SJC-12697

COMMONWEALTH vs. MANUEL TORRES-PAGAN.

Hampden. September 6, 2019. - January 29, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Firearms. Constitutional Law, Stop and frisk, Reasonable suspicion. Search and Seizure, Protective frisk, Reasonable suspicion. Practice, Criminal, Motion to suppress.

Complaints received and sworn to in the Springfield Division of the District Court Department on May 4 and 12, 2017.

A pretrial motion to suppress evidence was heard by William P. Hadley, J.

An application for leave to prosecute an interlocutory appeal was allowed by Lowy, J., in the Supreme Judicial Court for the county of Suffolk, and the case was transferred by him to the Appeals Court. After review by that court, the Supreme Judicial Court granted leave to obtain further appellate review.

Benjamin Shorey, Assistant District Attorney, for the Commonwealth.

Claire Alexis Ward for the defendant.

The following submitted briefs for amici curiae:

David Rassoul Rangaviz & Rebecca Kiley for Committee for Public Counsel Services.

Christopher DeMayo for Sharon Brockington.

BUDD, J. The defendant, Manuel Torres-Pagan, was charged with multiple crimes after a warrantless search of his motor vehicle. The defendant filed a motion to suppress, contending that the evidence was discovered after the police conducted an unlawful patfrisk. A judge in the Springfield Division of the District Court Department granted the defendant's motion, and the Commonwealth filed an interlocutory appeal. The Appeals Court reversed the order of the motion judge in an unpublished memorandum and order pursuant to its rule 1:28. Commonwealth v. Torres-Pagan, 93 Mass. App. Ct. 1123 (2018). We granted the defendant's application for further appellate review, and we conclude that the patfrisk was improper, as was the search of the defendant's motor vehicle, which was based on the results of the improper patfrisk. We therefore affirm the order of the motion judge allowing the defendant's motion to suppress.[1]

Background. We present the facts as found by the motion judge, supplemented by uncontroverted facts from the record that have been "explicitly or implicitly credited" by the motion judge, reserving certain details for discussion (citation omitted). Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015).

[1] We acknowledge the amicus briefs submitted by the Committee for Public Counsel Services and Sharon Brockington.

While on patrol one early evening in the spring of 2017, two officers observed a motor vehicle with a cracked windshield and an inspection sticker that had expired. The officers followed the vehicle for a short period of time, then activated the blue lights on their cruiser. After driving a short distance, the vehicle, which was being driven by the defendant, pulled into a residential driveway.

The officers got out of their cruiser and approached the vehicle. As they did so, the defendant got out of his vehicle and stood between the open door and the front seat, facing the officers. He then turned to look inside the vehicle on more than one occasion.[2] One of the officers ordered the defendant to stay where he was; the defendant complied.

The officers placed the defendant in handcuffs and conducted a pat frisk of his person. When a knife was found in the defendant's pants pocket, the defendant was asked if he had other weapons in his vehicle. The defendant indicated that he

[2] According to the motion judge's findings, the defendant looked into his vehicle after being ordered to stay where he was by one of the officers; however, the testifying officer indicated that the defendant looked into his vehicle before being addressed by the officer. This point was conceded by the Commonwealth at oral argument. In the absence of any conflict in the record, the motion judge's findings regarding this portion of the sequence of events is clear error. See Commonwealth v. Motta, 424 Mass. 117, 121 (1997), citing Commonwealth v. Bakoian, 412 Mass. 295, 297 (1992).

did, and the officers subsequently seized a firearm from the floor in front of the driver's seat.

Discussion. As an initial matter, we note that, because the defendant was driving a vehicle that had a cracked windshield and an inspection sticker that had expired, the stop was lawful. Commonwealth v. Santana, 420 Mass. 205, 207 (1995), quoting Commonwealth v. Bacon, 381 Mass. 642, 644 (1980) ("Where the police have observed a traffic violation, they are warranted in stopping a vehicle"). As the defendant does not contest the legality of the stop, and because he appears to have gotten out of the vehicle on his own initiative rather than in response to an order from the officer, the sole question is whether the ensuing patfrisk was permissible.

The Commonwealth contends that, given the circumstances of this case, chiefly the fact that the defendant alighted from his vehicle without being instructed to do so, the patfrisk of the defendant was justified. We disagree.

1. Standard. Both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights protect against unreasonable searches and seizures. A frisk, or "patfrisk," is a "carefully limited search of the outer clothing of [a] person[] . . . to discover weapons" for safety purposes. Terry v. Ohio, 392 U.S. 1, 30 (1968). It is a "serious intrusion on the sanctity of the person [that] is not

to be undertaken lightly." Commonwealth v. Almeida, 373 Mass. 266, 270-271 (1977), S.C., 381 Mass. 420 (1980), citing Terry, supra at 17.

During a stop for which there is constitutional justification, see Commonwealth v. Narcisse, 457 Mass. 1, 6-7 (2010), a patfrisk is permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous.[3] Arizona v. Johnson, 555 U.S. 323, 326-327 (2009). Terry, 392 U.S. at 27. The protection provided by the Massachusetts Declaration of Rights is coextensive with that of the United States Constitution in this regard. See Commonwealth v. Wilson,

[3] We have used the phrase "reasonable suspicion" interchangeably with "reasonable belief" in connection with the patfrisk standard. See Narcisse, 457 Mass. at 9, where we stated that "police officers may not escalate a consensual encounter into a protective frisk absent a reasonable suspicion that an individual has committed, is committing, or is about to commit a criminal offense and is armed and dangerous," and that "a reasonable belief that an individual has a weapon and appears inclined to use it acts to satisfy both prongs of the Terry analysis" (emphasis added). We acknowledge that the two standards are interrelated and perhaps even interchangeable. See Terry, 392 U.S. at 27 ("there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual"). See also Arizona v. Johnson, 555 U.S. 323, 327 (2009) ("To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous"). However, to be consistent, we clarify today that "reasonable suspicion" that a suspect is armed and dangerous is the preferred patfrisk standard. See id. at 326-327.

441 Mass. 390, 396 n.6 (2004), citing Commonwealth v. Fraser, 410 Mass. 541, 543 n.3 (1991).

Our articulation of the patfrisk standard has not always been clear. On occasion we have not been as precise with our language as we could have been, specifically when discussing the patfrisk standard as it relates to the standard for exit orders. For example, we stated in Commonwealth v. Washington, 449 Mass. 476, 482 (2007), that "under our State Constitution, neither an exit order nor a patfrisk can be justified unless a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger" (quotations and citation omitted). More recently, in Commonwealth v. Amado, 474 Mass. 147, 152 (2016), we observed that "[w]here an officer has issued an exit order based on safety concerns, the officer may conduct a reasonable search for weapons in the absence of probable cause to arrest." Both are technically correct statements of the law: it is true that a patfrisk is not justified unless an officer has safety concerns and that a patfrisk may be conducted in the absence of probable cause. However, in neither of the above cases did we specify that, to justify a patfrisk, an officer needs more than safety concerns; he or she also must have a reasonable suspicion that the suspect is armed and dangerous. Although an officer's concern for his or her safety and the safety of others animates

both standards, the officer's safety concern in an exit order context may be resolved once the suspect leaves her vehicle.[4] See id. at 151-152; Commonwealth v. Gomes, 453 Mass. 506, 512 (2009). Without a more particularized fear that the suspect is presently armed and dangerous, the officer cannot take the more intrusive step of pat frisking the suspect. Terry, 392 U.S. at 24-25.

Although for the most part we have articulated the patfrisk standard correctly, see, e.g., Commonwealth v. Villagran, 477 Mass. 711, 717 (2017), and Narcisse, 457 Mass. at 7, in isolated instances we have conflated the standard required to perform a patfrisk with the standard required for issuing an exit order. For example, we have stated, inaccurately, that the standard for a patfrisk is the same as that which is required to justify an exit order. See Commonwealth v. Torres, 433 Mass. 669, 676 (2001). In addition, we mistakenly have described a patfrisk as being "constitutionally justified when an officer reasonably

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[4] If, for example, the officer fears that the suspect may use her vehicle as a weapon, the officer may order the suspect out of that vehicle. See Commonwealth v. Papadinis, 23 Mass. App. Ct. 570, 571 (1987), S.C., 402 Mass. 73 (1988) (police officer killed after being dragged by vehicle during traffic stop). See also Commonwealth v. Douglas, 472 Mass. 439, 442 (2015) (passenger placed vehicle in drive during traffic stop). Once the officer has done so, that safety concern has been defused. The officer's concern that the suspect may use the vehicle as a weapon does not necessarily create a concern that the suspect is both armed and dangerous.

fears for his own safety or the safety of the public . . . or when the police officer reasonably believes that the individual is armed and dangerous" [emphasis added]). Commonwealth v. Johnson, 454 Mass. 159, 162 (2009), quoting Commonwealth v. Isaiah I., 450 Mass. 818, 824 (2008).[5]

We acknowledge that these differing articulations of the patfrisk standard may have caused confusion. However, we never have strayed intentionally from the armed and dangerous standard as articulated in Terry.[6] Accordingly, we clarify today that an exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds. See Amado, 474 Mass. at 151-152.

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[5] We are not aware of other instances in which we have merged the two standards. Further, we do not suggest that the cases in which we inaccurately stated the patfrisk standard were incorrectly decided.

[6] In Commonwealth v. Gonsalves, 429 Mass. 658, 666 (1999), we acknowledged that "[u]nder Terry, a police officer is permitted to pat frisk a person stopped under suspicion of criminal activity where the police officer has reason to believe he is dealing with an armed and dangerous individual." See Gomes, 453 Mass. at 512; Commonwealth v. DePeiza, 449 Mass. 367, 374 (2007); Wilson, 441 Mass. at 394. A decade later we noted that the Supreme Court reaffirmed that standard in Johnson, 555 U.S. at 326-327. Narcisse, 457 Mass. at 7, quoting Johnson, supra ("to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous"). See Villagran, 477 Mass. at 717; Commonwealth v. Martin, 457 Mass. 14, 19 (2010).

Thus, in the absence of reasonable suspicion of a crime or justification to search the vehicle on other grounds, an exit order is justified during a traffic stop if officers have a reasonable suspicion of a threat to safety. A lawful patfrisk, however, requires more; that is, police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous. See Martin, 457 Mass. at 19.

Having different standards for exit orders and patfrisks makes logical sense. To be sure, issuing an order to a motorist to get out of his or her vehicle during a traffic stop is an imposition that cannot be considered minimal. See Commonwealth v. Cruz, 459 Mass. 459, 469 n.16 (2011); Commonwealth v. Gonsalves, 429 Mass. 658, 663 (1999). However, an exit order is considerably less intrusive than a patfrisk, which is a "severe . . . intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience." Terry, 392 U.S. at 24-25. The only legitimate reason for an officer to subject a suspect to a patfrisk is to determine whether he or she has concealed weapons on his or her person. See Commonwealth v. Silva, 366 Mass. 402, 407-408 (1974), quoting Terry, supra at 29. We therefore do not allow such an intrusion absent reasonable suspicion that the suspect is dangerous and has a weapon. Without a basis for such

suspicion, there is no justification for the patfrisk. Terry, supra at 27.

2. Application. The Commonwealth contends that the officers had reasonable suspicion that the defendant was armed and dangerous in the circumstances presented, principally because the defendant got out of his vehicle unprompted by police; thus, the patfrisk was justified. We disagree.

As recounted supra, after pulling into a driveway, the defendant got out of his vehicle and turned to face the approaching officers. As they neared, the defendant, whose hands and body were in full view of the officers, turned to look into the front seat area of his vehicle multiple times. When the police told him not to move, he obeyed the order.

We begin by noting that the Commonwealth characterizes the defendant's movements as "furtive" even though the motion judge rejected this notion in his memorandum of decision allowing the motion to suppress. Furtive is defined as "done by stealth" or "secret." Webster's Third New International Dictionary 924 (1963). Here, the defendant faced the two officers, neither of whom observed any weapons on his person. Contrast Fraser, 410 Mass. at 545 (patfrisk justified by, among other factors, fact that "at all critical times the defendant kept his hands in his pockets"). He was not secreting anything, nor was he attempting to reach for anything. See Commonwealth v. Goewey, 452 Mass.

399, 407 (2008) (patfrisk justified during routine traffic stop where, in addition to other factors, defendant appeared to "hide or retrieve something"); Commonwealth v. Stampley, 437 Mass. 323, 327 (2002) (patfrisk justified during routine traffic stop where officer "observed the defendant pull his arms into the vehicle and lean forward, a motion consistent with reaching to the floor or under the seat"). Although furtive movements may be considered in analyzing whether a patfrisk is justified, see, e.g., Commonwealth v. DePeiza, 449 Mass. 367, 372 (2007), getting out of a motor vehicle in full view of approaching officers can hardly be considered "furtive."

Although not furtive, we acknowledge that the police may have found the defendant's behavior unexpected. Nevertheless, surprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous. Stampley, 437 Mass. at 326 (defendant's initial behavior during routine traffic stop, although "peculiar" and "unusual," was not threatening). Contrast DePeiza, 449 Mass. at 371, 374 (patfrisk justified where, among other factors, defendant walked with his "right arm held stiff and straight against his body," suggesting that he carried firearm). The degree of police intrusion must be proportional to the articulable risk to officer safety. Compare Commonwealth v. Edwards, 476 Mass. 341, 348 (2017), with Gomes, 453 Mass. at 513-514. Here, the defendant's actions,

without more, did not justify a patfrisk because they did not establish reasonable suspicion that the defendant was armed and dangerous. See Commonwealth v. Torres, 424 Mass. 153, 158-159 (1997) (fact that defendant alighted from vehicle during routine traffic stop was "insufficient to support the [defendant's] continued detention"); Commonwealth v. Brown, 75 Mass. App. Ct. 528, 532 (2009) (several innocuous observations together do not create reasonable suspicion that suspect is armed and dangerous). Contrast Stampley, supra at 327 (collecting cases recognizing that "gestures . . . suggestive of the occupant's retrieving or concealing an object . . . raise legitimate safety concerns to an officer conducting a traffic stop").

The fact that the defendant turned to look into the front seat of his vehicle more than once after he got out adds little if anything to the analysis.[7] At most, such action would suggest that the defendant had something of interest in his vehicle, not that he had a weapon on his person. See Wilson, 441 Mass. at 396, citing Terry, 392 U.S. at 29-30 (patfrisks must be

[7] The Commonwealth argued in its initial brief that the defendant repeatedly turned back toward the vehicle after he was ordered not to move, which suggested that the defendant, having ignored the officer's commands, might have attempted to retrieve a weapon, to use the vehicle as a weapon, or to flee. However, as mentioned, see note 2, supra, the Commonwealth conceded at oral argument that the defendant turned to look into the vehicle before being addressed by police. There was no evidence that the defendant failed to comply with police instructions.

"confined to what is minimally necessary to learn whether the suspect is armed and to disarm him should weapons be discovered").

The Commonwealth also contends that the fact that the events rapidly unfolded should factor into the reasonable suspicion analysis. See, e.g., Commonwealth v. Vazquez, 74 Mass. App. Ct. 920, 923 (2009) ("During an investigation, unfolding events are often interconnected and dynamic, requiring facts to be considered in totality when determining reasonable suspicion"). However, as we have explained, the defendant's actions did not indicate that he was armed and dangerous. He made no furtive movements; he already had gotten out of his vehicle and could not use it as a weapon; his body was fully visible to the officers; he was fully compliant with all commands issued by the officers; and he was outnumbered. Thus, the fact that the events, such as they were, unfolded quickly does not create a reasonable suspicion that the defendant was armed and dangerous.

Finally, the Commonwealth briefly mentions the characteristics of the area in which the stop took place. At the suppression hearing, an officer testified regarding numerous reports of shots fired, individuals being shot, and gang activity as well as arrests, including for violent crimes, in the vicinity of three specific streets in Springfield within a

week of the defendant's arrest. Thus, the motion judge was provided with information that had a direct connection with the specific location and activity being investigated. See United States v. Wright, 485 F.3d 45, 53-54 (1st Cir. 2007) (laying out three-factor test for high crime areas requiring nexus between crime suspected and type of crime prevalent in area; geographic boundaries to high crime area; and temporal proximity between crime suspected and heightened criminal activity). See also Ferguson & Bernache, The 'High-Crime Area' Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis, 57 Am. U. L. Rev. 1587, 1631-1635 (2008) (arguing that high crime areas should be delineated by "set boundaries" and should rely on current rather than historic crime rates); Grunwald & Fagan, The End of Intuition-Based High-Crime Areas, 107 Cal. L. Rev. 345, 350-352, 367-370 (2019) (arguing that high crime area factor has invited misuse and potential abuse, particularly when defining specific geographic boundaries of area).

Based on the information with which the judge was provided, he found that the stop and patfrisk occurred in a "high crime neighborhood." Given the other circumstances presented, however, the judge ultimately concluded that the "high crime" factor did not carry the day with regard to whether the defendant was armed and dangerous. We agree. See Commonwealth

v. Meneus, 476 Mass. 231, 238 (2017) ("we look beyond the term 'high crime area' to determine whether the inferences fairly drawn from that characterization demonstrat[e] the reasonableness of the intrusion" [quotations and citation omitted]); Jones-Pannell, 472 Mass. at 435 ("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").

Conclusion. Although the defendant properly was stopped for motor vehicle violations, the subsequent patfrisk of his person and search of his vehicle were unconstitutional.

Order allowing motion to suppress affirmed.