18-P-1440 Appeals Court

COMMONWEALTH vs. JAMAL CHIN-CLARKE.

No. 18-P-1440.

Suffolk. December 12, 2019. - June 9, 2020.

Present: Meade, Shin, & Singh, JJ.

Receiving Stolen Goods. Constitutional Law, Search and seizure, Reasonable suspicion, Investigatory stop. Search and Seizure, Reasonable suspicion, Threshold police inquiry. Threshold Police Inquiry. Practice, Criminal, Motion to suppress.

Indictments found and returned in the Superior Court Department on April 12, 2017.

A pretrial motion to suppress evidence was heard by Diane C. Freniere, J.

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

Alyssa Hackett, Committee for Public Counsel Services (Patrick Levin, Committee for Public Counsel Services, also present) for the defendant.

Amanda Cascione, Assistant District Attorney, for the Commonwealth.

SHIN, J. The defendant appeals from an order denying his motion to suppress evidence obtained following a stop and frisk of his person. The stop occurred after Boston Police Officer Michael McHugh observed the defendant on a city sidewalk with a man holding a bag of what looked like new clothes, which McHugh suspected were stolen. Because we conclude that McHugh did not have reasonable suspicion of criminal activity to justify the stop, we reverse.

Background. The motion judge's factual findings are unchallenged on appeal. We supplement those findings with facts drawn from McHugh's testimony, which the judge expressly credited, see Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015), and from our independent observations of the surveillance video entered as an exhibit at the hearing, see Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018).

On the morning of January 27, 2017, McHugh was on a "plain-clothes, walking beat" in the area of Boylston Street between Washington and Tremont Streets in downtown Boston. This area "is dominated by commercial properties and has heavy pedestrian foot traffic" and, by McHugh's description, is high in crime in that it is "frequented by a lot of people who sell and buy drugs, people who have drug problems, and that causes other problems. There's larcenies and robberies, shoplifting, assaults, public intoxication, trespassing . . . that kind of

thing." McHugh had previously seen people selling or trading stolen items on the street and had made several arrests in the area for shoplifting. "[T]hings that [he] . . . look[s] for" as indicative of shoplifting are "numerous kind[s] of odd items in a bag," items "with the tags still on them," and "bag[s] that might not be associated with the store that things were purchased from."

Around 9:20 A.M., McHugh was near St. Francis House, a daytime shelter that provides services to homeless people, including help with drug addiction, social services, meals, and clothing.[1] By the front door were three men, not known to McHugh, "looking in a plastic shopping bag and talking to each other." As McHugh drew closer, he saw "that there was some clothing in the bag, and some of it was outside of the bag and it had the tags."

McHugh heard one of the men -- he could not recall who -- say, "[H]ow much is this?" He also saw one man, later identified as Milton Noj, hold up some merchandise, an item of clothing. McHugh saw no security devices attached to any of the items in the bag, and he could not recall what store name was on

[1] McHugh had made "hundreds of arrests around [St. Francis House] for things ranging from stabbings to drug trafficking, drug dealing, drug possession, warrant arrests, . . . [t]respassing, malicious destruction of property, that kind of thing."

the tags or on the bag. He was also unaware of any reports of shoplifting in the area that day.

Nonetheless, suspecting that "some commerce was going on," McHugh walked up to the men and asked, "[W]hat's up guys. Is that stuff stolen?" Noj appeared startled, said, "[W]hoa," and backed up. McHugh identified himself as a police officer and told the third man to leave.[2] Responding to McHugh, Noj initially stated that he had purchased the items in the bag at the Natick Mall. When McHugh asked for receipts, Noj stated he did not have any and that his mother gave him the items.

While McHugh was talking to Noj, he noticed that the defendant had his hands in his pockets and was looking up and down the street. McHugh told the defendant to remove his hands from his pockets and to "stand over there" against the exterior wall of St. Francis House. The defendant complied. He also showed McHugh the inside of the bag he was carrying.

Turning his attention back to Noj, McHugh asked for his name and date of birth and entered the information into an "iPad" tablet computer that he carried while working to "access a couple of different applications that are helpful, mostly the Criminal Justice Information System." Upon verifying Noj's

[2] McHugh testified that he did so in part because "that's too many people to have with me."

identity,[3] McHugh told him to stand facing the wall and "to stay standing like he was." Noj complied, standing a few feet away from the defendant with his face inches from the wall.

As this was occurring, the defendant "appeared fidgety," "looked a little nervous," and "was looking up and down the street." After instructing Noj to stand facing the wall, McHugh asked the defendant for his identification.[4] The defendant "hesitated noticeabl[y]" before giving the name "Dana Clarke" and a date of birth. McHugh entered that information into the iPad and was able to find a driver's license photograph for a Dana Clarke, who looked "similar" to the defendant. McHugh was unsure, however, if the defendant was actually the person in the photograph. When McHugh asked the defendant for his Social Security number, the defendant said that he did not know it. Sometime during this conversation (it is unclear from the record precisely when), McHugh noticed that the defendant's hands were in his pockets and asked him to remove them. Although the defendant complied, "within a minute or two, he put his hands back inside of his . . . clothing."

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[3] Although McHugh was unsure whether this occurred before or after he told the defendant to stand by the wall, the surveillance video shows that McHugh first had the defendant stand by the wall and then used the iPad to confirm Noj's identity.

[4] As discussed infra, the Commonwealth concedes, and we agree, that the defendant was seized by this point.

McHugh's uncertainty about the defendant's identity "gave [him] a heightened sense of concern that something might be wrong," and so he had the defendant and Noj sit on the ground and called for backup. Less than two minutes later, Officer Fabien Belgrave arrived at the scene and told the defendant to stand up so that he could get a better look at the defendant's face. The officers also had the defendant remove his hood and eyeglasses. Based on other images Belgrave found using the iPad, the officers ultimately determined that the defendant was not the Dana Clarke depicted in the driver's license photograph.

At this point, given the defendant's nervousness and his "sort of bizarre answers to [the officers'] questions," McHugh "thought it would be prudent to put him in handcuffs until [they] could kind of sort out what was going on there." As McHugh reached out to handcuff the defendant, the defendant spun around, striking Belgrave in the chest and causing all three men to fall to the ground.[5] Two other officers arrived, and together they were able to handcuff the defendant.[6] One officer then pat frisked the defendant and found a loaded firearm, nine bags of

[5] While the officers struggled with the defendant, Noj left the scene, apparently at the direction of a St. Francis House worker. He was never charged with receiving stolen property.

[6] The Commonwealth does not argue that the defendant's struggle with the officers constituted an intervening act permitting the admission of evidence obtained thereafter. Cf. Commonwealth v. King, 389 Mass. 233, 245 (1983).

heroin, and twenty-three bags of "crack cocaine" in "a fanny pack that . . . had been inside of [the defendant's] pants." The defendant was arrested and transported to the police station where, at booking, one hundred dollars in cash and a cell phone were inventoried.

Discussion. "Absent clear error, we accept and adopt the findings of the motion judge, but we 'independently determine the correctness of the judge's application of constitutional principles to the facts as found.'" Commonwealth v. Narcisse, 457 Mass. 1, 5 (2010), quoting Commonwealth v. DePeiza, 449 Mass. 367, 369 (2007). It is the Commonwealth's burden to show that the seizure and frisk of the defendant were within constitutional limits. See Narcisse, supra.

We begin with the question of when the defendant was seized. The Commonwealth argued at the motion hearing, and the judge concluded, that the encounter did not escalate to an investigatory stop until McHugh tried to place the defendant in handcuffs. On appeal, however, the Commonwealth concedes that the defendant was seized when McHugh directed him to stand by the wall and asked for identification. We agree that the defendant was seized no later than this point.[7]

[7] The defendant claims that he was seized at the very outset of the encounter because McHugh immediately accused the men of committing a crime and ordered the third man to leave. We do not decide this issue.

A person is seized in the constitutional sense when "an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." Commonwealth v. Matta, 483 Mass. 357, 362 (2019). By directing the defendant to stand by the wall, McHugh "was communicating what a reasonable person would understand as a command that would be enforced by the police power." Commonwealth v. Barros, 435 Mass. 171, 176 (2001). The language McHugh used, "stand over there," would have indicated to a reasonable person that compliance would be compelled. By that point McHugh had already asserted his authority over the situation by telling the third man to leave. He then further asserted his authority by running a records check on Noj and ordering him "to stay standing like he was" with his face inches from the wall. Certainly, by the time McHugh asked the defendant for his identification, he had objectively communicated that he would use his police power to compel the defendant to stay. See Matta, supra at 365 (defendant seized "once the officer ordered him to stop, and then chased him"); Barros, supra (similar); Commonwealth v. Harris, 93 Mass. App. Ct. 56, 61 (2018) (defendant seized when "officers secured identification from each of [his] companions and began calling in that information").

The question then is whether, at the time of the seizure, McHugh had reasonable suspicion that the defendant "was committing, had committed, or was about to commit a crime." Matta, 483 Mass. at 365, quoting Commonwealth v. Martin, 467 Mass. 291, 303 (2014). Reasonable suspicion must be grounded in "specific, articulable facts and reasonable inferences drawn therefrom. A hunch will not suffice." Commonwealth v. Barreto, 483 Mass. 716, 720 (2019), quoting Commonwealth v. Wren, 391 Mass. 705, 707 (1984).

When McHugh told the defendant to stand by the wall and asked for identification, he knew the following facts: (1) Noj had a bag of clothes with tags on them; (2) the three men were looking in the bag; (3) one of the men said, "[H]ow much is this?"; (4) Noj held up an item of merchandise; (5) Noj gave arguably conflicting answers about the origin of the clothes; and (6) the defendant appeared nervous, had his hands in his pockets (at times), and was looking up and down the street. These facts do not give rise to reasonable suspicion that the defendant committed or was about to commit a crime. As an initial matter, though the Commonwealth contends that McHugh could rely on his training and experience to infer that the clothes were stolen, McHugh saw none of the signs of shoplifting "that [he] . . . look[s] for," apart from the unremarkable fact that the clothes had tags. He could not recall any details

about the items, what store brand was on the tags or on the bag, or whether there was a discrepancy between the brands. That the clothes appeared to be new could not alone give rise to reasonable suspicion that they were stolen, especially given that it was daytime and the area is one that is heavily commercial. Cf. Barreto, 483 Mass. at 721 (movements consistent with drug transaction "were just as consistent with any number of innocent activities").

Furthermore, even assuming, without deciding, that Noj's explanation about where he got the clothes gave rise to reasonable suspicion that Noj committed a crime,[8] McHugh observed nothing to suggest that the defendant received or was about to receive any of the items knowing them to be stolen. The judge made no finding that McHugh saw the defendant accept any item or give Noj anything in exchange. To the contrary, the judge found only that the defendant was looking on as Noj held up some merchandise. Cf. Barreto, 483 Mass. at 721 (no reasonable suspicion that defendant sold drugs to pedestrian where "officers did not observe an object change hands and did not observe anything in the pedestrian's hands either before or after meeting the defendant"); Commonwealth v. Smith, 55 Mass. App. Ct. 569, 573 (2002) (no reasonable suspicion where officer

[8] McHugh did not ask Noj whether he was with his mother when she purchased the clothes.

"did not observe any actual transaction or furtive activity on the part of the defendant").

Nor did McHugh have any information that the defendant knew the clothes were stolen (assuming that they were). See Commonwealth v. Namey, 67 Mass. App. Ct. 94, 97 (2006) (crime of receiving stolen property requires knowledge that property was stolen and knowing possession). There were no security devices on the clothes or any other signs of theft. McHugh asked the defendant not one question relating to the clothes -- he did not ask, for instance, whether the defendant knew Noj or what the defendant was doing there.[9] See Harris, 93 Mass. App. Ct. at 62 (although officers were justified in approaching defendant to investigate possible bicycle theft, "importantly, over the next several minutes they learned nothing that could have added to their suspicions"). Cf. Commonwealth v. Cordero, 477 Mass. 237, 242 (2017), quoting Commonwealth v. Cruz, 459 Mass. 459, 465 (2011) (traffic stop may not last "longer than reasonably necessary to effectuate the purpose of the stop"). The first question McHugh directed to the defendant was for his identification. As a result, while McHugh may have suspected

[9] The surveillance video showed Noj and the third man standing together on the sidewalk when the defendant passed by. They appear to get the defendant's attention. The three men were then together for approximately twenty seconds before McHugh walked up.

that "some commerce was going on," he had no specific and articulable facts indicating that it was illegal commerce. Cf. Barros, 435 Mass. at 177 (because carrying gun is not illegal, "anonymous tip that someone is carrying a gun does not, without more, constitute reasonable suspicion to conduct a stop and frisk"); Commonwealth v. Clark, 65 Mass. App. Ct. 39, 44-45 (2005) (observations of defendant handing item to another person and then appearing to count money did not support reasonable suspicion of drug activity).

There are no other facts giving rise to reasonable suspicion. McHugh did not know either the defendant or Noj. See Barreto, 483 Mass. at 720 (no reasonable suspicion where, among other factors, "neither the defendant nor [the person with whom he engaged in suspected exchange] was known to the officers"); Clark, 65 Mass. App. Ct. at 45 (similar); Smith, 55 Mass. App. Ct. at 573 (similar). He was aware of no reports of shoplifting in the area that day that might have added to the reasonable suspicion calculus. See Commonwealth v. Ellis, 12 Mass. App. Ct. 476, 477-478 (1981) (no reasonable suspicion where officer had no "independent information, such as a tip, that a crime was being committed" and "[t]here had been no report of a recent crime"). That the area is high crime did not justify the stop. See Narcisse, 457 Mass. at 13; Clark, supra at 44; Smith, supra at 572. The defendant's nervous demeanor,

and McHugh's general "sense of concern that something might be wrong," also did not justify the stop. See Cruz, 459 Mass. at 468 ("It is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police . . ."); Barros, 435 Mass. at 178 ("defendant's suspicious activities, including his breaking eye contact with the officer and his refusing to answer the officer's initial questions . . .[,] cannot provide reasonable suspicion for justification of a detention or seizure").

For these reasons we part ways with the dissent's conclusion that the facts in this case are analogous to those in Terry v. Ohio, 392 U.S. 1 (1968). There, the officer observed the petitioner himself, along with another man, "hover about a street corner for an extended period of time," "pace alternately along an identical route, pausing to stare in the same store window roughly [twenty-four] times," and confer on the corner after "each completion of this route." Id. at 23. In comparison here, McHugh observed the defendant, in a span of a few seconds, do nothing more than look on as Noj showed him what appeared to be new clothes. A reed as thin as this does not support reasonable suspicion of criminal activity.

We therefore conclude that the stop was unlawful and that the evidence obtained during the subsequent patfrisk and at

booking should have been suppressed as fruits of the poisonous tree.[10] The order denying the motion to suppress is reversed.

So ordered.

[10] Given our ruling, we do not address the defendant's argument that the officers' use of handcuffs was disproportionate to any threat he posed.

MEADE, J. (dissenting). The majority concludes that the seizure of the defendant occurred without sufficient antecedent reasonable suspicion, and as a result, his motion to suppress the firearm and narcotics found on his person should have been allowed. Because I believe the record evidence, the motion judge's findings, and the controlling case law support a conclusion at odds with that determination, I respectfully dissent.

"Under art. 14 of the Massachusetts Declaration of Rights, the touchstone of our analysis of police conduct that results in a search or seizure is whether that conduct was reasonable." Commonwealth v. Watts, 74 Mass. App. Ct. 514, 517 (2009). See Commonwealth v. Anderson, 406 Mass. 343, 346 (1989). See also Terry v. Ohio, 392 U.S. 1, 9 (1968) ("what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures" [citation omitted]). An investigatory stop, or "seizure" in the constitutional sense, is justified under art. 14 if the police have reasonable suspicion at the time of the stop. See Commonwealth v. Pinto, 476 Mass. 361, 363 (2017). "Reasonable suspicion exists when an officer, based on specific, articulable facts and reasonable inferences therefrom, in light of the officer's experience, has reasonable grounds to suspect a person is committing, has committed, or is about to commit a crime" (quotation and citation omitted). Id. at 363-

364. See Commonwealth v. Franklin, 456 Mass. 818, 820 (2010). Importantly, "reasonable suspicion is a lower standard than probable cause," Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998), and it is measured objectively. See Commonwealth v. Meneus, 476 Mass. 231, 235 (2017).

Moreover, it had been long held that "[p]olice have seized a person in the constitutional sense 'only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" Commonwealth v. Barros, 435 Mass. 171, 173-174 (2001), quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.).[1] See Florida v. Royer, 460 U.S. 491, 502 (1983). However, more recently, the Supreme Judicial Court has charted a course away from the "legal fiction" of the Mendenhall-Royer standard, because "civilians rarely feel 'free to leave' a police encounter," and a literal "application of the test would result in nearly every police inquiry being deemed a seizure in the constitutional sense." Commonwealth v. Matta, 483 Mass. 357, 360-361 & n.4 (2019). Instead, after a review of the totality of the circumstances, "the more pertinent question is whether an officer has, through words or conduct, objectively

[1] For more than fifty years, it has been recognized that "not every encounter between a law enforcement official and a member of the public constitutes [a seizure]." Commonwealth v. Stoute, 422 Mass. 782, 789 (1996).

communicated that the officer would use his or her police power to coerce that person to stay." Id. at 362. It is the defendant's burden to show that an encounter with the police rises to the level of a seizure in the constitutional sense. See Commonwealth v. Thinh Van Cao, 419 Mass. 383, 388, cert. denied, 515 U.S. 1146 (1995); J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 4-2[a] (2019).

1. The initial seizure. Here, the totality of the circumstances, as found by the motion judge, are as follows: Michael McHugh,[2] a ten-year veteran of the Boston Police Department, was specially trained in surveillance tactics, active shooter training, trademarks and identification of armed subjects. For the last four years prior to the arrest at issue here, he had been working as a plain clothes officer walking a beat in the area of Boylston Street between Washington and Tremont Street, which is a "high crime" area. McHugh had made numerous shoplifting arrests and had observed individuals selling and trading their stolen property outside on the street, often to feed drug addictions. McHugh had made arrests for shoplifting crimes based on his observation of people engaged in commerce on the street with items with tags still on them and items in bags not consistent with the items contained therein.

[2] The motion judge expressly credited McHugh's testimony.

On the morning of January 27, 2017, McHugh was by himself, in plain clothes, patrolling Boylston Street in the area of St. Francis House, a daytime homeless shelter located at 39 Boylston Street, which was an area where McHugh had made hundreds of arrests. In that area, he saw three men looking in a plastic shopping bag and talking to each other. McHugh's attention was drawn to the men, whom he did not know, when he noticed that the bag contained clothing, some of which was outside of the bag, with store tags still attached and visible. Based on what he saw, coupled with his training and experience, McHugh suspected that the men were buying or selling stolen clothing, and he decided to conduct a threshold inquiry.

As McHugh approached the three men, he overheard one male ask, "[H]ow much is this," as another male held up some merchandise. McHugh asked the group, "[W]hat's up guys. Is that stuff stolen?" Milton Noj, the man holding up the merchandise became startled and responded, "Whoa."[3] McHugh identified himself as a Boston Police officer and asked the men

[3] The surveillance video recording (video) depicts the defendant holding the merchandise and only returning it to Noj when McHugh confronted the two. In other words, the clothing was handed back to Noj when they were caught. Also, the video belies the majority's assertion that the defendant did not give Noj anything in exchange for the item handed to him. While it is true that McHugh did not see the exchange, the video depicts the defendant putting something in Noj's hand when the defendant arrives, which occurred before Noj displayed the merchandise for the defendant.

for their identifications.[4] As McHugh spoke with Noj, the defendant had his hands in his front pockets and was looking up and down Boylston Street. For safety purposes, McHugh asked the defendant to stand next to the exterior wall of St. Francis House while he spoke with Noj. Noj initially told McHugh that he purchased the items in the plastic bag at the Natick Mall. When Noj could not produce receipts, he changed his story and told McHugh that his mother gave him the items. This change in story further heightened McHugh's belief that the items were stolen. Noj was nervous, but provided his identifying information, including his full name and date of birth, without hesitation. McHugh accessed the Criminal Justice Information System (CJIS) images on his "iPad" tablet computer and confirmed Noj's identity in thirty-eight seconds.

At the hearing on the motion to suppress, the defendant claimed that he was seized at the moment Officer McHugh told him to stand next to the wall of St. Francis House.[5] On appeal, the

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[4] McHugh had sent the third man away for safety reasons because the third man was not engaged in the transaction with the defendant and Noj.

[5] The defendant also claims that he was seized when McHugh accused him of a crime. However, McHugh merely queried whether the items in the bag were stolen. It is well settled that "the police do not effectuate a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe that he was not free to turn his back on his interrogator and walk away" (citation omitted). Commonwealth v. Depina, 456 Mass. 238, 242

Commonwealth concedes that this is the point the seizure occurred. Assuming this to be true, i.e., that McHugh, through his words or conduct, objectively communicated that he would use his police power to coerce the defendant to stay, see Matta, 483 Mass. at 360-361 & n.4, this initial seizure was justified and appropriate for a threshold inquiry and safety purposes.[6]

For four years, Officer McHugh had been working in this high crime area, where he had made hundreds of arrests for narcotics sales, stabbings, larceny, robbery, assault, receiving stolen goods, trespassing, and shoplifting. See Matta, 483 Mass. at 367 (reaffirming that incident occurring in high crime area "may be taken into account as a factor in the reasonable suspicion analysis"). In particular, McHugh had made arrests for shoplifting based on his observation of people selling stolen items on the street with store tags still attached to the items. With that experience, as well as his training and the fact that the location was a high crime area, McHugh saw Noj holding a bag of clothing, with the defendant looking on, and he

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(2010). Here, Noj, although startled, claimed that the items were not stolen. In any event, as describe infra, McHugh had a reasonable and articulable suspicion that criminal activity was afoot even at the time he posed the question.

[6] The motion judge found that the seizure occurred later, when the defendant was handcuffed, but we can affirm her denial of the motion to suppress if the facts found by the motion judge support an alternative theory that justifies her ultimate order. See Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997).

heard one of the men ask, "[H]ow much is this," as the merchandise was held up. As the motion judge found, when McHugh approached the men, he was neither "hostile" nor "aggressive." McHugh inquired if the goods were indeed stolen, which startled Noj, and he exclaimed, "[W]hoa." As McHugh spoke to Noj, the defendant had his hands in his pockets and was surveilling Boylston Street. These specific, articulated facts, and the reasonable inferences drawn therefrom, when viewed in total and in light of Officer McHugh's experience, provided him reasonable grounds to suspect that Noj was attempting to sell or the defendant was attempting to receive stolen goods. See Pinto, 476 Mass. at 363-364. See also Matta, supra at 366 (police may rely on their experience and training as basis for reasonable suspicion); Commonwealth v. Silva, 440 Mass. 772, 784 (2004) (same). Accordingly, McHugh was warranted in stopping these individuals and making a threshold inquiry to either confirm or dispel his suspicions based on their actions and his experience.[7]

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[7] The defendant posits a variety of possible innocent explanations for the circumstances, including that Noj could have been selling the clothing his mother gave him. However, much like when proving guilt beyond a reasonable doubt or establishing probable cause, the government is not charged with excluding hypotheses of innocence, see Commonwealth v. Merola, 405 Mass. 529, 533-534 (1989); Commonwealth v. Hason, 387 Mass. 169, 175 (1982), the same is true -- on a much greater scale -- for reasonable suspicion. See Commonwealth v. Isaiah I., 450 Mass. 818, 823 (2008) (police do "not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion"); Commonwealth v. Deramo, 436 Mass. 40, 44

The majority labors to isolate McHugh's articulated facts and to diminish their collective import, and instead emphasizes things McHugh did not know. The majority correctly notes that the incident occurred in the daytime in a heavy commercial area, and that McHugh did not know whether the clothing items were actually stolen or whether the items retained security tags on them. He was also unaware of any reports of shoplifting in the area that day, and he did not know whether there was a discrepancy between the tags on the items and the bag from which they were retrieved. The majority further notes that McHugh neither knew the defendant nor Noj, that McHugh failed to inquire whether they knew one another, and that McHugh did not know whether the items in the bag were stolen.[8]

(2002) ("The standard of 'reasonable suspicion' does not require that an officer exclude all possible innocent explanations of the facts and circumstances"); Commonwealth v. Watson, 430 Mass. 725, 729 (2000) ("Seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry"); Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 346 (2010) ("Viewed through the eyes of experienced police officers and as a whole, even seemingly innocent activities may take on a sinister cast and give rise to reasonable suspicion").

[8] Relying on Commonwealth v. Namey, 67 Mass. App. Ct. 94, 97 (2006), the majority correctly notes that receiving stolen property requires knowledge that the property is stolen. However, the issue in Namey was whether there was sufficient evidence to prove the defendant guilty of the crime beyond a reasonable doubt. Id. at 99-100. Here, in contrast, the issue is merely reasonable suspicion, a standard even lower than probable cause. Smigliano, 427 Mass. at 492. In other words, McHugh was only required, in light of his experience and the articulated facts, to have reasonable grounds to suspect the

An examination of the seminal case of Terry v. Ohio, 392 U.S. 1 (1968), illustrates why the majority's focus is improper. In Terry, at 2:30 P.M. on an October day, Martin McFadden, a plainclothes police officer, was patrolling downtown Cleveland, Ohio. Id. at 5. He had been assigned to patrol this area for shoplifters and pickpockets for thirty years. Id.McFadden had developed "routine habits of observation over the years and that he would 'stand and watch people or walk and watch people.'" Id. While engaged in this routine, McFadden's attention was drawn to two men, Terry and Chilton. McFadden "was unable to say precisely what first drew his eye top them," but these men "didn't look right to [him]." Id. From his vantage point 300 to 400 feet away, McFadden watched the two men repeatedly walking past and peering into a storefront before returning to a corner to converse. Id. at 5-6. At one point, a third man, Katz, approached the two and briefly engaged them in conversation, before two men resumed their window peering exercise. Id. at 6. After this had gone on for ten to twelve minutes, McFadden had "become thoroughly suspicious." He suspected the two men were "casing a job, a stick-up," and feared they may have been armed with a gun. Id. McFadden approached them, identified himself as a police officer, and

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defendant was committing, had committed, or was about to commit a crime. See Pinto, 476 Mass. at 363-364. This he had.

asked for their names. Id. at 6–7. When the men mumbled in response, McFadden grabbed Terry, "spun him around" and pat frisked him. Id. at 7. This frisk revealed a gun in Terry's left breast coat pocket. McFadden's patfrisk of Chilton similarly yielded a gun; Katz was not armed. Id.

Like McHugh in this case, McFadden did not know Terry or Chilton, and had never seen them before. "[H]e had received no information concerning them from any other source." Terry, 392 U.S. at 7. McFadden was not patrolling with any specific knowledge of criminal activity in the area, but rather McFadden's "knowledge was confined to what he had observed." Id. He did not ask Terry and Chilton if they knew one another, but only requested their names. The Court concluded that Terry was seized when McFadden grabbed him. Id. at 19. Despite the gaps in McFadden's knowledge, and that each of the acts McFadden observed could have themselves be innocent, id. at 22-23, the Court nonetheless concluded that it was reasonable for McFadden -- given his experience -- to believe that Terry and Chilton were about to commit a crime, and that they were probably armed. Id. at 23, 28, 30. With this comparison to the instant case, which the majority artificially truncates, I respectfully suggest the majority has misapplied the reasonable suspicion standard.

2. The continuing investigation. After the initial seizure, McHugh's further investigation and action were similarly justified and proper in scope and proportionality. See Commonwealth v. Williams, 422 Mass. 111, 116 (1996); J.A. Grasso, Jr. & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 4-4[b]. Given that he was outnumbered, and that the defendant had his hands in his pockets while he looked up and down Boylston Street, McHugh appropriately separated the defendant from Noj for safety purposes by having the defendant stand against the wall.

After separating the two, McHugh learned that Noj did not have receipts for the clothing items, and Noj gave McHugh conflicting explanations as to whether and where he purchased the items, before claiming they were a gift from his mother. As the motion judge found, this change in story further heightened McHugh's belief that the items were stolen. See Commonwealth v. Feyenord, 445 Mass. 72, 78 (2005), cert. denied, 546 U.S. 1187 (2006) (defendant's inconsistent explanations for his activity provided proper basis for reasonable suspicion). Also, as the motion judge found, as the defendant stood against the wall, he "was fidgety, nervous and looking up and down Boylston Street, again heightening Officer McHugh's suspicion that a crime was afoot." See Commonwealth v. DePeiza, 449 Mass. 367, 372 (2007) ("Although nervous or furtive movements do not supply reasonable

suspicion when considered in isolation, they are properly considered together with other details to find reasonable suspicion"). The defendant had his hands in his pockets, and McHugh instructed him to remove them from his pockets. Although the defendant initially complied, within a minute or two, he put his hands back inside his clothing. See Commonwealth v. Johnson, 454 Mass. 159, 164 (2009) (officers in high crime area "not required to accept the risk of . . . ambiguity" posed by defendant who disregarded command to take his hands out of his pockets); Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 313 (2013) (for reasonable suspicion of defendant being armed analysis, proper for officer to consider that defendant failed to remove hands from pockets after being requested to do so). Based on his observations of the defendant, McHugh was concerned that he might be armed and dangerous. When the defendant was asked for his identification, he lied,[9] and could not provide a single digit of his Social Security number. McHugh called for back-up, and for safety reasons, asked the defendant and Noj to sit on the ground. Given everything that had transpired,

[9] The defendant claimed he was "Dana Clarke," and "noticeably hesitated" before he provided a date of birth. McHugh's CJIS search with that information produced a registry of motor vehicles photograph that was similar to the defendant's appearance, but not a match. Another officer, who provided McHugh with back-up, agreed that the defendant did not appeared to be Dana Clarke.

including the defendant providing a false identification, McHugh decided to handcuff the defendant. During this attempt, the defendant spun around, struck another officer, and all three men ended up on the ground. Once subdued, a patfrisk revealed the defendant was in possession of a firearm, heroin, and "crack" cocaine.

In the end, where McHugh, in a high crime area, saw the defendant engage in conduct consistent with the attempted purchase or sale of stolen goods; where the defendant refused to keep his hands out of his pockets and looked up and down Boylston Street; where the defendant gave a false name and date of birth and could not provide his Social Security number; and where the defendant was nervous and fidgety, McHugh was justified in placing the defendant in handcuffs and patfrisking him as a precautionary safety measure. See Pinto, 476 Mass. at 363. In my view, McHugh acted reasonably under the circumstances, and the motion to suppress was properly denied.