth v. Privette, Mass., February 11, 2022

100 Mass.App.Ct. 222
Appeals Court of Massachusetts,
Suffolk.

COMMONWEALTH
v.
David PRIVETTE.

No. 20-P-251
|
Argued June 3, 2021.
|
Decided September 14, 2021.

**Synopsis**

**Background:** Defendant was indicted for armed robbery and various firearms offenses. The Superior Court Department, Suffolk County, Elaine M. Buckley, J., denied defendant's motion to suppress evidence found during stop and frisk, and the Supreme Judicial Court, Lenk, J., allowed defendant's application to prosecute an interlocutory appeal.

**Holdings:** The Appeals Court, Sacks, J., held that:

[1] responding officer's knowledge that suspect of armed robbery had a beard was imputed, under doctrine of "collective knowledge," to officer who was aware defendant had a beard before he arrested him;

[2] appellate court could supplement findings of motion court with responding officer's testimony that suspect of armed robbery had a beard; and

[3] arresting officer had reasonable suspicion that defendant was suspect of armed robbery to make investigatory stop.

Affirmed.

West Headnotes (23)

**[1] Criminal Law** Illegally obtained evidence

**Criminal Law** Evidence wrongfully obtained

In reviewing ruling on motion to suppress, Appeals Court adopts motion judge's factual findings absent clear error, and conducts independent review of her ultimate findings and conclusions of law.

**[2] Criminal Law** Theory and Grounds of Decision in Lower Court

Appeals Court is free to affirm a ruling on a motion to suppress on grounds different from those relied on by motion judge if correct or preferred basis for affirmance is supported by record and findings.

**[3] Arrest** Reasonableness; reason or founded suspicion, etc

To justify a police investigatory stop under the Fourth Amendment or article 14 of the Massachusetts Declaration of Rights, the police must have reasonable suspicion that the person has committed, is committing, or is about to commit a crime. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

1 Cases that cite this headnote

**[4] Arrest** Justification for pat-down search

To proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

**[5] Arrest** Collective knowledge

Responding officer's knowledge that armed robbery suspect had a beard was imputed, under doctrine of "collective knowledge," to officer who was aware suspect had a beard before he stopped him, even if responding officer never communicated that knowledge to officer who stopped suspect; officers were both involved in responding to armed robbery, they cooperated by using same radio channel in order

  

to search for suspect and could be heard reporting their observations and actions on that channel, and they approached suspect from opposite directions at essentially the same time.

1 Cases that cite this headnote

[6] **Criminal Law** Evidence wrongfully obtained

Appellate court could supplement findings of motion court, on review of motion to suppress evidence, with responding officer's testimony that suspect of armed robbery had a beard; motion court generally credited responding officer's testimony without any explicit or implicit qualification, the officer's testimony was uncontroverted and was confirmed by the recording in evidence, and supplementing the motion court's findings would not detract from its ultimate findings.

[7] **Criminal Law** Evidence wrongfully obtained

An appellate court may supplement a motion judge's subsidiary findings with evidence from the record that is uncontroverted and undisputed and where the judge explicitly or implicitly credited the witness's testimony; the appellate court may do so only so long as the supplemented facts do not detract from the judge's ultimate findings.

[8] **Arrest** Collective knowledge

**Arrest** Reasonableness; reason or founded suspicion, etc

In determining whether police officers have reasonable suspicion for making a stop, the knowledge of each officer is treated as the common knowledge of all officers and must be examined to determine whether reasonable suspicion exists. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

1 Cases that cite this headnote

[9] **Arrest** Collective knowledge

Application of collective knowledge doctrine to an investigatory stop does not depend on explicit finding by judge that officers were engaged in close cooperative effort.

[10] **Arrest** Reasonableness; reason or founded suspicion, etc

Reasonable suspicion to make an investigatory stop must be based on specific, articulable facts and reasonable inferences therefrom. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[11] **Arrest** Reasonableness; reason or founded suspicion, etc

The standard for reasonable suspicion for an investigatory stop is an objective one; whether the facts available to the officer at the moment of the seizure or the search warrant a person of reasonable caution to believe that the action taken was appropriate. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[12] **Arrest** Reasonableness; reason or founded suspicion, etc

Although a mere hunch does not create reasonable suspicion for an investigatory stop, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[13] **Arrest** Reasonableness; reason or founded suspicion, etc

In determining whether an officer has reasonable suspicion justifying a stop, a court does not examine each fact known to the officer at the time of the stop in isolation; instead a court views the facts and inferences underlying the officer's suspicion as a whole when assessing the reasonableness of his acts. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

  

1 Cases that cite this headnote

[14] **Arrest** Reasonableness; reason or founded suspicion, etc

Officer does not have to exclude all possible innocent explanations for facts in order to form reasonable suspicion for investigatory stop. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[15] **Arrest** Particular cases

Arresting officer had reasonable suspicion that defendant was suspect of armed robbery to make investigatory stop; it was 3:43 a.m. and raining, officer knew that suspect fled gas station on foot, in direction of drugstore, that responding officers had seen no one on foot on relevant portion of roads near drugstore, that suspect was described as Black male in late 20s, with facial hair, wearing blue jeans and blue hooded sweatshirt, that defendant was first pedestrian arresting officer or other officers had seen in the area and was walking away from gas station, that defendant was Black male with a beard, wearing dark sweater, jeans, and roughly meeting description of suspect's age, and that defendant was found around 700 feet from gas station, approximately seven minutes since robbery. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

1 Cases that cite this headnote

[16] **Arrest** Reasonableness; reason or founded suspicion, etc

A complete match to a description is not required to establish reasonable suspicion for an investigatory stop; police must be allowed to take account of the possibility that some descriptive facts supplied by victims or witnesses may be in error. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[17] **Arrest** Reasonableness; reason or founded suspicion, etc

Even where a description is vague or general, its value in the reasonable suspicion analysis for an investigatory stop may be enhanced if other factors known to the police make it reasonable to surmise that the suspect was involved in the crime under investigation. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[18] **Arrest** Particular cases

Fact that suspect of armed robbery was described as wearing a blue hooded sweatshirt and a red plaid backpack and that defendant was wearing green sweater and no backpack at time of investigatory stop was not dispositive of whether officers had reasonable suspicion to stop defendant; upper-body garments could be removed quickly and discarded or stowed in a container or removed from a container and worn to conceal what a suspect wore at time of crime, and backpack could easily be stowed nearby immediately before a crime and retrieved afterward. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[19] **Arrest** Reasonableness; reason or founded suspicion, etc

The more time that passes after a crime, and the farther away a suspect could have traveled in that time, the less significance there may be to the location where the defendant is stopped, when determining whether law enforcement had reasonable suspicion for investigatory stop. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[20] **Arrest** Reasonableness; reason or founded suspicion, etc

A suspect's presence in a location closer than the maximum possible travel distance may, in some circumstances, diminish reasonable suspicion for an investigatory stop. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[21] **Arrest** Reasonableness; reason or founded suspicion, etc

  

Proximity is accorded greater probative value in the reasonable suspicion calculus for an investigatory stop when the distance is short and the timing is close. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[22] **Arrest** Particular cases

Fact that law enforcement did not search a particular street near gas station where armed robbery occurred did not diminish significance of defendant being sole pedestrian encountered by officers immediately after armed robbery, for purposes of reasonable suspicion for investigatory stop; officers were not required to complete a search of a particular radius around gas station before finding it significant that defendant fit the description of suspect of the armed robbery. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

[23] **Arrest** Particular cases

Fact that defendant neither acted suspiciously nor changed his behavior upon seeing police officer responding to armed robbery did not diminish officer's reasonable suspicion to make investigatory stop of defendant, where officer was in plain clothes, and the area was poorly lit. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14.

1 Cases that cite this headnote

****292** Firearms. Practice, Criminal, Motion to suppress. Constitutional Law, Search and seizure, Reasonable suspicion, Stop and frisk. Search and Seizure, Reasonable suspicion, Threshold police inquiry. Threshold Police Inquiry.

Indictments found and returned in the Superior Court Department on October 10, 2018.

A pretrial motion to suppress evidence was heard by Elaine M. Buckley, J.

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

**Attorneys and Law Firms**

Anne Rousseve, Committee for Public Counsel Services, for the defendant.

Daniel J. Nucci, Assistant District Attorney, for the Commonwealth.

Present: Massing, Sacks, & Singh, JJ.

**Opinion**

SACKS, J.

***222** This is the defendant's interlocutory appeal from a Superior Court judge's order denying the defendant's motion to suppress a gun and other fruits of a stop and frisk. The gun and other evidence led to the defendant's indictments for armed robbery and various firearms offenses. We conclude that police ***223** had reasonable suspicion that the defendant had just committed an armed robbery, thus justifying the stop and frisk. We therefore affirm the order denying the suppression motion.

Background. We summarize the judge's detailed findings of fact, supplementing with additional facts from testimony that the judge explicitly or implicitly credited.[1] See ****293** Commonwealth v. Isaiah I., 448 Mass. 334, 337, 861 N.E.2d 404 (2007), S.C., 450 Mass. 818, 882 N.E.2d 328 (2008). As of August 2018, Boston Police Officer Brian Doherty had been a police officer for five years and had been assigned for three years to the C-11 Dorchester area, which he already knew well because he had grown up there. On August 12, 2018, Doherty and a partner were working the midnight shift in plain clothes and an unmarked car. At approximately 3:36 a.m., Doherty received a radio transmission, on the channel dedicated to C-11 use,[2] that there had been a robbery at gunpoint of a gasoline station on Morrissey Boulevard at the intersection of Freeport Street.

The initial transmission identified the suspect as a Black male in his late twenties, between five feet, seven inches and five feet, eight inches in height, of medium build, and wearing blue jeans[3] and a blue hooded sweatshirt. This initial description did not mention that the suspect had any facial hair, a point to which we return infra. The suspect had left the gasoline station

on foot in the direction of a CVS store (CVS) further south on Morrissey Boulevard, at the intersection of Victory Road.

Upon hearing the call, Doherty did not drive to the gasoline station, because other officers were en route. Instead, he searched the streets for the suspect. Doherty headed toward the Clam Point area, which is close to the gasoline station and the CVS. Intimately familiar with that area, Doherty knew that nearby, on the same side of Morrissey Boulevard as the gasoline station, there was a large gap in the fence that separated Morrissey Boulevard from Ashland Street, part of Clam Point. Doherty traveled on Victory Road and then drove around four side streets in the Clam Point area for approximately four to six minutes. During that ***224** time, Doherty observed no one walking on the streets. It was raining at the time.

At 3:43 a.m., seven minutes after hearing the first broadcast about the robbery, Doherty turned from Mill Street onto Ashland Street. There Doherty saw a man, later identified as the defendant, walking at a normal pace in the direction of Doherty's unmarked car. Along with the rain, the area was poorly lit. Doherty observed that the defendant was a Black man, of the same approximate age as on the broadcast, and that he had noticeable facial hair, consisting of a beard. He was wearing a green sweater and black jeans.[4] He was also wearing a red plaid backpack. He was later determined to be thirty-two years old and five feet, eleven inches tall.

Doherty parked, approached the defendant on foot, identified himself as a Boston police officer, and instructed the defendant to show his hands. The defendant did so, without attempting to run or otherwise evade Doherty. Because the armed robbery had occurred a short time earlier, and because the defendant was the sole person seen walking in the area of the robber's "flight path," Doherty conducted a patfrisk. ****294** He felt the front pocket of the defendant's jeans, felt a large wad of cash, removed it from the defendant's pocket, and then immediately returned it to the defendant.

At the same time, Boston Police Lieutenant Darryl Dwan arrived on the scene.[5] Dwan had been working a detail on Victory Road on the other side of Morrissey Boulevard when he heard the first radio call about the robbery. Dwan, driving his private car, proceeded on Victory Road toward Morrissey Boulevard and the CVS to look for the suspect. Seeing no one, Dwan turned north onto Morrissey Boulevard, drove to the gasoline station, made a U-turn, and drove south again to the CVS. He was scanning the street the entire time but did not see anyone.

As Dwan drove, he heard an updated radio description, which included the detail that the suspect had facial hair. Dwan continued ***225** on Victory Road, turned north on a Clam Point side street, and proceeded to where it intersected with Ashland Street. There he saw a man in dark clothing, wearing a backpack, walking away from him on Ashland Street; the man, later identified as the defendant, was the only person on the street. Dwan turned left onto Ashland Street, parked, and got out of his car. At the same time, he could see officers approaching the defendant from the other end of Ashland Street.[6] Dwan approached the defendant from behind; once the defendant removed his backpack as instructed, Dwan conducted a patfrisk of the outside of the backpack. He located a hard object that "felt like the butt end of a firearm." He opened the backpack and found a silver gun near the top, as well as a blue hooded sweatshirt.

Boston Police Officer Luis Lopez was also working in the area that night, in uniform and in a marked cruiser. Lopez concentrated his search efforts in the Victory Road area near the CVS, but he saw no one. After the defendant was stopped and frisked, a decision was made to conduct a showup identification procedure, so Lopez was instructed to pick up the robbery victim at the gasoline station and bring him to where Doherty and Dwan were holding the defendant. Lopez did so. Upon seeing the defendant, the victim stated, "I'm 99.9 percent sure that's him. But, he doesn't have the blue hoodie on." The defendant was arrested.

After he was indicted, the defendant moved to suppress the fruits of the stop and frisk as not justified by reasonable suspicion that he was the armed robber. The judge denied the motion.[7] The defendant then obtained leave to pursue this interlocutory appeal.

**[1]** **[2]** Discussion. In reviewing a ruling on a motion to suppress, "we adopt the motion judge's factual findings absent clear error," Isaiah I., 450 Mass. at 821, 882 N.E.2d 328, and "conduct an independent review of [her] ultimate findings and conclusions of law," Commonwealth v. Jimenez, 438 Mass. 213, 218, 780 N.E.2d 2 (2002). We are "free to affirm a ruling on grounds different from those relied on by ****295** the motion judge if the correct or preferred basis for affirmance is supported by the record and the findings." Commonwealth v. Va Meng Joe, 425 Mass. 99, 102, 682 N.E.2d 586 (1997).

  

***226** **[3]** **[4]** "To justify a police investigatory stop under the Fourth Amendment [to the United States Constitution] or art. 14 [of the Massachusetts Declaration of Rights], the police must have 'reasonable suspicion' that the person has committed, is committing, or is about to commit a crime" (citation omitted). Commonwealth v. Costa, 448 Mass. 510, 514, 862 N.E.2d 371 (2007). The parties agree that the defendant was seized at the moment Doherty instructed him to show his hands. We thus focus on whether, at that moment, Doherty had a reasonable suspicion that the defendant had committed the armed robbery.[8]

**[5]** Before reviewing the factors relevant to that determination, we first consider whether the reasonable suspicion calculus may take into account that the updated description, heard by Dwan before the stop, included the fact that the suspect had facial hair. This fact is significant because Doherty, before stopping the defendant, observed that the defendant had a beard. If Dwan's knowledge may be imputed to Doherty under the collective knowledge doctrine, see Commonwealth v. Roland R., 448 Mass. 278, 285, 860 N.E.2d 659 (2007), then Doherty would have an additional basis for reasonable suspicion that the defendant was the robber.

1. Knowledge that suspect had facial hair. Doherty gave internally contradictory testimony regarding whether, when he stopped the defendant, he was aware that the suspect had been described as having facial hair, and the judge did not resolve that conflict. We therefore turn to Dwan's knowledge.

Dwan testified that he heard not only the initial radio call for the armed robbery but also, as he drove on Morrissey Boulevard looking for the suspect, an updated description. Asked whether he remembered any parts of that description, Dwan replied, "I believe it was a [B]lack male, late 20's, facial hair of some sort, wearing a blue hooded sweatshirt, blue jeans."

**[6]** **[7]** The judge made no finding regarding this part of Dwan's testimony, but "an appellate court may supplement a motion judge's subsidiary findings with evidence from the record that 'is uncontroverted and undisputed and where the judge explicitly or ***227** implicitly credited the witness's testimony.' " Commonwealth v. Jones-Pannell, 472 Mass. 429, 431, 35 N.E.3d 357 (2015), quoting Isaiah I., 448 Mass. at 337, 861 N.E.2d 404. We "may do so only so long as the supplemented facts do not detract from the judge's ultimate findings" (quotation and citation omitted). Jones-Pannell, supra. Here, (1) the judge generally credited Dwan's testimony, without any explicit or implicit qualification; (2) Dwan's testimony was uncontroverted and indeed confirmed by the recordings in evidence;[9] and (3) supplementing the findings ****296** with Dwan's testimony would not detract from the judge's ultimate findings.[10] We are thus free to, and do, consider it as showing Dwan's knowledge that the description included facial hair.

**[8]** This implicates the collective knowledge doctrine. "In determining whether police officers have reasonable suspicion for making a stop, 'the knowledge of each officer is treated as the common knowledge of all officers' and must be examined to determine whether reasonable suspicion exists" (citation omitted). Roland R., 448 Mass. at 285, 860 N.E.2d 659. "Where a cooperative effort is involved, facts within the knowledge of one police officer have been relied on to justify the conduct of another." Commonwealth v. Quinn, 68 Mass. App. Ct. 476, 480, 862 N.E.2d 769 (2007), quoting Commonwealth v. Riggins, 366 Mass. 81, 88, 315 N.E.2d 525 (1974).

**[9]** Here, Doherty and Dwan were both involved in responding to the armed robbery. They were cooperating by monitoring the same radio channel in order to search for the suspect and can be heard reporting their observations and actions on that channel. And they approached the defendant from opposite directions at ***228** essentially the same time. Dwan's knowledge that the suspect reportedly had a beard is thus imputed to Doherty, even if Dwan never communicated that knowledge to Doherty. See Commonwealth v. Mendez, 476 Mass. 512, 519 n.8, 69 N.E.3d 968 (2017); Commonwealth v. Montoya, 464 Mass. 566, 576, 984 N.E.2d 793 (2013); Quinn, supra at 477-478, 480-481, 862 N.E.2d 769.[11] Likewise, Dwan's knowledge that he saw no one walking in the Morrissey Boulevard or Victory Road areas in the minutes immediately after the robbery, and Lopez's knowledge that he searched for a suspect but saw no one in the Victory Road area near the CVS, is also imputed to Doherty.

**[10]** **[11]** **[12]** **[13]** **[14]** 2. Reasonable suspicion. "Reasonable suspicion must be 'based on specific, articulable facts and reasonable inferences therefrom' " (citation omitted). Costa, 448 Mass. at 514, 862 N.E.2d 371. The standard is an objective one: "would the facts available to the officer at the moment of the seizure or the search 'warrant a [person] of reasonable caution in ****297** the belief' that the action taken was appropriate?" Commonwealth v. Mercado,

422 Mass. 367, 369, 663 N.E.2d 243 (1996), quoting Terry v. Ohio, 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause." Kansas v. Glover, —— U.S. ——, 140 S. Ct. 1183, 1187, 206 L.Ed.2d 412 (2020), quoting Prado Navarette v. California, 572 U.S. 393, 397, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014). In determining whether an officer has reasonable suspicion justifying a stop, a court does "not examine each fact known to [the officer] at the time of the stop in isolation; instead [a court] view[s] the 'facts and inferences underlying the officer's suspicion ... as a whole when assessing the reasonableness of his acts.' " Isaiah I., 450 Mass. at 823, 882 N.E.2d 328, quoting Commonwealth v. Thibeau, 384 Mass. 762, 764, 429 N.E.2d 1009 (1981). Further, "[a]n officer does not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion." Isaiah I., supra, citing Commonwealth v. Deramo, 436 Mass. 40, 44, 762 N.E.2d 815 (2002).

**[15]** Here, at the time of the stop and including the knowledge ***229** imputed from Dwan and Lopez, Doherty knew that the suspect had departed the gasoline station on foot, heading in the direction of the CVS on Morrissey Boulevard; that Dwan, in his two passes in his private car along the relevant part of Morrissey Boulevard and adjoining portions of Victory Road, had seen no one at all on foot; and that Lopez had not seen anyone along Victory Road near the CVS. Doherty also knew that just south of the gasoline station, on the same side of Morrissey Boulevard, there was a gap in a fence that gave easy access to Ashland Street in the Clam Point neighborhood. Doherty drove around four side streets in Clam Point for approximately four to six minutes and, like Dwan, saw no one on the street. It was by now about 3:43 a.m. and raining -- factors that could reasonably be expected to cause few persons to be on the street.

Doherty knew that the suspect was described as a Black male in his late twenties, between five feet, seven inches and five feet, eight inches in height, of medium build, with facial hair, and wearing blue jeans and a blue hooded sweatshirt. Doherty then saw the defendant -- the first pedestrian he, Dwan, or Lopez had seen in the area -- walking toward him (and away from the direction of the gasoline station) on Ashland Street. The defendant was a Black male, with a beard, wearing a dark sweater and what Doherty initially described as blue jeans, and "roughly meet[ing]" the description of the suspect's age.[12] The point at which Doherty saw the defendant was about 700 feet away from the gasoline station, a distance easily traversed on foot in the seven minutes since the robbery. We conclude that although the defendant did not exactly match the description, the defendant's appearance compared with that description, coupled with his direction of travel, his location seven minutes after the robbery, and his being the only person seen on the street by three separate officers searching for suspects -- all in the middle of a rainy night -- gave Doherty reasonable suspicion that the defendant was the robber.

We first observe that the description here went beyond the sort of "bare-bones description" -- "a young Black man in a black hoodie and blue jeans" -- that we ****298** hold today in a separate decision to have been insufficient, even together with other factors, to support reasonable suspicion for a street stop in a busy commercial area. ***230** Commonwealth v. D.M., 100 Mass. App. Ct. 211, 177 N.E.3d 165 (2021). The description here included additional details -- the suspect's approximate age, height, build, and his facial hair -- and thus was not "so general that it would include a large number of people in the area where the stop occur[red]." Commonwealth v. Depina, 456 Mass. 238, 245-246, 922 N.E.2d 778 (2010). See Commonwealth v. Warren, 475 Mass. 530, 535, 58 N.E.3d 333 (2016) (in reasonable suspicion determination, "information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics" contributes to police ability to distinguish suspect from other Black men "wearing dark clothes and a 'hoodie' in Roxbury").

**[16]** **[17]** Also, a complete match to a description is not required to establish reasonable suspicion; "[p]olice 'must be allowed to take account of the possibility that some descriptive facts supplied by victims or witnesses may be in error' " (citation omitted). Commonwealth v. Emuakpor, 57 Mass. App. Ct. 192, 198, 782 N.E.2d 7 (2003). And even where, unlike here, a description is vague or general, its "value ... in the reasonable suspicion analysis may be enhanced if other factors known to the police make it reasonable to surmise that the suspect was involved in the crime under investigation." Commonwealth v. Meneus, 476 Mass. 231, 237, 66 N.E.3d 1019 (2017).

This case is unlike Commonwealth v. Cheek, 413 Mass. 492, 493, 597 N.E.2d 1029 (1992), relied on by the defendant, where the suspect was described only as "a [B]lack male with a black 3/4 length goose known as Angelo of the

Humboldt group." Here, unlike in Cheek, police knew other distinguishing features, such as that the suspect "had facial hair," id. at 496, 597 N.E.2d 1029,[13] and his approximate age, height, and build.[14] Cf. id. (knowledge of suspect's height and weight could help support reasonable suspicion). Moreover, the description in Cheek lacked details "that would have distinguished the ***231** defendant from any other [B]lack male in the area." Id. Here, the defendant was not only the only Black male in the area but also the only pedestrian of any description in the area.[15]

We need not canvass the varying facts of each case cited by the parties in which ****299** reasonable suspicion was or was not held to be present. We do, however, briefly address certain additional points that the defendant argues weigh against reasonable suspicion here.

**[18]** a. Appearance. That the suspect wore a blue hooded sweatshirt, whereas the defendant wore a green sweater, is not dispositive. Upper-body garments may quickly be removed and either discarded or stowed in a container; alternatively, additional garments may be removed from a container and donned in order to conceal what a suspect wore at the time of the crime. Compare Commonwealth v. Martinez, 74 Mass. App. Ct. 240, 246, 905 N.E.2d 592 (2009) (no reasonable suspicion where, among other discrepancies, suspect wore blue jean shorts, whereas defendant wore long pants).[16] Likewise, that the defendant carried a red plaid backpack, whereas the suspect was not described as carrying anything, does not make it unreasonable to suspect the defendant. A backpack or similar container may easily be stowed nearby immediately before a crime and then retrieved immediately afterward. Compare id. (that defendant had arm cast, unmentioned in description of suspect, detracted from reasonable suspicion).

**[19]** **[20]** **[21]** b. Location. The defendant suggests that it was unreasonable to suspect him of the robbery because, seven minutes after it occurred, he was only 700 feet from the gasoline station. But we know of no presumption that an armed robber will flee the area of the robbery as quickly as humanly possible. To be sure, the more time that passes after a crime, and the farther away a suspect could have traveled in that time, the less significance there may be to the location where the defendant is stopped. See Warren, 475 Mass. at 536-537, 58 N.E.3d 333. Being present in a location closer than the ***232** maximum possible travel distance may, in some circumstances, diminish reasonable suspicion. See id. at 537, 58 N.E.3d 333. But in Warren the defendant was stopped one mile from the crime scene, about twenty-five minutes after the victim called police, in a place that was in a direction opposite from either of the reported paths of flight. See id. at 535, 537, 58 N.E.3d 333. Here, in contrast, the defendant was stopped seven minutes after the crime, 700 feet away, walking in a direction consistent with the reported flight path. "Proximity is accorded greater probative value in the reasonable suspicion calculus when the distance is short and the timing is close." Id. at 536, 58 N.E.3d 333, citing Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 555 n.8, 778 N.E.2d 1023 (2002). See Commonwealth v. Evelyn, 485 Mass. 691, 704, 152 N.E.3d 108 (2020) (court "consistently ha[s] held that geographic and temporal proximity to a recent crime weigh toward reasonable suspicion in the overall analysis"). Compare D.M., 100 Mass App. Ct. at ——, 177 N.E.3d at 169 (that police saw juvenile on same block identified by confidential informant, within thirty minutes to three hours after informant's tip, was not particularly significant, where police were not investigating recent crime, and proximity did not help distinguish juvenile from any other Black male in area wearing "black hoodie and blue jeans").

**[22]** c. Lone pedestrian. The defendant suggests that the significance of his being the lone pedestrian encountered by the officers is diminished by the fact that they did not search a particular street on the ****300** other side of Morrissey Boulevard. It is true that a search of a wider area might have increased the significance of the defendant being the sole person seen on foot in that search. But Doherty, aided by other officers, was not required to complete a search of any particular radius around the gasoline station before finding it significant that the defendant -- the first pedestrian that any officer encountered in the area -- fit the description of the robber in a number of respects. That is particularly true where the defendant was found not only on the same side of Morrissey Boulevard as the gasoline station, but also on a street that, due to the gap in the fence near the gasoline station, was a logical flight path for the robber.

The defendant also suggests that, notwithstanding the late hour and the rainy weather, his appearance on the street could have been explained by his being a patron of the nearby CVS or an ***233** adjacent Chinese restaurant.[17] But an officer need not "exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion." Isaiah I., 450 Mass. at 823, 882 N.E.2d 328.

  

**[23]** d. Behavior. The defendant suggests that the fact that he neither was acting suspiciously when spotted by Doherty nor changed his behavior once he saw Doherty further diminishes the reasonableness of Doherty's suspicion. Doherty was, of course, in plain clothes, and the area was poorly lit, making the defendant's lack of reaction to Doherty's presence less noteworthy. Cf. Depina, 456 Mass. at 240-241, 247, 922 N.E.2d 778 (defendant's obvious effort to avoid encountering police, identifiable as such as they approached, contributed to reasonable suspicion); Mercado, 422 Mass. at 371, 663 N.E.2d 243 (behavior of defendant "on seeing a police officer" contributed to reasonable suspicion).

Even if this particular factor diminishes reasonable suspicion here, the larger points are (1) that we look at the facts known to Doherty not in isolation, but as a whole, Isaiah I., 450 Mass. at 823, 882 N.E.2d 328; and (2) that reasonable suspicion is less than probable cause, let alone proof of wrongdoing by a preponderance of the evidence. See Kansas v. Glover, 140 S. Ct. at 1187. Cf. Matter of a Grand Jury Investigation, 427 Mass. 221, 225, 692 N.E.2d 56, cert. denied sub nom. A.R. v. Massachusetts, 525 U.S. 873, 119 S.Ct. 171, 142 L.Ed.2d 140 (1998) (probable cause for search is less than proof by preponderance of evidence).

Conclusion. Considering together all the factors contributing to Doherty's suspicion, and all the factors the defendant claims weigh against it, we conclude that Doherty's suspicion was reasonable.

Order denying motion to suppress affirmed.

**All Citations**

100 Mass.App.Ct. 222, 176 N.E.3d 289

Footnotes

1 The judge stated that she credited and accepted the testimony of the three police officers who testified at the suppression hearing.

2 Our references to recorded radio transmissions are to those on the channel for C-11 use, except where otherwise noted. We have listened to all the recordings in the record but refer only to those that are most relevant.

3 The judge found that the radio transmission reported "dark" jeans, but Doherty's testimony and the recorded transmission make clear that the report said the jeans were blue.

4 Doherty initially testified, and the judge found, that the defendant was wearing blue jeans. On cross-examination, asked if the jeans were black, Doherty replied that he did not remember. After having his recollection refreshed with the booking sheet, Doherty testified that the jeans were black. The defendant asserts, and the Commonwealth does not contest, that the finding that the jeans were blue was clearly erroneous.

5 Dwan had been on the force since 2000; he was a sergeant at the time of the incident but was later promoted.

6 The hearing transcript makes clear that one of those officers was Doherty. Doherty testified that Dwan "arrived with me.... We came from one end of the street, he came from the other end of the street."

7 The judge also concluded that the discovery of the gun and the showup identification were permissible. As the defendant does not challenge those conclusions on appeal, our factual recitation omits details regarding those issues.

8 If Doherty had such reasonable suspicion, the defendant does not press any separate challenge to the patfrisk that ensued. "[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." Commonwealth v. Narcisse, 457 Mass. 1, 7, 927 N.E.2d 439 (2010), quoting Arizona v. Johnson, 555 U.S. 323, 326-327, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). Reasonable suspicion that the defendant had just committed an armed robbery would also, on this record, establish reasonable suspicion that he was armed and dangerous.

9 Two updated descriptions mentioning facial hair were broadcast, on the channel for C-11 use, before Doherty saw and stopped the defendant at 3:43 a.m. Particularly in light of this confirmation of Dwan's testimony, it is of no significance that Dwan prefaced his recounting of the updated description with the phrase "I believe." We note that in addition to the two updated descriptions just mentioned, two other recordings confirm that the suspect was described as having a beard or

  

facial hair. These included the victim's statement in his call to the 911 operator and a broadcast approximately one minute thereafter on another channel, shown in the record as corresponding to "BAPERN CENTRAL." There being no evidence that Dwan heard those two other recordings and that the speakers were officers involved in the effort to apprehend the robber, we do not rely on those statements to establish Dwan's knowledge.

10 Contrary to the defendant's contention, the judge's finding, in discussing Doherty's knowledge, that "[t]here was no mention in the original broadcast about facial hair" in no way "excludes the possibility that the judge found that Dwan heard the subsequent description prior to the stop." The two facts are independent of each other.

11 Contrary to the defendant's suggestion (which is unsupported by citation to authority), application of the collective knowledge doctrine does not depend on an explicit finding by the judge that the officers were engaged in a close cooperative effort. See, e.g., Mendez, 476 Mass. at 519 n.8, 69 N.E.3d 968 (doctrine applied without mention of express finding of cooperative effort); Roland R., 448 Mass. at 280, 285, 860 N.E.2d 659 (same); Commonwealth v. Lanoue, 356 Mass. 337, 340, 251 N.E.2d 894 (1969) (same); Quinn, 68 Mass. App. Ct. at 480-481, 862 N.E.2d 769 (same; appellate court reached its own conclusion regarding cooperative effort).

12 The defendant was thirty-two years old at the time.

13 See also Commonwealth v. Carrington, 20 Mass. App. Ct. 525, 526, 528, 481 N.E.2d 224 (1985) (where defendant, like suspect, was Black male in his thirties with receding hairline, moustache, and beard, and was stopped not far from crime scene at 6:30 a.m., one hour after first report, police had reasonable suspicion, although defendant's clothes did not match description of suspect).

14 That the suspect was described as five feet, seven inches or five feet, eight inches tall and in his late twenties, whereas the defendant is five feet, eleven inches tall and was then thirty-two years old, is not disqualifying. See Emuakpor, 57 Mass. App. Ct. at 198, 782 N.E.2d 7. (At oral argument the defendant disclaimed any argument based on whether he matched the description of the suspect as having a medium build.) Similarly, that the suspect was described as wearing blue jeans, whereas the defendant's jeans turned out to be black, is not fatal to reasonable suspicion. The night was rainy, the area where Doherty saw the defendant was poorly lit, and there are various shades of blue and black.

15 Doherty could reasonably consider that the late hour and the rain had likely kept pedestrians inside unless they had a pressing reason to go out. Cf. Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 310, 313, 983 N.E.2d 719 (2013) (that defendant and companion were alone on street on "cold, windy, wet night filled with snow and slush" contributed to reasonable suspicion).

16 Nor is this a case where the defendant wore distinctive clothing, the absence of which from the description of the suspect may be significant. Compare Meneus, 476 Mass. at 233, 237, 66 N.E.3d 1019 (defendant wore "black bomber jacket with a visibly distinctive orange lining").

17 A radio transmission made fifteen minutes after the defendant was stopped suggests that the CVS was open at the time. There is no record evidence regarding whether the restaurant was open.

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## UNITED STATES CONSTITUTION

### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## MASSACHUSETTS DECLARATION OF RIGHTS

### Article 14

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

## Certificate of Compliance

I hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction). This brief is set in 14-point Athelas and contains 10,896 non-excluded words, as determined through the "Word Count" feature in Microsoft Word for Office 365.

*/s/ Anne Rousseve*
Anne Rousseve

## Certificate of Service

I hereby certify that I have today served the brief of Defendant-Appellant David Privette on the Commonwealth by directing a copy through the electronic filing service provider to:

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May 27, 2022