COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Bristol, ss. **No. SJC-13086**

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

ZAHKUAN J. BAILEY-SWEETING,
Appellant.

On Appeal from Judgments of the Bristol Superior Court

BRIEF AND ADDENDUM FOR THE APPELLANT

For the Appellant/Defendant,
Zahkuan J. Bailey-Sweeting

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

SECONDARY SOURCES

ISSUE PRESENTED

I. Did the government violate Zahkuan Bailey-Sweeting's right, under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment of the United States Constitution, to be free from an unlawful search and seizure where, as a passenger in a car, he was removed and patfrisked based upon the officers' suspicion or "hunch" that another passenger's uncharacteristic behavior was an attempt to distract the police?

STATEMENT OF THE CASE

Prior Proceedings

On March 15, 2018, Mr. Bailey-Sweeting[1] was indicted for possession of a loaded large capacity firearm, in a vehicle, without a license, in violation of Mass. General Laws chapter 269, sections 10(a),(m), and (n). RA.10-18.[2]

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[1] In its decision, the Appeals Court reverses the Defendant's surname to Sweeting-Bailey based upon how it appears in the indictment. A.29. The correct order is Bailey-Sweeting.

[2] References to the record on appeal are as follows: to the Addendum bound herewith (which includes the transcript of the judge's on-the-record ruling and the Appeals Court's decision) by A.[page #]; to the Record Appendix bound separately by RA.[page #]; to the motion to suppress hearing transcripts by Tr1[Tr2, or Tr3]/[p. #] (there are separate transcripts for the AM and PM hearing held June 22nd, referenced as Tr2 and Tr3); to the August 30, 2018 plea hearing by Plea-Tr:[page #].

On June 12, 2018, Bailey-Sweeting filed a motion to suppress evidence seized without a warrant. RA.5. An evidentiary hearing on that motion was held on June 20th and 22nd, 2018 (Yessayan, R., J., presiding). Tr1/1; Tr2/1. On July 20, 2018, the lower court denied the motion, making his findings on the record. A.1-23.

On August 30, 2018, at a plea hearing (Yessayan, R., J., presiding), a nolle prosequi was entered on the charges of carrying a loaded large capacity weapon without a license, and, contingent upon the results of the instant appeal of the denial of the motion to suppress, Mr. Bailey-Sweeting pleaded guilty to one count each of possession of a large capacity firearm and carrying without a license. Plea-Tr/6-10; RA.7. The conditional plea agreement was signed by the Commonwealth. RA.23. On the possession charge, he was sentenced to state prison for not less than 2 years, 6 months and not more than 4 years, with a concurrent sentence of the same length on the license charge. RA.7. He received credit for 185 days of pre-trial incarceration. RA.7.

At the suppression hearing and plea hearing, Bailey-Sweeting was represented by Michelle Rioux, the government by ADA Matthew Sylvia. Plea-Tr:1. His present counsel, Elaine Fronhofer, was appointed to represent him for post-conviction matters. RA.8.

Bailey-Sweeting's direct appeal of his convictions was entered into the Appeals Court on July 2, 2019. Oral argument was held March 13, 2020 before a panel of three judges. Two of the three judges on that panel ruled in favor of Bailey-Sweeting. A.28. The panel was expanded resulting in a three-two decision in favor of the Commonwealth. A.29.

Statement of Facts

Suppression hearing

New Bedford police detective Kory Kubik testified that for the prior two years he was assigned to the gang unit. Tr1/5. At 7:00 pm on February 26, 2018, he was working, driving an unmarked police cruiser with fellow officers, detectives Gene Fortes and Roberto DaCunha. Tr1/6. It was dark out. Tr1/7. A red vehicle changed lanes in front of him, causing the vehicle behind it to break hard. Tr1/6-7. Within about 60 feet, the officers effectuated a traffic stop at the parking lot of a Kentucky Fried Chicken. Tr1/7.

The red car was already turning into the restaurant before Det. Kubik activated his unmarked cruiser's lights to pull the car over. Tr1/28,29. The car stopped in a parking spot of the restaurant and a man named Raekwan Paris, whom Kubik knew, stepped out of the

car's front passenger seat. Tr1/8,29. Kubik asserted Mr. Paris was a member of the United Front gang. Tr1/11.

A year and half prior to this incident, Kubik received information that someone who was with Paris was involved in an incident in which a firearm was pointed at people from a vehicle. Tr1/9,15. On that prior occasion, when a detective stopped Paris while he was walking away from the car he had been in and brought him back to it, Paris's demeanor was calm. Tr1/9,11. Police then found a gun in the car, for which Paris was charged and later convicted. Tr1/12. Kubik believed Paris was out on bail for that case at the time of the traffic stop at issue in this case. Tr1/41. That prior firearm incident occurred close to where the traffic stop at issue in this case occurred. Tr1/9.

Other than that encounter, Kubik had two other "traffic stop" encounters with Paris, and on each of those occasions Paris was cooperative and calm. Tr1/12.

Kubik testified that at the time of this February 2018 traffic stop, Paris refused Det. DaCunha's repeated requests that he sit back in the vehicle. Tr1/12-13. He was asked to step to the back of the vehicle, which he did comply with but was becoming angrier, taking a

"combative" posture, "questioning the stop" and accusing the police "of harassing him." Tr1/14,18.

At that point, Kubik was speaking with the driver, Alyssa Jackson, whom the detective did not know. Tr1/15,20. He saw Mr. Bailey-Sweeting in the rear driver's side seat. Tr1/15-16. Kubik stated he knew Bailey-Sweeting to be a member of the Bloods gang. Tr1/16.

Carlos Cortes was the other passenger in the backseat. Tr1/16. Within a "close period of time," members of Kubik's gang unit had been informed by Boston police that Mr. Cortes had posted a music video on social media displaying what appeared to be a firearm and referencing a gang based in Fall River. Tr1/17,39,40.

Because Paris was becoming "hostile," Kubik was unable to address the traffic infraction with Ms. Jackson and instead walked back and handcuffed Paris, whose hands were clenched. Tr1/18,19.

Due to Paris's "uncharacteristic" behavior, which Kubik suspected was an attempt to distract the police from the vehicle, Ms. Jackson and both rear passengers were asked to step out of the car. Tr1/20. Kubik also asserted he felt his safety was in danger. Tr1/20-21.

The driver was taken out first and patfrisked but nothing was found on her. Tr1/21. Det. DaCunha then took Mr. Cortes out, who

was patfrisked and no weapons were found. Tr1/22. Bailey-Sweeting was then taken out and patfrisked by Kubik who found a gun in his waistband. Tr1/22-23.

Bailey-Sweeting was handcuffed and as he was being put in the cruiser, fellow passenger Cortes asked Bailey-Sweeting why he was being arrested. Tr1/24. He responded: "I had that blicky" (said to be slang for a firearm). Tr1/25.

After the driver was issued a citation for the traffic infraction, she and the others, including Mr. Paris, were allowed to leave. Tr1/25-26.

Kubik acknowledged that, on the day of this traffic stop, he had no information that this vehicle, nor anyone in it, had been involved in either gang activity or had a gun. Tr1/28,35. He also admitted his whole suspicion about this vehicle was as a result of Paris's behavior, which led him to have a "hunch" that Paris was "using tactics to distract us." Tr1/35. Det. Kubik confirmed that but for the behavior of Paris he would not have removed the operator or either of the rear passengers. Tr1/36-38.

Det. Gene Fortes's testimony was consistent with Kubik's account of how the traffic stop/search unfolded. Tr2/1-15. He too was familiar with Paris, both from the gun incident that occurred a year-

and-a-half prior, and from when Paris was in school and Fortes was a school resource officer. Tr2/6-7.

Fortes was also familiar with Bailey-Sweeting because Bailey-Sweeting would hang out in the same neighborhood Fortes worked. Tr2/13. As a detective, Fortes said he had had "numerous encounters" with Paris. Tr2/7. In those prior encounters, Paris had been "respectful." Tr2/7. On this occasion, however, Paris was upset and questioning the reason for the stop. Tr2/8-9.

Fortes testified that the rear passengers were removed from the car "once we realized Carlos Cortes was in the car" because his unit had received information that he had "posted pictures of a firearm on social media." Tr2/14. Fortes admitted that he himself had never seen the pictures. Tr2/19. He further admitted that, but for Paris's behavior, the police would have had no reason to take anyone out of the vehicle. Tr2/16.

Det. Roberto DaCunha's testimony also mainly conformed with the two other officers' testimony as to how the stop and search unfolded. Tr3/1-21. DaCunha added that the stop was within a quarter mile of "United Front" gang territory and that it was a "high-crime" area. Tr3/8.

He too testified that he had "numerous" interactions with Paris in his role as a gang unit officer. Tr3/9. This included the gun possession arrest in June of 2016. Tr3/9. That incident, over a year-and-a-half prior, was a half to a quarter mile from where the traffic stop in this case occurred. Tr3/11. During that prior arrest, DaCunha testified that Paris was "cordial." Tr3/11.

DaCunha testified he had also stopped Paris on the street (not a traffic stop), numerous times and that Paris was "never very engaging, but he would speak to [the police]." Tr3/12.

On the occasion of this traffic stop, however, Paris stepped out of the car, was loud and accused the police of harassing him. Tr3/12.

After Paris was handcuffed, DaCunha observed that the right rear passenger was Carlos Cortes. Tr3/16. Mr. Cortes is a rap musician and about a month prior, DaCunha's unit had been sent a link to a music video Cortes had posted on YouTube in which he displayed what was suspected to be an "authentic" firearm. Tr3/16.

Due to Paris's behavior and the information they had about Cortes, DaCunha was concerned that the vehicle or Cortes had a firearm. Tr3/17.

Det. DaCunha also recognized Bailey-Sweeting, whom he knew to have had an "armed robbery, firearms offense" three years prior (in 2015), for which he was committed to the Department of Youth Services. Tr3/18. His presence too raised DaCunha's concern. Tr3/18.

DaCunha admitted, however, that both Cortes and Bailey-Sweeting were just sitting quietly in the car while the traffic stop was proceeding and that but for Paris's uncharacteristic behavior, neither would have been removed from the car. Tr3/28.

DaCunha testified he was the officer who arrested Paris in June of 2016 for gun possession and that despite Paris presumably knowing his gun possession was a problem, Paris was calm at that time. Tr3/29. He admitted Paris's behavior at that prior incident was in stark contrast to Paris's demeanor during this traffic stop, when he did not have anything on him and, given the reason for the stop, might not have been aware of why they were being pulled over. Tr3/29.

Lower court's on-the-record findings

Set forth below are the specific factors on which the motion judge based the denial of the motion to suppress.

It was dark out and a "high crime" area. A.6-7. After the car was stopped for a traffic infraction, the front-seat passenger, Mr. Paris,

who was a known gang member, immediately exited the car and refused commands that he get back into the car. A.7,9,12.

Paris was raising his voice, eventually taking a combative posture, and at one point clenching his fist. A.10,15. The motion judge wrote that Det. DaCunha ordered Paris to get back in the car three times. A.9. (DaCunha's actual testimony was that he asked Paris twice, then "thought better of it." Tr3/13.)

Paris's conduct was uncharacteristic, in that on the many prior occasions that the police had questioned Paris he had been cooperative. A.7-9,12,14.

At one of those prior incidents, a year-and-a-half prior to this traffic stop, Paris was arrested for possession of a firearm after he walked away from a vehicle where a firearm was recovered. A.7-8. That gun possession arrest was within a half to a quarter mile from where this traffic stop occurred. A.18.

In addition, within the previous month or so police had been informed that backseat passenger Carlos Cortes had posted a rap video on social media displaying what police suspected was an authentic firearm. A.15.

Finally, police were aware that Mr. Bailey-Sweeting was a gang member and had been charged as a juvenile for possession of a firearm. A.11,14,15.

The judge also noted that all three of the passengers were known to be gang members, as the officers also knew Cortes was "affiliated" with a Fall River gang. A.11,15,19.

Additional details from the record relevant to this appeal are set forth below.

SUMMARY OF ARGUMENT

The suppression hearing judge ruled on the motion to suppress prior to this Court's decision which clarified that there are different standards for an exit order and a patfrisk. The judge did *not* conclude that the evidence established the officers had a reasonable belief that Bailey-Sweeting was armed and presently dangerous -- the standard for upholding a patfrisk. Rather, he concluded only that the officers had a reasonable belief of a threat to their safety, which would only have supported an exit order. Without the aid of this Court's decision, however, the judge erroneously ruled that the threat to officer safety permitted both the exit order *and* the patfrisk Bailey-Sweeting. Page 21.

The lower courts both relied upon the officers' "hunch" or suspicion that fellow passenger Raekwan Paris's "uncharacteristic" behavior of angrily complaining about being harassed by the police was actually a ploy to divert their attention. That hunch, however, was undermined by the substantial evidence that Paris *was* being harassed by the police. Pages 22-24. Moreover, police conduct that is based upon a hunch is incompatible with the protections of the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights. Page 25.

The lower courts relied upon the evidence that Paris was arrested for possession of a firearm a year-and-a-half prior to the traffic stop and that three years prior to the stop, Bailey-Sweeting had been found delinquent as a juvenile for a firearm charge. There was, however, no evidence that Bailey-Sweeting had engaged in any communication with Paris from which one could infer possession of a weapon. Especially given that this was a traffic stop for a minor infraction, with no indication of criminal activity, and where the evidence established Bailey-Sweeting was simply sitting quietly in the backseat throughout, the two men's criminal history did not support a reasonable inference that Bailey-Sweeting was armed and dangerous. Pages 26-27.

Given the complete lack of evidence of any crimes that had occurred either recently or in the area of the traffic stop, the motion judge inappropriately relied upon the fact that the stop occurred in a "high crime" area to support his ruling. Page 28.

Aside from the suspicions about Mr. Paris's behavior, the factor the lower courts most heavily relied upon to uphold the officers' conduct was the police testimony that alleged the passengers were "gang members." That testimony, however, provided almost no details by which the relevance or, especially, the reliability of that evidence could be weighed and did not support the enormous weight and significant inferences the lower courts extrapolated from it. Pages 29-32. The weight the Appeals Court gave this factor, in particular, went far beyond what was appropriate in the totality of the circumstances or what our caselaw has previously allowed. Pages 32-34.

The reliance on the limited testimony that labeled the passengers as "gang members" was especially inappropriate given the record in this case and analysis of data from police departments across the nation (including the city of New Bedford, where this stop occurred) which strongly indicates that the gang categorization process is highly discretionary, subjective, unreliable and racially biased. Pages 35-41.

ARGUMENT

I. The patfrisk of Mr. Bailey-Sweeting, a passenger in a car stopped for a traffic infraction, conducted based upon a "hunch" or suspicion that another passenger's uncharacteristic behavior was an attempt to distract the police, violated his right to be free from an unlawful search and seizure under the Fourth Amendment of the Unites States Constitution and art. 14 of the Massachusetts Declaration of Rights.

In accord with *Commonwealth* v. *Gomez*, 480 Mass. 240, 241 (2018), Mr. Bailey-Sweeting entered his plea contingent upon appellate review of the denial of his motion to suppress. Plea-Tr/7. *Gomez* allows a defendant to enter a conditional plea if, as here, "it is entered with the consent of the court and the Commonwealth and identifies the specific ruling from which the defendant intends to appeal." *Id.*; Plea-Tr/6-10.

Standard of review: "[W]here, as here, the search [was conducted] without a warrant the burden of establishing its reasonableness is on the Commonwealth." *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 57 (1974). An appellate court accepts a judge's subsidiary findings of fact, absent clear error, but conducts an independent review of the judge's ultimate findings and conclusions of law. *Commonwealth* v. *Mubdi*, 456 Mass. 385, 388 (2010), citing *Commonwealth* v. *Mercado*, 422 Mass. 367, 369

(1996) ("Our duty is to determine 'the correctness of the judge's application of constitutional principles to the facts as found.'").

Bailey-Sweeting does not contest that the police made a valid traffic stop for a civil motor vehicle infraction: an unsafe lane change. Tr1/7. This appeal centers on the constitutionality of his patfrisk.[3]

For a patfrisk of a citizen to discover guns or other instruments for assault of the police, the government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 & 29 (1968). *Commonwealth* v. *Silva*, 366 Mass. 402, 406 (1974) (holding same). The "officer must reasonably suspect that the person stopped is armed and dangerous." *Arizona* v. *Johnson*, 555 U.S. 323, 327-328 (2009).

A decision by this Court, handed down after the underlying motion to suppress had been decided, clarified that in circumstances where a citizen is in a vehicle there are different standards for exit orders and

[3] Although the exit order in this case was also unlawful for much the same reasons as the patfrisk, Bailey-Sweeting focuses his arguments on the illegality of the patfrisk in light of this Court's recognition that the justification for a patfrisk "requires more" than an exit order. *Commonwealth* v. *Torres-Pagan*, 484 Mass. 34, 38 (2020).

patfrisks. *Commonwealth* v. *Torres-Pagan*, 484 Mass. 34, 38 (2020). Specifically, that while an exit order "is an imposition that cannot be considered minimal [it] is considerably less intrusive than a patfrisk, which is a severe ... intrusion upon cherished personal security." *Id.* at 39. This Court emphasized that with respect to patfrisks our constitutions "do not allow such an intrusion absent reasonable suspicion that the suspect is dangerous *and has a weapon*." *Id.* (emphasis in original).

Here, the judge who ruled on the motion to suppress did *not* conclude that the officers had a reasonable suspicion that Bailey-Sweeting was armed and presently dangerous. Rather, he concluded only that the government had presented evidence that established the officers had a reasonable belief of a threat to their safety. A.19. Without the aid of the *Torres-Pagan* decision, however, the motion judge erroneously ruled that the threat to officer safety allowed the police to issue the exit order *and* patfrisk Bailey-Sweeting. A.19.

The key factors that the motion judge held established a legitimate concern for officer safety, were that the stop occurred in a high crime area, all three of the car's passengers were "gang members" who had "involvement with firearms," the traffic stop occurred within a half mile to a quarter mile from where a fellow passenger, Paris, had

been arrested a year and half earlier on a gun possession charge, and Paris exited the car and was behaving "uncharacteristically." A.7-19. The Appeals Court relied upon similar factors. A.26-7.

The fundamental error in the motion judge's and, particularly, the Appeals Court's reasoning is that they gave these factors a significance and weight that the evidence did not justify.

Raekwan Paris's behavior did not support the officers' hunch

In *Commonwealth* v. *Torres*, 424 Mass. 153, 159 (1997), as here, the judge cited the front seat passenger's "unusual behavior…in exiting the passenger side of the vehicle, without being asked to do so" to justify the warrantless search. A.9.[4] In *Torres*, that behavior, along with other information the officer gathered from the driver, led the officer to investigate the passenger's identity, which led to a search of the car. *Id.* at 155-156. This Court reversed the denial of the motion to suppress noting that it "is not unnatural" for a driver or passenger, or

[4] Here, the motion judge stated: "a passenger of a vehicle stepping out of the vehicle during a traffic stop in and of itself causing [*sic*] safety concern for the officers." A.9.

both, to get out of the car to meet an officer who has signaled for the vehicle to pull over. *Id.* at 159.

Here, the officers testified that they based their actions on their "hunch" or suspicion that Mr. Paris was not actually upset at being harassed by the police (as he asserted [Tr3/12]) but that Paris was actually trying to divert the officers' attention. Tr1/20,35;Tr3/17. This "hunch," however, was contradicted by the fact that *all three officers* testified they had each stopped Paris for either traffic stops or to make in-the-street inquiries of him, unrelated to his prior firearms charge, many times. Tr1/12;Tr2/7; Tr3/12.

Det. Kubik testified that Paris's behavior was different than that which he displayed in the two prior traffic stops Kubik personally had made with Paris in the car (Kubik testified he may have even stopped Paris a third time but he could not be sure). Tr1/12,31. DaCunha and Fortes likewise testified to having stopped Paris for both traffic stops or in-the-street inquiries, and both described having subjected Paris to these encounters on "*numerous*" occasions. Tr2/7; Tr3/12 (emphasis added).

(Recent news reports shows that these officers were acting under a directive to ramp up the number of stops they made while on

patrols. See Kiernan Dunlop, South Coast Today – The Standard Times, "City announces end to controversial police directive, changes to Use of Force policies" (Jan. 10, 2021) www.southcoasttoday.com/story/news/politics/2021/01/10/new-bedford-rescinds-controversial-directive-associated-gracia-death/6604037002/. Further, the directive itself specifically warned the officers that citizens might perceive "these tactics" as "harassment." *Id.* Another recent report that analyzed stops made by New Bedford police between 2015 and 2020 show that just a handful of officers made the vast majority of these interrogation stops. See Citizens for Juvenile Justice, "We are the Prey: Racial Profiling and Policing of Youth in New Bedford," 2 (2020), https://www.cfjj.org/we-are-the-prey. Even on that short list of "most prolific" officers, DaCunha and Fortes stood out. Fortes was the fourth most prolific. DaCunha was number one, making more of these type stops than the eighth, ninth and tenth "most prolific officers" *combined*. *Id.* at 14.)

In any event, the DaCunha's, Fortes', and Kubik' own testimony clearly supported the fact that Paris *was* being harassed by the police. As such, his act of stepping out and expressing frustration and anger at being stopped by the police--yet again--was not an unnatural

reaction. This is especially so in the circumstance of this traffic stop, where Paris would not necessarily have known why the car had been pulled over. Tr3/29.

The officers had also stressed that in an incident a year-and-a-half earlier, Paris had been cooperative when a gun was found in a car he had just exited. Tr1/12;Tr3/11. As such, it makes little sense to conclude that because Paris was behaving in an *un*cooperative manner, it could be inferred that a gun might be found in a car he had just exited. Based upon this rationale, it is unclear what Paris could have done to express his displeasure at being harassed by the police that would *not* have caused them to pull everyone else out of the car and patfrisk them.

In sum, the record establishes that Det. Kubik's admission that his actions were based on a "hunch" was accurate, and not a particularly well-founded hunch at that. Tr1/35.

> The vice in interrogations and searches based on a hunch is their essentially random and arbitrary nature, a quality inconsistent, under constitutional norms (art. 14 of the Declaration of Rights of the Massachusetts Constitution and the Fourth Amendment to the Constitution of the United States), with a free and ordered society.

Commonwealth v. *Torres*, 424 Mass. at 161, quoting *Commonwealth* v. *Bartlett*, 41 Mass. App. Ct. 468, 472 (1996). *Commonwealth* v. *Silva*, 366

Mass. at 406 ("A mere 'hunch' is not enough. Simple good faith on the part of the officer is not enough.")

All three officers testified that, but for Paris's behavior, they would have had no basis to remove or patfrisk Bailey-Sweeting. Tr1/36-38; Tr2/16; Tr3/28. The motion judge erred when he concluded that the officers' hunch or suspicion supported a reasonable belief of a threat to officer safety. And the Appeals Court clearly erred when it concluded that it supported a reasonable belief that Bailey-Sweeting was armed and presently dangerous. See *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979) ("person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"); *United States* v. *Di Re*, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled").

The passengers' "involvement with firearms"

The motion judge also relied upon the fact that "all" of the passengers "had involvement with firearms." A.19. Cortes's alleged "involvement with firearms," however, consisted of testimony that a

month or more before the traffic stop police became aware that (on some undisclosed date) he had posted a music video on YouTube displaying what the police "suspected" was an authentic firearm. Tr3/16. (The Appeals Court, appropriately, did not rely upon this as a factor supporting the patfrisk of Bailey-Sweeting. A.26-27.)

The other evidence regarding firearms was that, a year-and-a-half prior to the traffic stop, Paris was arrested for possession of a firearm. Tr1/33-34. And three years prior to the stop, Bailey-Sweeting had been found delinquent as a juvenile for a firearm charge. Tr3/18.

As the dissent below stated, Bailey-Sweeting did not "engage in any verbal or nonverbal communication with Paris from which to infer that he jointly possessed a weapon with Paris." A.29. Viewing the circumstances in their totality, and especially in light of the fact this was a traffic stop for a minor infraction, with no indication of criminal activity, and where Bailey-Sweeting was simply sitting quietly and compliantly in the backseat of the car, his three-year old firearm charge as a juvenile and Paris' year-and-a-half year old charge did not support a reasonable inference that Bailey-Sweeting was armed and presently dangerous. See *Commonwealth* v. *Cordero*, 477 Mass. 237, 246 (2017) ("the defendant's prior convictions, without further specific and

articulable facts indicating that criminal activity was afoot, could not create reasonable suspicion").

Insufficient evidence to support the "high crime" area factor

As this Court recently emphasized: "The characterization of an area as 'high crime' cannot justify the diminution of the civil rights of its occupants." *Commonwealth* v. *Evelyn*, 485 Mass. 691, 709 (2020), citing *United States* v. *Wright*, 485 F.3d 45, 54 (1st Cir. 2007). In *Wright*, the Court cited caselaw that warned the label "high crime" area could be "used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business." *Wright*, 485 F.3d at 54 (internal citations omitted). In *Evelyn*, this Court held that to "guard against this risk, we consider this factor only if the 'high crime' nature of the area has a 'direct connection with the specific location and activity being investigated.'" *Evelyn*, 485 Mass. at 709, citing *Torres-Pagan*, 484 Mass. at 41 (in turn, quoting *Wright*, 485 F.3d at 54).

Here, there was no testimony of any specific crimes committed in the area where the traffic stop occurred. The only evidence of any specific prior crime committed anywhere near the traffic stop was testimony regarding the arrest of Paris, a year and a half earlier, in a

location approximately a quarter to a half mile away. Cf. *Commonwealth* v. *Jones-Pannell*, 472 Mass. 429, 435 (2015) ("That one or more 'crimes' occurred at some point in the past somewhere on a particular street does not necessarily render the entire street a 'high crime area,' either at that time or in perpetuity").

Given the lack of supporting details, the motion judge erred when he relied upon the mere labeling of the location of the traffic stop a "high crime" area as factor for denying the motion to suppress.

The lower court's over-reliance upon the testimony of "gang membership" -- evidence that is also inherently *unreliable*

To make the inferential leaps necessary to move from the officers' inchoate suspicion about Paris's behavior to a finding of reasonable suspicion for the officer's exit order and patfrisk, both lower courts heavily relied upon the officers' testimony that the passengers were gang members. The paucity of the evidence that supported the label "gang member", however, was insufficient to support those inferences.

For its part, the Appeals Court focused on the officers' testimony that both Paris and Bailey-Sweeting were said to be affiliated with the Bloods gang. A.27. Indeed, it explained that its decision rested upon this purported "relationship" between Paris and Bailey-

Sweeting. A.27. Yet, the only evidence to support labeling Paris as a Bloods' gang member was the officer's bare assertion. Tr1/37. This label provided no information as to how, why, or when Paris was so categorized. There was no information provided as to how he would be de-categorized, or whether, having been so categorized, he was on that list in perpetuity. There was also no evidence Paris ever committed any acts of violence or crimes as an affiliate of that gang. Not with Bailey-Sweeting. Not recently. Not ever.

The evidence regarding Cortes' purported affiliation with some unknown gang from the city of Fall River[5] was equally deficient. Tr1/37. There was no information as to how or when Cortes was so categorized, why he was, how these New Bedford officers learned of his alleged gang membership, how he would be de-categorized, or whether, once categorized, he was forever a "gang member." And as with Paris, there was also no evidence Cortes ever committed any acts of violence or crimes as an affiliate of this unnamed gang (or that he ever committed *any* crime).

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[5] In his decision, the hearing judge wrote that Cortes was a member of the "40-Blocc gang from Fall River." A.11. The only testimony regarding Cortes' gang membership was Kubik's assertion that Cortes was a member of "a gang from Fall River." Tr1/37.

With respect to Bailey-Sweeting, the defense elicited that at the time of the traffic stop the police had categorized him as being a Bloods gang member based upon a point system. Tr3/21-26. Det. DaCunha explained that police assign citizens points for various behaviors and once a person reaches a threshold of ten points, they are deemed "validated." Tr3/22.

DaCunha said that individuals are given two points for "contact with known gang members" and testified to having pictures of Bailey-Sweeting's contact with what he asserted was a validated Bloods' member (not Mr. Paris). Tr3/23. He said they are given four points for appearing in a picture taken of a group of Bloods' members, which DaCunha said Bailey-Sweeting had done. Tr3/23-24. And they are given four points for "use and/or possession of group paraphernalia or identifier," which for Bailey-Sweeting was fulfilled by police possession of "several photos" of him wearing a red bandanna as well as "several photos" of him "throwing" Bloods' hand gestures. Tr3/25. In other words, at the time of the traffic stop, Bailey-Sweeting had reached ten points, *just* making the threshold of being a validated gang member.

There was no evidence that Bailey-Sweeting had ever committed any crime, violent or otherwise, in conjunction with that gang or

any other. Nor that he had committed any crime or act of violence connected to Mr. Paris.

It is also important to note that DaCunha also testified Bailey-Sweeting *and his family* had ties to the Bloods gang. Tr2/13. That meant that even if Bailey-Sweeting was in fact *not* a Bloods' member, the police would almost certainly have "validated" him as one merely for wearing a red bandanna, as presumably he would also be seen hanging out with Bloods' members (i.e., his family) and likewise appear in a group photo with Bloods' members.

Despite the limited evidence that the gang membership label was reliable evidence from which one could reasonably infer a threat of violent or criminal behavior by the three passengers, the motion judge mentioned their gang membership as a justification for finding there was a legitimate concern of a threat to officer safety approximately *thirty* times in his decision. A.10,11,12,13,14,15,16,17,18,19.

The Appeals Court relied upon the gang membership label to any even greater extent, citing it to bridge any and all gaps in the evidence needed to reach its conclusion that there was reasonable suspicion that Bailey-Sweeting was armed and presently dangerous. Its reasoning went as follows. Paris's hostile behavior *could* be a ploy to divert

police attention from something in the car. A.27. The something in the car *could* be a gun. *Id*. The Court then asserted that because Bailey-Sweeting was allegedly a member of one of the two gangs that Paris was alleged to belong to, Paris *could* know that Bailey-Sweeting had a gun on him. *Id*. Further, because they were allegedly members of the same gang, Paris's actions *could* be an attempt to shield a fellow gang member. *Id.*

The many inferences that the Appeals Court held could be extrapolated from the officers' mere labeling of the passengers as gang members, went far beyond what the evidence actually established. The dissent correctly described the Appeals Court's speculation as "too great an inferential leap, [which] is neither supported by the testimony or the judge's findings, nor argued by the Commonwealth." A.29.

The fact that the lower courts relied upon *Commonwealth* v. *Elysee*, 77 Mass.App.Ct. 833 (2010) to support their conclusion that the patfrisk was lawful underscores how the Appeals Court's decision erodes the protections of the Fourth Amendment and art.14. It is true that in both *Elysee* and here the court discussed the fact that the vehicle's occupants were said to have gang affiliations and at least one had involvement with firearms. *Id.* at 836. But those were *not* the factors

that the *Elysee* court held justified the exit order. The critical factors that the *Elysee* court held justified the exit order of the rear seat passenger were that:

- the police were following the vehicle because of their concern that the occupants of the vehicle were in the middle of an *unresolved* and potentially violent gang dispute that had erupted just minutes earlier [*Id.* at 841];
- when the police stopped the vehicle, they observed a rocking of the *rear* of the vehicle *where the passenger who was ordered out of the car was located*, consistent with something being concealed [*Id.* at 842 (the court referred to this as the most important factor)];
- the exit order was issued to that rear passenger after he "fail[ed] when asked to identify himself, to look at [the officer], or to answer, and [lied] when asked if he had identification…." *Id.* This behavior, the Court explained, "could appropriately have served to bolster the officers' suspicion that indeed some contraband, most likely a weapon, was somewhere in the vehicle." *Id.*

In contrast, here the police were effecting a routine traffic stop for a minor infraction. Tr1/6. The driver promptly pulled over.

Tr1/7,28,29. The police had no information that the car or anyone in it was involved in a crime nor any violent or suspicious activity. Tr1/28,35. Throughout the duration of the traffic stop Bailey-Sweeting was simply sitting quietly. Tr3/28.

In sum, the dissent was correct when it explained that we cannot:

> … impute, from a gang member's uncharacteristic behavior during a motor vehicle stop, reasonable suspicion to believe that a fellow gang member, who did nothing more than sit calmly and quietly and cooperate with police, was armed and dangerous.

A.28.

There is, however, another compelling reason the lower court's over-reliance on the mere label "gang member" was inappropriate: the available data that strongly indicates that the gang categorization process itself is unreliable and racially biased.

The reliability of the information that police base their conduct on has long been held to be paramount. See *Commonwealth* v. *Vasquez*, 426 Mass. 99, 103 (1997) (upholding exit order and search of vehicle because officer had "reliable" information supporting reasonable suspicion of gun in vehicle); *Commonwealth* v. *Fraser*, 410 Mass. 541, 546 (1991) ("of course" the constitutionality of patfrisk centers on whether the officer had transmitted "reliable" information); *Commonwealth* v.

Antobenedetto, 366 Mass. at 55-56 (search held unconstitutional where government failed to establish the "reliability" of the message police received). Yet, analysis of police "gang databases" in Boston, Chicago, and New York City reveal a stunning racial disparity in the race of the persons police categorize as gang members, raising serious doubts about the reliability of that process. See Shannon Dooling, Here's What We Know About Boston Police's Gang Database, WBUR (June 26, 2019), https://www.wbur.org/news/2019/07/26/boston-police-gang-database-immigration (analysis of data from Boston Regional Intelligence Center Gang Database shows that only *two percent* of the more than 5,300 unique names in that database represent white people; 97.7 percent of the names in the gang database are non-white people); City of Chi., Office of Inspector General, Review of the Chicago Police Department's "Gang Database," at 4 (2019), https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf ("OIG's analysis of Chicago's Gang Arrest Card data found that Black, African American, and Latinx persons comprise 95% of the 134,242 individuals designated as gang members during arrest, and are designated at both younger and older ages as well as issued more Gang Arrest Cards per person than White

gang designees."); Hum. Rights Watch, Groups Urge NYPD Inspector General to Audit the NYPD "Gang Database," (Sept. 22, 2020), https://www.hrw.org/news/2020/09/22/groups-urge-nypd-inspector-general-audit-nypd-gang-database ("[A]ccording to the latest figures provided by the department, the database is 98.5% nonwhite, and a majority of those individuals are Black [66%] and Latino [31.7%].").

In the city of New Bedford (where the underlying traffic stop occurred), according to a recent study, police are *twenty-seven times* more likely to categorize a Black resident as being a gang member than a white resident. Citizens for Juvenile Justice, "We are the Prey: Racial Profiling and Policing of Youth in New Bedford," at 2 (2021).

One factor that would, of course, lead to this racial disparity is the longstanding and intractable "blight" of over-policing of non-whites. *Commonwealth* v. *Evelyn*, 485 Mass. at 708-709, citing *Commonwealth* v. *Warren*, 475 Mass. 530, 539-540 (2016) (concluding that "pattern of racial profiling" by Boston police meant that flight of an African-American man "is not necessarily probative of … consciousness of guilt), *Commonwealth* v. *Phillips*, 413 Mass. 50, 53 (1992) (describing how informal policy of Boston police created "martial law" for young

African-Americans), and *Terry* v. *Ohio*, 392 U.S. at 14 n. 11 ("field interrogations are a major source of friction between the police and minority groups" [citation omitted]). In New Bedford, Blacks are nearly *thirteen times* more likely to be stopped by police officer than their white counterparts. Citizens for Juvenile Justice, "We are the Prey: Racial Profiling and Policing of Youth in New Bedford," at 12 (2021).

In light of this racial disparity, the Appeals Court's decision which holds that police testimony that labels an individual a "gang member" can, with scant supporting evidence, be used to infer reasonable suspicion, creates a serious problem The reality that few *white* citizens are categorized as gang members relative to their proportion in the population means that the Appeals Court's decision promotes a system of justice in which police will be allowed to *much* more easily invade the property and persons of non-whites. In other words, it will exacerbate the existing racial disparity in our criminal justice system. See Chief Justice Ralph D. Gants, Massachusetts Supreme Judicial Court, Annual Address: State of the Judiciary, 5 (Oct. 20, 2016), https://www.mass.gov/files/documents/2017/10/10/state-of-judiciary-speech-sjc-chief-justice-gants-2016_0.pdf.

Moreover, that increased racial disparity in who the police can search will arise even if we assume the police are able to accurately determine gang membership. But the problem is likely far worse.

The subjective and discretionary nature of the gang categorization process along with years of research supports the conclusion that conscious and unconscious bias makes that process *particularly unreliable* when it comes to categorizing Blacks.

It is axiomatic that allowing police too much discretion undermines the protections enshrined in the Fourth Amendment. See *Terry* v. *Ohio*, 392 U.S. at 22, quoting *Beck* v. *Ohio*, 379 U.S. 89, 97 (1964) ("'If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police.'"); *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979) (discretionary stops of motorists to check driver's license and automobile registration constitute Fourth Amendment violation). But as the evidence introduced in this case established, the entire process of gang categorization is dependent upon police discretion. Tr3/22-26. Det. DaCunha's testimony itself showed that Bailey-Sweeting could easily have

been categorized as a gang member, even if he was not, based upon the subjective criteria used.[6] See discussion supra at 32.

In her concurrence in *Commonwealth* v. *Buckley*, 487 Mass. 861, 878 (2018), Chief Justice Budd cited several studies that analyze the underlying causes of over-policing of Blacks: "explicit bias (i.e., racial profiling), unconscious bias, or a combination of both." Another article that analyzed the existence of implicit bias in our society noted that Blacks, and especially young men, are unconsciously viewed as "violent, hostile, aggressive, and dangerous." L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2039 (2011). Significantly, these "implicit biases can lead to a lower threshold for finding identical behavior suspicious when engaged in by blacks than by whites." *Id.* As a result, when it comes to determining if someone has met a criterion that is indicative of gang membership (such as use or possession of group paraphernalia, e.g., gang colors), Blacks are more likely to be evaluated as taking part in this suspicious behavior.

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[6] During the suppression hearing, DaCunha claimed Bailey-Sweeting admitted, after his arrest, to being a gang member. Tr3/25. The recent report on over-policing in New Bedford, however, includes citizen reports of police pressuring individuals to say they *are* a gang member. Citizens for Juvenile Justice, "We are the Prey: Racial Profiling and Policing of Youth in New Bedford," at 22 (2020).

In *Terry* v. *Ohio*, supra, the Supreme Court understood that it was opening the door to greater police discretion by allowing police to patfrisk citizens based upon a new lower standard of "reasonable suspicion" but in doing so suggested that any harm would be minimized because:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security *without the objective evidentiary justification* which the Constitution requires.

392 U.S. at 15 (emphasis added). The Appeals Court failed to fulfill that responsibility when it held the mere assertion that a citizen is a gang member, with minimal supporting evidence, provided that objective evidentiary justification.

Here, the government failed to meet its burden of proving that the patfrisk of Bailey-Sweeting did not violate the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. *Commonwealth* v. *Antobenedetto*, 366 Mass. at 57. Because the discovery of the gun was the product of an unlawful search, Bailey-Sweeting's subsequent statement to the police about the gun must also be suppressed as "fruit of the poisonous tree." See *Wong Sun* v. *United States*, 371 U.S. 471, 484-488 (1963).

Conclusion

For the foregoing reasons, Mr. Bailey-Sweeting's convictions must be reversed.

Respectfully submitted,

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ADDENDUM

VOLUME: I
PAGES: 1-30
EXHIBITS: None

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. ZAHKUAN J. BAILEY-SWEETING, Defendant	Docket No.: 1873CR00090

FINDINGS AND RULINGS
BEFORE THE HONORABLE RAFFI N. YESSAYAN

APPEARANCES:

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Fall River, Massachusetts
Courtroom 7
July 20, 2018

Transcript produced by Approved Court Transcriber Cindy Crowley

(9:36 a.m.)

THE CLERK: The attorneys are here on Commonwealth versus Zahkuan Bailey-Sweeting/Sweeting-Bailey.

THE COURT: He's not here today; correct?

MS. RIOUX: No, he is here. It was also on for final pretrial conference. So he is here, and I'm told by the court officer that he is present.

THE COURT: Okay. And I believe we did the motion and I heard argument everything; correct?

MS. RIOUX: Yes.

MR. SYLVIA: That's correct.

THE COURT: So, what I'm going to do is -- and I know this is a matter that he's being held on 58A.

MS. RIOUX: Right.

THE COURT: All right. So I'm going to put findings on the record.

MR. SYLVIA: Okay.

THE COURT: When he gets here, we'll bring him in.

MS. RIOUX: Perfect.

THE COURT: You know, and then we will just -- that will be resolved, and then we can -- do you already have a trial date, I think, or no?

MR. SYLVIA: We do.

MS. RIOUX: We do.

THE COURT: Yeah. Okay.

MS. RIOUX: It's scheduled for 8-20, but I'm hearing bad things next door. I don't know that (indiscernible at 9:36:41 -- garbled speech).

THE COURT: Okay. Oh, 8-20 next door?

MS. RIOUX: It's -- yeah. 8-20 next door. I mean I don't know if it's -- if there's availability here. I don't --

THE COURT: There may be, depending. I don't know, but I know I'm taking one of the cases from that session next week, so.

MS. RIOUX: Okay.

THE COURT: Who knows. We'll try to get it done.

MR. SYLVIA: Thank you, Your Honor.

THE COURT: All right. All right. So why don't I just step off for a minute, and then --

(Recess taken at 9:37 a.m.)

(Recess ended at 9:59 a.m.)

(Defendant present.)

(Court called to order.)

THE CLERK: Commonwealth versus Zahkuan Sweeting-Bailey. Defendant is here in the courtroom, Your Honor.

If counsel would -- counsel, please identify themselves.

MR. SYLVIA: On behalf of the Commonwealth, ADA Matt Sylvia. Good morning, Your Honor.

THE COURT: Good morning.

MS. RIOUX: Good morning, Your Honor. On behalf of

Mr. Zahkuan Bailey, Attorney Michele Rioux.

THE COURT: Good morning. And good morning, Mr. Bailey-Sweeting.

MR. BAILEY-SWEETING: Good morning, sir.

THE COURT: Okay. All right. As I said -- let me just give --

(Pause.)

THE COURT: So we are here. It was on for a status today, maybe a pretrial hearing today.

MS. RIOUX: I'm sorry. It was on for a final pretrial today.

THE COURT: Okay. All right. So this is a matter that Mr. Sweeting-Bailey was held on May 24 -- he was arraigned on April 6th, and he's being held for a danger; is that right?

MS. RIOUX: That's correct.

MR. SYLVIA: Yes, Your Honor.

THE COURT: Okay. So I know we had given it a jury trial date, and we needed to expedite these matters with -- which counsel did. I just point out that on June 12th, a motion to suppress evidence was filed.

On June 20th, the day of the hearing, counsel also filed the affidavit, and obviously the Commonwealth had sufficient notice to proceed. We had the hearing on the 20th, and counsel asked for some time to submit a supplemental memorandum, which the Court received on June 29th. I have

reviewed -- at that time I was actually out for a couple of weeks, but I've reviewed it, and in order to keep this matter moving forward, I'm -- what I'm going to do is I'm going to make findings and rulings from the bench today.

MS. RIOUX: Thank you, Your Honor.

MR. SYLVIA: Thank you.

THE COURT: So, again we had a hearing on this matter -- and you can sit down unless anyone -- does anyone want to be heard any further?

MS. RIOUX: No, Your Honor.

MR. SYLVIA: Nothing further, Your Honor.

THE COURT: Okay. All right. So we had a hearing where the Court heard testimony on June 20, 2018. At that time, the Court heard testimony from three detectives from the New Bedford Police Department: Detective Corey Cubik (phonetic), Detective Gene Fortes and Detective Roberto Dacunha.

And again the motion the suppress in this case was a motion to suppress evidence seized without a warrant. It was a motor vehicle stop wherein the defendant was a rear passenger of the vehicle, and he's moving to suppress a firearm that was allegedly recovered on his person, as well as any fruits of that alleged unlawful search and seizure. So the Court held the hearing, heard testimony from these three witnesses. The Court finds the testimony of the three detectives to be credible in all relevant respects.

Corey Cubik is a detective. He's been with the New Bedford Police Department for seven years, the last two years with the gang unit. He's familiar with the various gangs and gang members in New Bedford, as are all of three of the witnesses. They're familiar with the various gangs in the city as well as any sorts of disputes they were in and the members of those gangs.

On February 26, 2018, the detectives were patrolling the west end of the city in an unmarked cruiser. Detective Cubik was operating the vehicle, and at about 7:05 p.m., they were traveling eastbound on Kempton Street.

Eastbound on Kempton Street, approaching the area of County Street, they observed a red Chevy switching lanes in an unsafe manner cut in front of another vehicle causing that other vehicle to abruptly hit the brakes to avoid collision. The officers then intended to conduct a motor vehicle stop for that purpose. It was dark outside at the time, it being February and just after 7 p.m. The officer switched to that lane of travel. The vehicle then turned right on County Street and immediately was signalling to turn left into the Kentucky Fried Chicken parking lot, which is on the corner of Kempton and County Street. As the vehicle was turning in, the officers activated their lights. They didn't activate siren. They activated their lights indicating the motor vehicle stop. The car pulled into the parking lot, didn't travel very far,

just pulled into a parking spot facing the building and stopped there, and the officers pulled up behind that vehicle. The vehicle had only traveled about 60 feet or so, not too far from when the police initially observed the motor vehicle infraction, and the car didn't do anything to avoid being stopped or anything of that nature.

The officers were not familiar with the car. They had no idea who was in the vehicle at that time. They were not looking for that vehicle for any reason or any of the occupants. They were simply conducting a motor vehicle stop.

Upon stopping, the front passenger door of the vehicle immediately opened, and an individual by the name of Rayquan Paris, who was known to the officers from prior dealings, which included a prior gun arrest, a recovery of a firearm and an arrest, at the United Front Housing Development. They had -- he had been arrested for that offense about 18 months earlier at the United Front Housing Development, which is about a half mile to a quarter of a mile from the area of this motor vehicle stop on this evening.

Also the officers -- at least one of the officers testified that this area was a high-crime area. And just the officers actually several of them testified going back to that earlier incident with Mr. Paris that at that time, I think it was in June of 2016 thereabouts, they received information from an informant that Mr. Paris and another individual by the

name of Shazon (phonetic) Gilmet had a firearm. They were in a vehicle in the area of Monte's Park which is an area in the south end of the city where there is a gang, the Monte's Park Gang, in the south end of the city which historically the United Front gang members from the west end of the city have been in feuds with and gang disputes with.

So they had information that Mr. Paris and this Mr. Gilmet were in the area with a firearm. They then received information that they had left that area. Officers, some officers continued to respond to the Monte's Park area on that date and other officers responded to the United Front area. Officers that responded -- and I believe that Officer Dacunha may have been one of the officers at the time of the arrest -- responded to -- the ones that responded to the United Front area observed Mr. Paris walking away from the vehicle.

They stopped him, they ordered him to go back to the area of that vehicle, and he was -- he went back to the vehicle. He was cooperative with the police officers on that date. I think historically with the officers in their dealings with him, he had been someone that would be talkative with them, not over friendly with them, but he had been -- he would talk with them, and he certainly obeyed their order that day to return to the car, and then they searched that car, and they found the firearm in that vehicle. So that was about 18 months or so prior to this incident on June -- on

February 26th of 2018.

And Office Cubik himself had had two prior other dealings aside from that knowledge of -- I don't know if he was there for that incident in June of 2016, but he had had two prior other dealings with Mr. Paris, motor vehicle-type stops where Mr. Paris was cooperative with him.

On this occasion, on February 26th of 2018, Mr. Paris got out of the vehicle immediately, and it should be pointed out that a passenger of a vehicle stepping out of the vehicle during a traffic stop in and of itself causing safety concern for the officers. But at this time he refused -- and the officers in light of that were ordering him to get back into the vehicle, and they weren't trying to search him or anything of that nature. They were ordering him to get back into the vehicle as they were simply conducting a motor vehicle stop for a motor vehicle violation, and he refused to get back in the car.

Actually, it was Detective Dacunha that was the -- I think the front passenger, in the front passenger seat, he was the first one out of the vehicle, in the police vehicle, and he told Mr. Paris on three occasions to get back into the car because they were conducting a motor vehicle stop, but Mr. Paris refused to do so.

And Mr. Paris then was -- also encountered Detective Fortes at the rear of the vehicle, who he was

familiar with. And during -- and again, Detective Fortes was essentially trying to calm Mr. Paris down. He knew him from when he was a school resource officer, I believe, a New Bedford Police school resource officer. He was familiar with Mr. Paris over the years, and he was trying to calm Mr. Paris down, and Mr. Paris was getting combative in the sense that he was continuing to argue, and at one point, he actually took a bladed stance, almost like a fighting stance, where he turned his body sideways, and certainly all of the -- all the officers observed that and thought that he was getting ready to throw a punch, and officers also observed him clenching his fists at a certain point, and Detective Fortes was so concerned to the point that he moved in closer to Mr. Paris in the event that Mr. Paris did strike him, he wouldn't be able to put as much force into the blow because of the close proximity, and at a certain point, the officers -- and actually Detective Dacunha -- strike that. Strike that.

Now Officer -- strike that -- Detective Cubik was able to observe as he had approached the driver of the car that Zahkuan Baily was in the rear seat and also -- behind the driver's side and that Carlos Cortes was in the rear passenger side. Detective Cubik knew the defendant from the past in past dealings and knew him to be a member of the Bloods gang. He had no knowledge of the defendant's prior criminal activity, but he was familiar with him as a member of the

Bloods.

Also, the New Bedford police had received information regarding Mr. Cortes from the Boston police youth violence strike force of some YouTube video where Mr. Cortes was observed -- it's some sort of a rap video, but in the video, he had some firearms which appeared to be real firearms to the officers, and they had observed that video, and also that he was affiliated with a gang called the 40-Blocc Gang in Fall River.

Now Mr. Paris was taken to the rear of the car by Detective Dacunha and Fortes while Detective Cubik approached the driver to conduct the motor vehicle stop, to speak with the driver. He didn't recognize the driver. It was a female. He did see the defendant and Mr. Cortes in the backseat, but the problem was the -- before he could really get into the motor vehicle stop aspect of what he was trying to do, the reason they had stopped the car, his attention was drawn back to the rear of the vehicle to assist the other two officers in dealing with Mr. Paris who was really becoming hostile, and at a certain point, they put Mr. Paris in handcuffs.

After he was in handcuffs, Detective Cubik drew his attention back on the vehicle. He did speak with Alyssa Jackson, the operator, but the officers at this point had -- they had a heightened concern about what was going on with Mr. Paris. The officers had a legitimate concern at that

point that there may be a weapon in the car because of the past dealing with Mr. Paris and his behavior on this date. And I'll get into further detail about their past dealings, but the officers had never had this type of a confrontation with Mr. Paris. In all of their dealings with him in the past, he had been not friendly but he had spoken with them, he had been cordial, and in particular with Detective Fortes who had known him for many years after having been the school resource officer, this was very different behavior from the defendant, but that coupled with the fact of that earlier gun arrest where Mr. Paris -- I'm sorry. If I was saying defendant, Mr. -- Detective Fortes. Detective Fortes is dealing with Mr. Paris, not the defendant.

The officers were concerned that Mr. Paris was trying to distract them from the vehicle, and I think legitimately based upon that earlier incident where he was walking away from the vehicle. He was subsequently charged with a firearm in that vehicle. I find that the officers had a legitimate concern that Mr. Paris was trying to distract them from the vehicle, that there may be a weapon in that vehicle, and especially with the fact that you had two other individuals in that vehicle that were known gang members and Mr. Paris was a known gang member.

So with that, feel -- being concerned for their safety and that there may be a weapon in the car, the officers removed

the driver from the vehicle. She was pat-frisked, no weapons were found.

Mr. Cortes was removed from the vehicle by Detective Dacunha. A large sum of money was found on him, but there were no weapons.

And Detective Cubik removed the defendant from the vehicle and pat-frisked him. With the defendant's hands on the vehicle roof while he pat-frisked him, he worked his way from his shoulders down, and as he pat-frisked the waist area, Detective Cubik felt the grip portion of a firearm. He gained control of the defendant's hands, cuffed him and notified the other officers.

Now as he was escorting the defendant to the cruiser, apparently Detective Cubik said, "Good thing it was -- the firearm was on him and not on the floor or else everyone in the vehicle would be getting arrested," and the defendant said, "I'm not like that. It's mine," and apparently as he was walking him to the cruiser, Cortes asked the defendant why he was getting arrested, and the defendant made the statement, "I had that blicky."

After the defendant was placed under arrest, the driver of the -- the operator of the vehicle was issued a citation for the lane change, and everyone else was allowed to leave.

And the officers -- as far as Mr. Paris, he was known to the officers as a United Front gang member and a Bloods gang

member.

The defendant, as I said earlier, was known as a Bloods gang member, and I think was a verified member prior to the stop, but after the stop I think they had conversation with him where he admitted to being a Blood member so that added a certain number of points to their verification of him being a Blood gang member, but they had verification prior to the stop as well that he was a Blood member.

And as I was saying about Detective Fortes, Paris was known to him since he was a young kid. He knew him when he was a school resource officer, always had a good rapport with Paris, Mr. Paris, and knew that Mr. Paris was associated with the West End United Front Gang, but he had -- Mr. Paris had always been respectful to him. He was aware of Paris's prior gun arrest, although he was not involved in that arrest. But on this occasion as Mr. Paris was flailing his arms, questioning why they had stopped him, walking back and forth away from the vehicle and back, and Detective Dacunha kept telling him to step back in the car, and Paris continued being loud and asking why they had stopped him, and Detective Fortes certainly thought this was uncharacteristic of how his prior dealings were with Mr. Paris. And Detective Fortes was -- also knew the defendant prior to this incident and recognized him immediately in the backseat of the car. He knew the defendant and his family had ties to the Bloods gang.

Also important to note that there was no indication that Mr. Paris was drunk or on any kind of drugs. They didn't -- officers had no indication that he was under the influence of anything causing this behavior of his that was different from their earlier dealings with him.

And again as far as that YouTube video of Mr. Cortes, it would have been within the previous month or so of this stop that they had received that information from the Youth Violence Strike Force and had seen the video, and as Detective Dacunha said, they appeared to him to be authentic firearms that were observed in the video.

Detective Dacunha recognized the defendant in the backseat from prior dealings. He knew he was a validated Bloods gang member, and he had knew he had been charged as a juvenile with a firearmed offense.

And again each -- so you have three individuals in this car, each of whom the officers have known gang affiliations with these three individuals, and each of which -- each of whom have prior involvement with firearms, and Mr. Paris acting in a behavior as though to distract the officers from that vehicle similar to his earlier incident where he was walking away from the vehicle that had a firearm in it.

It's also important to note that this -- the entire incident from the time of the -- Mr. Paris stepping out of the vehicle until the defendant was actually ordered out of the

car was all -- took place in about a minute and a half as estimated by Detective Dacunha.

And as far as the validation of the defendant as a gang member, prior to this incident, Detective Dacunha testified that he had associations with a Brent Lagoa (phonetic) who apparently is a Bloods member. They had photos of the defendant with gang members. He also on this date admitted afterwards in booking to being a member of the gang, and there were photos of him wearing red bandanas and throwing up Blood hand signs. So he was already, as I said earlier, a validated Bloods gang member prior to this incident but his admission made it that much stronger of a validation.

All right. So, with that, I do find that we had three experienced gang officers -- oh, and just as far as Detective Fortes with 18 years with the New Bedford Police Department, five years on the gang unit, very familiar with various gang members throughout the city and the gang affiliations, and Detective Roberto Dacunha, 13 years with the New Bedford Police Department with three and a half years in the gang unit. So all -- so we have three experienced gang unit officers with familiarity with the gangs and gang members in New Bedford including the defendant and the two other male occupants of the car, the passengers of the car. As I said, I find the testimony of the officers to be credible in all respects. They conducted here what would be a lawful

legitimate motor vehicle stop based on a marked lanes type violation or cutting another vehicle off, and in all likelihood, this would have simply been just a citation to the female driver and that was it.

Oh, and another fact to just point out. That I think it was Detective Dacunha testified the defendant was not walking into the restaurant. He was not walking towards the restaurant. As the vehicle was parked facing eastbound, facing directly towards the restaurant, the entrance would have been to the left side of the car, and the defendant was on the passenger side walking away from the car. He was walking away from the entrance to the restaurant. So he was not walking into the restaurant to get food during this motor vehicle stop as the officers were trying to get him to return back to the vehicle and sit in the vehicle.

Again, a legitimate motor vehicle stop. We had Mr. Paris, a known gang member with a prior gun and use of a gun and similar modus operandi, so to speak, in his walking away from a vehicle that had a gun in it and trying to distract the officers from that car -- well, on the earlier incident, I would say just trying to get away from the car. However, in this incident I think the officers have a legitimate concern that he was -- maybe that he walking away from the vehicle and causing a disturbance, trying to distract them from the vehicle and what may be in that vehicle, and the officers had

legitimate concerns. Those concerns were certainly heightened by the fact there were two other gang members known to them, including this defendant, in that vehicle in the backseat of that vehicle. This was in a high-crime area. It was 18 months since the -- Mr. Paris's earlier arrest for a firearm, but we were -- at this point, the officers in this high-crime area were within a half mile to a quarter mile of that exact area of the United Front Development and the area where Mr. Paris's earlier gun arrest had occurred.

Mr. Paris was behaving differently in his dealings with the officers, especially with Detective Fortes who he had known for many years as a school resource officer and had had a good rapport with.

Again, the defendant was -- strike that. Mr. Paris was not walking toward the restaurant but was walking away from the car and away from the entrance to the restaurant trying to distract from that vehicle. He was ignoring the officers' commands to get back in the vehicle so they could conduct their motor vehicle stop investigation. He then took that bladed stance as if to fight with the officers, clenched his fists, and again no indication that he was drunk or high. He was placed in handcuffs for the safety of the officers, clearly wasn't placed under arrest. He was allowed to go after that. He was placed in handcuffs for the safety of the officers, and again with these two other individuals that were

known gang members to the officers, they had a legitimate safety concern that there may be a firearm in that vehicle, and I find that it was a valid exit order and pat-frisk of those two individuals including the defendant.

Again, the defendant was already a validated gang member of the Bloods at that time, and they had that -- again that -- and he was known to have a prior gun as a juvenile or involvement with a gun as a juvenile. Mr. Corts -- Cortes was seen in a video with a gun. So two gang members in the car, three gang members total coming out of the car, all of whom had involvement with firearms in this high-crime area close to Mr. Paris's earlier arrest in the United Front development. So I do find -- and all of this happening really within a minute and a half or so from the time of the stop.

So I do find it was a lawful motor vehicle stop, a lawful exit order based on the legitimate concern for officer safety based on the totality of circumstances.

And I would also -- the Commonwealth cited to Commonwealth verse Elysee, and in that Appeals Court decision -- I'm just going to quote a little bit from that decision.

On page 845 Elysee is quoting Commonwealth verse Gonsalves, 429 Mass. 658. In saying: "That an exit order is justified where the police have a reasonable belief that the officer's safety, or the safety of others, is in danger," and 'reasonable belief' is shorthand for reasonable, articulable

suspicion." And that was certainly present in this case.

Also on page 845 of Elysee: "Thus, to support an order to a passenger to alight from a vehicle stopped for a traffic violation...the officer need not point to specific facts that the occupants are 'armed and dangerous.' Rather, the officer need point only to some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." And again I think those facts were present here.

And again citing from Elysee: "While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality again, totality of the circumstances they confront and must assess."

And it's important to note in Elysee as well, the individuals, Golston, Tubberville and Elysee, were all known to have previous firearm arrests, and again we have similar circumstances here with the officers having information either of an arrest or conviction, or simply having seen Mr. Cortes on a video with what appeared to be real firearms.

And it's important -- in Elysee, the Court says: "Most importantly, after the SUV was pulled over, and while the police were approaching it, they observed it rocking in a manner consistent with significant movement by the SUV's occupants."

We certainly did not have that circumstance in this case, but what I would say is significant in this case, not the same as that but significant in this case, is Mr. Paris's behavior in trying to distract the officers from the vehicle that caused that heightened awareness.

And again as a matter of Massachusetts law under Article 14: "A police officer may not, without some additional justification, extend a routine traffic stop by questioning a passenger once the driver has produced a valid license and registration."

In this case, the officers didn't get a chance to do that because of their concerns. Immediately upon the stop, Mr. Paris distracting them, trying to distract them from the vehicle as Officer -- as Detective Cubik was at the driver's side about to get that information, he had to leave that area to go and deal with Mr. Paris as he was becoming more and more combative, and then at that point, the officers had that safety concern and ordered everyone out of the vehicle and pat-frisked them for weapons before any kind of information was obtained to issue a citation, which was ultimately issued

to the operator of that vehicle.

So with all of that and for the reasons stated by -- obviously the Commonwealth had cited Elysee, based on all that, I'm going to deny the defendant's motion to suppress.

So I have two copies of the motion to suppress. I'm going to make the endorsement on the June 20th, the second copy.

MS. RIOUX: That's fine. Thank you, Your Honor.

(Pause.)

THE COURT: Oh, actually so there was -- there were statements made. So, Commonwealth, there was -- and again this was not a motion to suppress based on Miranda, and I know we're trying to get to a trial date here.

MR. SYLVIA: Right.

THE COURT: There was no indication that the officer read Miranda before he made that statement, "You know, it was a good thing it was on your person and not on the floor. If we were to have a hearing on that, I would certainly suppress that.

The Commonwealth's not intending to use that statement, are you?

MR. SYLVIA: No.

THE COURT: Okay. As far a the other statement, Mr. Cortes, that's another story, but as far as the officer -- all right. So you're not going to use that?

MR. SYLVIA: No.

THE COURT: All right. Because I certainly would have suppressed that --

MS. RIOUX: Understood, Your Honor.

THE COURT: -- on another motion to -- but in the sake of saving some time. Okay. Very good. Sorry to interrupt.

THE CLERK: Zahkuan Sweeting-Bailey on 1873CR0090, the Court denies your motion to suppress for reasons as the Court just dictated on the record. This matter will be sent over to courtroom 6 at this time for a final pretrial conference.

MS. RIOUX: Thank you.

MR. SYLVIA: Thank you.

THE COURT: Thank you.

(End of proceeding.)

98 Mass.App.Ct. 862
Appeals Court of Massachusetts,
Bristol..

COMMONWEALTH
v.
Zahkuan **SWEETING**-**BAILEY**.[1]
No. 19-P-992.
|
Argued March 13, 2020.
|
Decided December 2, 2020.

Synopsis
Background: Defendant entered a guilty plea to one count of unlawful possession of a large capacity firearm and one count of carrying a firearm without a license. After a hearing, the Superior Court Department, Bristol County, Raffi N. Yessayan, J., denied defendant's motion to suppress. Defendant appealed.

Holdings: The Appeals Court, Rubin, J., held that:

[1] officers' exit order to defendant during traffic stop was justified by legitimate safety concerns, and

[2] officers possessed reasonable suspicion that defendant was armed, and thus, patfrisk of defendant's person was justified.

Affirmed.

Maldonado, J., filed a dissenting opinion in which Shin, J., joined.

West Headnotes (9)

[1] **Criminal Law**🔑Illegally obtained evidence
Criminal Law🔑Evidence wrongfully obtained

When reviewing a ruling on a motion to suppress, the appellate court accepts the judge's subsidiary findings of fact absent clear error but conducts an independent review of his ultimate findings and conclusions of law.

[2] **Automobiles**🔑Ordering occupants out of vehicle

Exit order, ordering defendant to exit vehicle, is justified during traffic stop where police are warranted in belief that safety of the officers or others is threatened, and reasonable suspicion that an occupant or occupants of a vehicle are armed is not a necessary predicate for a valid exit order. U.S. Const. Amend. 4.

[3] **Arrest**🔑Duration of detention and extent or conduct of investigation

To determine whether police order that vehicle occupants exit stopped vehicle was justified, test is whether reasonably prudent man in officer's position would be warranted in belief that safety of police or of other persons was in danger. U.S. Const. Amend. 4.

[4] **Arrest**🔑Duration of detention and extent or conduct of investigation

It does not take much for a police officer to establish a reasonable basis to justify an exit order to occupants of stopped vehicle based on safety concerns, and, if that basis is there, a court will uphold the order as valid. U.S. Const. Amend. 4.

[5] **Automobiles**🔑Ordering occupants out of

vehicle

Police officers' order to defendant during traffic stop to exit vehicle was justified by legitimate safety concerns, where officers were directly confronted by front seat passenger who assumed a fighting stance and clenched his fists, police were outnumbered by defendant and other occupants of vehicle, and occupant of vehicle still possessed control over vehicle's movement which gave rise to reasonable fear that vehicle could be used as a weapon. U.S. Const. Amend. 4.

[6] **Arrest**Duration of detention and extent or conduct of investigation or frisk

The United States Constitution does not require officers to gamble with their personal safety, and police officers conducting a threshold inquiry may take reasonable precautions when the circumstances give rise to legitimate safety concerns. U.S. Const. Amend. 4.

[7] **Arrest**Justification for pat-down search
ArrestDuration of detention and extent or conduct of investigation

Different standards exist for exit orders, ordering defendant to get out of vehicle, and patfrisks; to justify a patfrisk, as opposed to an exit order, it is not enough for police to have a generalized safety concern, rather, police must have a reasonable suspicion based on articulable facts that the suspect is dangerous and has a weapon. U.S. Const. Amend. 4.

[8] **Arrest**Duration of detention and extent or conduct of investigation

Under the totality of circumstances, officers possessed reasonable suspicion based on articulable facts that defendant was in possession of a firearm, and thus officers' patfrisk of defendant was justified, where another occupant of vehicle, who known to police as a member of a gang who had previously been arrested for having a gun in his car, exited the vehicle and displayed combative behavior towards police supporting a reasonable suspicion that occupant was trying to distract officers from the vehicle because it contained contraband, defendant was a member of the same gang as occupant and also had history of crime involving firearm, and, thus, it was reasonable to conclude defendant might have been acting to protect fellow gang member by concealing a weapon on his person. U.S. Const. Amend. 4.

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

While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, so as to justify a patfrisk, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess. U.S. Const. Amend. 4.

****206** Firearms. Search and Seizure, Motor vehicle, Protective frisk, Reasonable suspicion, Threshold police inquiry. Constitutional Law, Reasonable suspicion, Stop and frisk. Practice, Criminal, Motion to suppress.

Indictments found and returned in the Superior Court Department on March 15, 2018.

A pretrial motion to suppress evidence was heard by Raffi N. Yessayan, J., and a conditional plea was accepted by him.

Attorneys and Law Firms

Elaine Fronhofer for the defendant.

Daniel J. Walsh, Assistant District Attorney, for the Commonwealth.
Present: Green, C.J., Vuono, Rubin, Maldonado, & Shin, JJ.[2]

Opinion

RUBIN, J.

***862** ****207** The defendant, Zahkuan Sweeting-Bailey, entered a guilty plea (conditioned on his right to pursue an appeal from the ***863** order denying his motion to suppress) to one count of unlawful possession of a large capacity firearm, in violation of G. L. c. 269, § 10 (m), and one count of carrying a firearm without a license, in violation of G. L. c. 269, 10 (a).[3] Prior to the plea, the defendant had filed and litigated a motion to suppress the firearm, alleging that both an exit order from a vehicle and a subsequent patfrisk were invalid. The motion was denied after hearing, and this appeal timely followed. We affirm.

Factual background. The following facts were found by the judge, who issued findings from the bench, supplemented where noted by facts testified to by police witnesses, all of whom were found by the judge to be "credible in all relevant respects."

The defendant was a back seat passenger in a vehicle that police validly stopped for a traffic violation. The vehicle, containing a driver, the defendant, and two other passengers, came to a stop without incident in a parking lot. Once the vehicle stopped, the front seat passenger, Raekwan Paris, known to the police to be a member of the United Front Gang in New Bedford and of the Bloods, and to have previously been arrested for having a gun in a motor vehicle, exited the car.

This was the fourth time that Paris had been involved in a police stop. On two of those occasions, Paris had been fully cooperative and no gun was recovered. On another occasion, while still being cooperative, Paris was stopped while walking away from the vehicle. A firearm (which resulted in Paris's firearm conviction) was recovered from the vehicle from which he was observed walking away.

Having exited the car, Paris immediately became "combative" with the police, questioning the reason for the stop and complaining of harassment. Paris refused several commands to return to the vehicle and at one point took a fighting stance, as if ready to punch the officers. Meanwhile, the three remaining vehicle occupants -- the driver, the defendant, and one other passenger -- remained seated. The officers made no observations of any movements, gestures, or nervousness. They pat frisked and handcuffed Paris, and ordered the other ****208** occupants to exit the vehicle. They complied without incident.

The two back seat passengers (the defendant and one other) were both known to the police. They knew the defendant also was ***864** a member of the Bloods and that he had been found delinquent as a juvenile for a firearm offense. The other back seat passenger was known by police to be a member of a gang in a neighboring city and to have been seen on a video posted to the video sharing Web site YouTube in possession of what appeared to be a genuine firearm. The officers pat frisked each of the other three car occupants, and recovered the subject firearm from the defendant's person.

[1]Discussion. "When reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotation and citation omitted). Commonwealth v. Almonor, 482 Mass. 35, 40, 120 N.E.3d 1183 (2019).

[2] [3] [4]1. Exit order. We turn first to the exit order. The standard for an exit order in Massachusetts is well settled. See Commonwealth v. Torres-Pagan, 484 Mass. 34, 38, 138 N.E.3d 1012 (2020); Commonwealth v. Barreto, 483 Mass. 716, 722, 136 N.E.3d 697 (2019). The Supreme Judicial Court has made it clear that reasonable suspicion that an occupant or occupants of a vehicle are armed is not a necessary predicate for a valid exit order. Torres-Pagan, supra at 38-39, 138 N.E.3d 1012. Rather, an exit order is valid when, among other reasons, "police are warranted in the belief that the safety of the officers or others is threatened." Id. at 38, 138 N.E.3d 1012. When reviewing an exit order, "we ask 'whether a reasonably prudent [person] in the [officer's] position would be warranted in the belief that the safety of the police or that of other persons was in danger.' " Commonwealth v. Santana, 420 Mass. 205, 212-213, 649 N.E.2d 717 (1995), quoting Commonwealth v. Almeida, 373 Mass. 266, 271, 366 N.E.2d 756 (1977). "[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order ... based on safety concerns, and, if the basis is there, a court will uphold the order." Commonwealth v. Gonsalves, 429 Mass. 658, 664, 711 N.E.2d 108 (1999).

[5] [6]Here, we have little doubt that Paris's combative behavior and threatening stance with the police raised such safety concerns. Paris directly confronted the

officers and assumed a fighting stance with clenched fists -- which reasonably suggested that Paris was going to "throw a punch." The officers were also slightly outnumbered. See, e.g., Commonwealth v. Feyenord, 445 Mass. 72, 76, 833 N.E.2d 590 (2005) (exit order justified partly because occupants outnumbered officer). There were three police officers and, including Paris, four vehicle occupants -- one of whom still possessed control over the vehicle's movement. See Torres-Pagan, 484 Mass. at 37 n.4, 138 N.E.3d 1012 ***865** (reasonable fear that vehicle could be used as weapon will justify exit order). "[P]olice officers conducting a threshold inquiry may take reasonable precautions ... when the circumstances give rise to legitimate safety concerns." Commonwealth v. Haskell, 438 Mass. 790, 794, 784 N.E.2d 625 (2003). "The [United States] Constitution does not require officers 'to gamble with their personal safety' " (citation omitted). Id. Accordingly, on all the facts and circumstances, we conclude the exit order was appropriate.

[7]2. Patfrisk. To justify a patfrisk, "an officer needs more than safety concerns." Torres-Pagan, 484 Mass. at 37, 138 N.E.3d 1012. The standard is more stringent. ****209** See id. at 39, 138 N.E.3d 1012 ("Having different standards for exit orders and patfrisks makes logical sense. ... [A]n exit order is considerably less intrusive than a patfrisk"). It is not enough for police to have a generalized safety concern. See id. at 38, 138 N.E.3d 1012 ("A lawful patfrisk, however, requires more"). Rather, to justify a patfrisk, police must have a "reasonable suspicion" based on articulable facts, "that the suspect is dangerous and has a weapon." Id. at 39, 138 N.E.3d 1012.[4]

[8]We think the patfrisk was justified under this standard. In all the previous police encounters with Paris, he had been cooperative. Indeed, in a previous motor vehicle stop that had led to Paris's arrest for possession of a firearm found in the vehicle, Paris had gotten out of the car and started to walk away, but was cooperative when ordered back to the car. On this day, though, Paris got out of the vehicle, was combative, would not obey orders to return to the vehicle, behaved in a frenetic manner, and would not calm down.

[9]As the judge found, particularly after the police pat frisked Paris and found nothing, it was reasonable for the officers to ***866** believe –- though not by any means with certainty –- that Paris was trying to distract the officers from the vehicle because it contained contraband, specifically, given the history of all the passengers, a firearm. In particular, the facts and circumstances supported reasonable suspicion that a firearm would be found in the car, either loose, or on the person of Paris's fellow Bloods member, the defendant, a passenger previously adjudicated delinquent for an offense involving use of a firearm. (Given the posture of the case, whether there was a basis for a reasonable belief a firearm might have been found on the person of the other back seat passenger or the driver is not before us.) "While gang membership alone does not provide reasonable suspicion that an individual is a threat to the safety of an officer or another, the police are not required to blind themselves to the significance of either gang membership or the circumstances in which they encounter gang members, which are all part of the totality of the circumstances they confront and must assess." Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841, 934 N.E.2d 837 (2010). It is reasonable to think that a gang member might act to protect a fellow gang member from arrest and thus, given the circumstances known to the police, it was reasonable to suspect that the item from which Paris was trying to distract the police could be found not only in the car, but on the defendant's person.

Although our dissenting colleagues state that "we cannot view the defendant's actions in isolation from Paris's behavior," their analysis essentially ignores that behavior. ****210** The dissent asserts that the defendant's "mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him," and that "the defendant did exactly what is asked of those stopped by police[, sitting] calmly and compl[ying] with police instructions." Post at 869, 159 N.E.3d at 211-12.

Those statements are true, but they do not address all the circumstances here. The question is whether there was reasonable suspicion based on articulable facts that the defendant, sitting in the car, was in possession of a firearm. Given the defendant's membership in the same gang as Paris, and the defendant's own history of crime involving a firearm, in light of Paris's conduct and history, there was. And, because our determination necessarily rests on Paris's unusual and combative behavior, his history, and his relationship with the defendant, our decision does not, as the dissent suggests, "exclude gang members with any prior firearm involvement from the reasonable suspicion requirement ***867** established by Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and its progeny." Post at 870, 159 N.E.3d at 212.

Because, taken together, all the facts and circumstances here supported a reasonable belief based on articulable facts that the defendant was armed and dangerous, the motion to suppress was properly denied.

Order denying motion to suppress affirmed.

MALDONADO, J. (dissenting, with whom Shin, J., joins).

I respectfully dissent because I do not believe that we can impute, from a gang member's uncharacteristic behavior during a motor vehicle stop, reasonable suspicion to believe that a fellow gang member, who did nothing more than sit calmly and quietly and cooperate with police, was armed and dangerous.

In Commonwealth v. Torres-Pagan, 484 Mass. 34, 39, 138 N.E.3d 1012 (2020), the Supreme Judicial Court made clear that, while concern for officer safety is sufficient to justify an exit order, "[a] lawful pat frisk ... requires more." Id. at 38, 138 N.E.3d 1012. The court reasoned that, "[h]aving different standards for exit orders and patfrisks makes logical sense" because "an exit order is considerably less intrusive than a patfrisk" (quotation omitted). Id. at 39, 138 N.E.3d 1012. Thus, to justify a patfrisk, police must have a "reasonable suspicion that the suspect is dangerous and has a weapon." Id.

Without the benefit of Torres-Pagan, the judge concluded that both the exit order to, and the patfrisk of, the defendant were lawful because Paris's conduct raised legitimate safety concerns. The judge based his determination on the officers' belief that Paris's behavior gave rise to an inference that he was distracting police from discovering a weapon in the car. While I believe that inference is attenuated, I do not dispute that Paris's combative behavior, in the circumstances, sufficiently justified an exit order. But I do not agree that such uncharacteristic behavior gave rise to a reasonable suspicion of there being a gun in the car or on the person of the defendant, and the judge did not so find.[1]

***868** ****211** The majority, pointing to nothing the defendant said or did in the course of the motor vehicle stop that evening, but based on his association with Paris as a member of the Bloods, a three year old juvenile delinquency finding on a firearm offense, and Paris's combative behavior, concludes that the patfrisk of the defendant was justified. Although we cannot view the defendant's actions in isolation from Paris's behavior, the defendant's mere presence in the same car as Paris, however, was insufficient to justify a patfrisk of him (the defendant). Cf. Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979) ("person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person"); United States v. Di Re, 332 U.S. 581, 587, 68 S.Ct. 222, 92 L.Ed. 210 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"). Likewise, that the defendant was a known gang member in the company of another gang member, and was adjudicated delinquent as a juvenile on a firearm offense several years earlier, were also insufficient to justify his patfrisk. See Commonwealth v. Pierre P., 53 Mass. App. Ct. 215, 216, 217, 757 N.E.2d 1131 (2001) (high crime area and fact that some individuals were gang affiliated did not justify patfrisk). Cf. Commonwealth v. Cordero, 477 Mass. 237, 246, 74 N.E.3d 1282 (2017) ("the defendant's prior convictions, without further specific and articulable facts indicating that criminal activity was afoot, could not create reasonable suspicion").

Concluding otherwise, the majority relies, as did the judge, on Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841, 934 N.E.2d 837 (2010), for the proposition that gang membership can be considered as part of the totality of the circumstances in a reasonable suspicion inquiry. I do not quarrel with that general proposition; however, Elysee concerned the validity of an exit order, and the judge here relied on it for that precise purpose. With jurisprudential guidance, the judge understandably equated the justification necessary for the exit order with the justification required for the patfrisk. See Torres-Pagan, 484 Mass. at 38, 138 N.E.3d 1012 ("we mistakenly have described ***869** a patfrisk as being constitutionally justified when an officer reasonably fears for his own safety" [quotation and citation omitted]).

We now know, however, that a reasonable fear of officer safety is not enough to justify the greater personal intrusion of a patfrisk. See Torres-Pagan, 484 Mass. at 39, 138 N.E.3d 1012 ("a patfrisk ... is a severe ... intrusion upon cherished personal security" [quotation and citation omitted]). With this distinction clarified, therefore, the inquiry before us is whether the patfrisk was independently supported by a reasonable suspicion to believe the defendant was armed and dangerous. Id. Nothing the defendant said or did supports such a conclusion, and any reliance on Elysee in support of a contrary view is misplaced.

Putting aside that Elysee did not involve the validity of a patfrisk, it is also factually distinguishable because there, police had observed the occupants engage in movements consistent with the concealment ****212** of a weapon. See Elysee, 77 Mass. App. Ct. at 842, 934 N.E.2d 837. Conversely, no such similar observations were made of the driver or the back seat passengers here. Rather, in this

case, the defendant exhibited no suspicious behavior in the course of the stop. He did not make any furtive gestures from which to infer that he concealed a weapon. See Commonwealth v. Villagran, 477 Mass. 711, 718, 81 N.E.3d 310 (2017) (no "reasonable belief that the defendant was armed and dangerous where the defendant was compliant and did not make any furtive gestures or reach into his pockets in a manner that would suggest that he was carrying a weapon"). He did not bend down or make any movements from which to infer that he was attempting to reach for a weapon. See Torres-Pagan, 484 Mass. at 40, 138 N.E.3d 1012 (patfrisk not justified where defendant made no movements suggesting he was armed and dangerous). He did not display any signs of nervousness. Cf. Commonwealth v. Brown, 75 Mass. App. Ct. 528, 533, 915 N.E.2d 252 (2009) ("Suppression is appropriately denied where, in addition to the defendant's nervous appearance, other factors exist, including in particular police observation of a furtive gesture"). And the defendant did not engage in any verbal or nonverbal communication with Paris from which to infer that he jointly possessed a weapon with Paris.

In short, the defendant did exactly what is asked of those stopped by police. He sat calmly and complied with police instructions. While acknowledging these facts, the majority surmises that a gang member might act to protect a fellow gang ***870** member and so it is reasonable to suspect that Paris's behavior and complaints of harassment were designed to distract the police from a firearm that was on the person of the defendant, specifically. This is too great an inferential leap, and it is neither supported by the testimony or the judge's findings, nor argued by the Commonwealth. Indeed, the officers also pat frisked the female driver, who had no known gang affiliation or prior weapons involvement.

In the absence, therefore, of any evidence that the defendant engaged in suspicious behavior or activity, his past firearm involvement as a juvenile and gang association with Paris did not alone create a reasonable suspicion that the defendant was armed and dangerous.[2] To hold otherwise would, in effect, exclude gang members with any prior firearm involvement from the reasonable suspicion requirement established by Terry v. Ohio, 392 Mass. 1, 30, 464 N.E.2d 1356 (1984), and its progeny.

All Citations

98 Mass.App.Ct. 862, 159 N.E.3d 205

Footnotes

1 In conformity with our custom, we spell the defendant's name as it appears in the indictments.

2 This case was initially heard by a panel comprised of Justices Rubin, Maldonado, and Shin. After circulation of a majority and a dissenting opinion to the other justices of the Appeals Court, the panel was expanded to include Chief Justice Green and Justice Vuono. See Sciaba Constr. Corp. v. Boston, 35 Mass. App. Ct. 181, 181 n.2, 617 N.E.2d 1023 (1993).

3 In addition, nolle prosequis were entered on charges of unlawful possession of a large capacity firearm, see G. L. c. 269, § 10 (m), and carrying a loaded firearm without a license, see G. L. c. 269, § 10 (n).

4 The dissent states that the judge conflated the test for an exit order and the test for a patfrisk. Post at 868, 159 N.E.3d at 211. Although, because our application of the law to the facts is de novo, this is ultimately irrelevant, the judge's conclusions of law, issued from the bench, are not clear on the point. The judge found that there was reasonable suspicion that there was a firearm in the car and, before finding the patfrisk justified, he repeatedly referred to the firearm history of both the defendant and the other back seat passenger. Torres-Pagan, released after the within motion was decided, did not announce anything new; that a patfrisk is justified only where there is reasonable suspicion that an individual is armed and dangerous was a central holding in Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and has been repeated often by our appellate courts throughout the years since then. See, e.g., Commonwealth v. Narcisse, 457 Mass. 1, 7, 927 N.E.2d 439 (2010). In the fifty-two years since Terry, a mere fear for officer safety, see post at 869, 159 N.E.3d at 211-12, has never been enough to support a patfrisk of an individual's person. Torres-Pagan merely made clear that some loose language on the matter in prior opinions had not altered that.

1 It is clear from the judge's decision that the only conclusion he drew from Paris's actions was that they created sufficient officer safety concerns to justify the minimal intrusion of an exit order. Then, without the benefit of Torres-Pagan, the judge assumed that the same concerns validated the patfrisk. The judge did not conclude that Paris's actions gave rise to a reasonable suspicion to search the vehicle for weapons, and the Commonwealth does not so argue on appeal. Nor would such an argument be

tenable. See Torres-Pagan, 484 Mass. at 40, 138 N.E.3d 1012 ("surprise in response to unexpected behavior is not the same as suspicion"). In any event, any reasonable suspicion to search the car would not have automatically extended to the defendant's person. "A person is not a container" for purposes of an automobile search. Commonwealth v. Griffin, 79 Mass. App. Ct. 124, 128, 944 N.E.2d 595 (2011), citing Wyoming v. Houghton, 526 U.S. 295, 308, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (Breyer, J., concurring).

2 We recognize that "[t]he subjective intentions of police are irrelevant so long as their actions were objectively reasonable." Commonwealth v. Cruz, 459 Mass. 459, 462 n.7, 945 N.E.2d 899 (2011). Nevertheless, it is worth noting that all three officers indicated that, but for Paris's actions, they would not have even removed the defendant from the vehicle. Thus, based on the defendant's actions alone, even multiple police officers did not suspect that he was armed and dangerous.

STATUTORY ADDENDUM

U.S. CONST., Amend IV

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.

MASS. DECL. OF RIGHTS, art. 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, Elaine Fronhofer, hereby certify pursuant to Mass. R. App. P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including those required by Mass. R. App. P. 16(a)(1)-(8), 16(d)-(h), 18 & 20. The font used for the main body of text is proportionally spaced Baskerville size14 point. The number of non-excluded words is 7,338. The word-processing program used is Word, version 12.3.6.

/s/ Elaine Fronhofer___
Elaine Fronhofer

CERTIFICATE OF SERVICE

I, Elaine Fronhofer, hereby certify that I have this day served a copy of this brief and appendix on counsel for the appellant, ADA David Mark, by electronic service to david.b.mark@state.ma.us.

/s/ Elaine Fronhofer___
Elaine Fronhofer

Dated: April 20, 2021