20-P-821 Appeals Court

COMMONWEALTH vs. ERNEST MONELL.

No. 20-P-821.

Suffolk. March 4, 2021. – April 16, 2021.

Present: Milkey, Kinder, & Sacks, JJ.

Constitutional Law, Stop and frisk, Reasonable suspicion, Search and seizure. Search and Seizure, Reasonable suspicion, Motor vehicle, Protective frisk, Protective sweep. Practice, Criminal, Motion to suppress, Traffic violation. Firearms. Motor Vehicle, Firearms.

Indictments found and returned in the Superior Court Department on August 14, 2019.

A pretrial motion to suppress evidence was heard by Jackie A. Cowin, 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.

Sarah Montgomery Lewis, Assistant District Attorney, for the Commonwealth.

Kelly M. Cusack for the defendant.

KINDER, J. The defendant has been charged with carrying a firearm without a license, second offense, in violation of G. L. c. 269, § 10 (a); carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10 (n); and possession of ammunition without a firearm identification card, in violation of G. L. c. 269, § 10 (h) (1). Following an evidentiary hearing, a Superior Court judge allowed the defendant's motion to suppress the firearm seized from the defendant's car following a traffic stop, reasoning that the exit order was unlawful. The Commonwealth's application to pursue an interlocutory appeal was allowed by a single justice of the Supreme Judicial Court, who reported the matter to this court. The Commonwealth's principal arguments on appeal are that the exit order was justified by a concern for officer safety, and that the subsequent patfrisk search of the defendant's person and the limited search of his car were based on a reasonable suspicion that the defendant was armed and dangerous. We agree and reverse the suppression order.

Background. We summarize the relevant facts from the judge's findings on the motion to suppress, supplemented where appropriate by uncontroverted suppression hearing testimony that the judge explicitly or implicitly credited. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015). At approximately 8:42 P.M. on May 21, 2019, there was a homicide by gunshot at 95

Millett Street in the Dorchester section of Boston.[1] A little over two hours later, Boston Police Officers Antoine Ramos and Dennis Layden were on routine patrol in the area of Millet Street, which they knew to be a "high crime" area based on previous arrests there, many of which involved firearms. The officers were not directly involved in investigating the homicide, but they were aware that it had occurred and that the shooter remained at large. The officers observed a car fail to stop for a stop sign while "coming off of Millet," such that the officers were forced to slow down abruptly to avoid a collision. They activated their vehicle lights, stopped the car without incident, and approached the driver and sole occupant, later identified as the defendant.

Officer Layden approached the driver's side and asked the defendant for his license and registration. The defendant was compliant and did not appear nervous.[2] Officer Ramos went to the passenger's side and illuminated the inside of the car with his flashlight. He observed a holster for a firearm on the driver's

---

[1] The judge's finding that the homicide occurred on May 21, 2017, appears to have been a typographical error. The uncontroverted testimony was that the events at issue in this case occurred in 2019.

[2] The defendant explained that he did not have his operator's license with him, but provided a Social Security number. The officers later confirmed that the defendant had an active driver's license and that the car was registered to one of the defendant's relatives.

side floor, touching the defendant's right foot. Based on his experience, Officer Ramos knew the holster was the type used to conceal a firearm inside of one's pants. He could not see whether the holster contained a firearm.

Fearing for his safety and that of Officer Layden, Officer Ramos immediately notified Officer Layden of his observation. Officer Layden ordered the defendant to get out of the car. The defendant "'froze' while acting as if he was trying to conceal his right hand." Officer Layden then physically removed the defendant from the car and pat frisked his person. The defendant was not armed and possessed no contraband. After the officers placed the defendant in handcuffs, they saw that the holster in the car was empty. Officer Layden then searched the driver's seat area and under the seat discovered a case that felt as if it contained a firearm. He opened the case and discovered a handgun.

Discussion. We accept the judge's factual findings unless they are clearly erroneous. See Commonwealth v. Welch, 420 Mass. 646, 651 (1995). However, we "make an independent determination of the correctness of the judge's application of constitutional principles to the facts." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

1. The exit order. Our analysis begins with the validity of the exit order because there is no dispute that the initial

stop of the defendant's vehicle was valid. See Commonwealth v. Amado, 474 Mass. 147, 151 (2016), quoting Commonwealth v. Santana, 420 Mass. 205, 207 (1995) ("Where the police have observed a traffic violation, they are warranted in stopping a vehicle"). "[A]n 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." Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020), citing Amado, supra at 151-152. Our focus here is on the first factor, the perceived threat to the officers' safety. To justify an exit order on this basis, an officer's fear must be grounded in "specific, articulable facts and reasonable inferences" in light of the officer's experience (citation omitted). Commonwealth v. Silvelo, 486 Mass. 13, 16 (2020). See Commonwealth v. Silva, 366 Mass. 402, 406 (1974). The test is an objective one that is based on the "totality of the circumstances" (citation omitted). Commonwealth v. Gonsalves, 429 Mass. 658, 665 (1999).

Here, the defendant was stopped late at night by officers on patrol in an area where they knew there had been a fatal shooting approximately two hours earlier.[3] The officers also

[3] Although there was evidence that the stop occurred in a "high crime" area, we discount that factor here because the high

knew that the shooter remained at large. When Officer Ramos saw a holster on the floor within the defendant's reach, he believed that the holster might contain a firearm, and the judge found his belief to be reasonable. These facts were enough to cause "a heightened awareness of danger that would warrant an objectively reasonable police officer" in fearing for his safety (citation omitted). Commonwealth v. Stampley, 437 Mass. 323, 326 (2002). We recognize that the defendant was unknown to the officers and did not engage in suspicious behavior prior to the exit order. But the test we apply is based on the totality of the circumstances, and "it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns." Gonsalves, 429 Mass. at 664. "The Constitution does not require officers to gamble with their personal safety" (quotation and citation omitted). Commonwealth v. Haskell, 438 Mass. 790, 794 (2003). Mindful of these principles, we are satisfied that the totality of the circumstances in this case justified the officers' concern for

---

crime nature of the area did not have a "direct connection with the specific location and activity being investigated." Commonwealth v. Evelyn, 485 Mass. 691, 709 (2020), quoting Torres-Pagan, 484 Mass. at 41.

their safety. Accordingly, the exit order was lawful. See Torres-Pagan, 484 Mass. at 38.[4]

2. The patfrisk and search. On appeal, the defendant argues that even if the exit order was lawful, the suppression order should be affirmed because the patfrisk of his person and the limited search of the interior of the car were unconstitutional. The test for a patfrisk is more stringent than for an exit order. A police officer may pat frisk a suspect following an exit order only when he has a reasonable suspicion that the suspect is armed and dangerous. Torres-Pagan, 484 Mass. at 38-39. Here, the defendant "'froze' while acting as if he was trying to conceal his right hand" when he was ordered out of the car. This specific and articulable fact, considered together with the presence of the holster, the time of night, and the earlier fatal shooting, was sufficient to establish a reasonable suspicion that the defendant was armed

---

[4] This case is not like Commonwealth v. Gomes, 458 Mass. 1017 (2010), or Commonwealth v. DeJesus, 72 Mass. App. Ct. 117 (2008), on which the judge relied. In each of those cases, the police responded to an anonymous tip of a man with a gun, approached a suspect in a parked vehicle, and ordered him to exit based on the information provided by the anonymous tipster. See Gomes, supra at 1017-1018; DeJesus, supra at 118. The holding in each of those cases was that, without more than the anonymous tip, and despite the interaction having occurred in a high crime area, there was no reasonable basis for the officer to suspect that he was in imminent danger. See Gomes, supra at 1018-1019; DeJesus, supra at 120. In this case, as we have said, there was more.

and dangerous. See Commonwealth v. DePeiza, 449 Mass. 367, 374 n.4 (2007) (defendant's reaching gesture contributed to officers' reasonable fear for their safety).

Once the defendant was removed from the car and no weapon was discovered during the patfrisk of his person, the officers were justified in their concern that a weapon might remain in the car. See Commonwealth v. Gouse, 461 Mass. 787, 792-793 (2012). The Supreme Judicial Court has consistently held that in these circumstances the police are permitted to perform a limited, protective search of the car interior. See Silvelo, 483 Mass. at 16 (protective search of vehicle permitted where "defendant may access a weapon left behind upon returning to the vehicle"); Commonwealth v. Douglas, 472 Mass. 439, 447 (2015) (protective search of car permitted before allowing defendant to reenter); Commonwealth v. Daniel, 464 Mass. 746, 752 (2013) (protective limited search of car permitted if defendant likely to return to car at conclusion of inquiry); Commonwealth v. Almeida, 373 Mass. 266, 272-273 (1977), S.C., 381 Mass. 420 (1980) (protective search of area around driver's seat permitted following observation of holster); Silva, 366 Mass. at 408 ("Terry type of search may extend into the interior of an automobile so long as it is limited in scope to a protective end"). Here, Officer Layden's search of the car was limited to a search for a weapon in the area of the driver's seat. He

immediately found a case under the seat through which he felt the weight and shape of a firearm. His seizure of the firearm was justified. See Commonwealth v. Wilson, 441 Mass. 390, 396-397 (2004) (officer may seize object during Terry-type frisk if contraband nature of object can readily be identified by its mass and contour).

Conclusion. The order allowing the motion to suppress is reversed.

So ordered.

MILKEY, J. (concurring). I agree with the majority that the exit order and patfrisk of the defendant's person were justified. I also agree that the subsequent sweep of the interior of the vehicle for weapons is consistent with the broad pronouncements that the Supreme Judicial Court has made on the subject. See, e.g., Commonwealth v. Silvelo, 486 Mass. 13, 16 (2020). I write separately because I believe that in the particular circumstances presented, the sweep was inconsistent with applicable constitutional principles. For that reason, I think this case offers an appropriate opportunity to reexamine the breadth of the existing case law.

Outside of the traffic stop context, the police generally cannot pat frisk a detained individual based only on a reasonable belief that the individual is armed and dangerous. See Commonwealth v. Narcisse, 457 Mass. 1, 7-9 (2010). Instead, the police also must have reasonable suspicion that a crime is afoot. Id. at 9. That rule generally does not apply in the context of a traffic stop, because the person being pat frisked is being detained on an independent ground (the civil infraction). See Commonwealth v. Torres-Pagan, 484 Mass. 34, 36-37 (2020). This is one of the many ways in which search and

seizure jurisprudence involving traffic stops fundamentally differs from that involving stops that occur in other contexts.[1]

The wide latitude afforded to police officers during routine traffic stops threatens to erode constitutional protections by allowing such stops to serve as cover for unwarranted searches and seizures. The potential for bias exacerbates such problems. See Commonwealth v. Buckley, 478 Mass. 861, 876, 878 (2018) (Budd, J., concurring) (discussing "pretextual stops of people of color [which] stem from explicit bias [i.e., racial profiling], unconscious bias, . . . or a combination of both," and recognizing that "pretextual [traffic] stops disproportionately affect people of color," even where driver was not stopped merely for "driving while black"). See also Commonwealth v. Long, 485 Mass. 711, 717 (2020) ("This

[1] The case law recognizes an automobile exception under which the need for a search warrant is excused, even if no exigencies exist. See Commonwealth v. Bongarzone, 390 Mass. 326, 350-351 (1983) (no warrant needed where car searched fewer than two hours after impoundment). In addition, the cases have created exceptions under which searches of cars may be conducted without probable cause. As but one example, so long as the police have a reason to impound a car and a written policy for inventorying its contents -- however all-encompassing that policy may be -- police are allowed to conduct an inventory search of the vehicle. Compare Commonwealth v. Rosario-Santiago, 96 Mass. App. Ct. 166, 175-177 (2019) (upholding detailed search of car that went beyond mechanical cataloguing of its contents), with id. at 188 n.14 (Milkey, J., dissenting) (characterizing term "inventory search" as a "misnomer that beckons for abuse").

court has identified the discriminatory enforcement of traffic laws as particularly toxic").[2]

In light of such issues, the Supreme Judicial Court in recent years has recognized the need for increased scrutiny of police actions during traffic stops for civil infractions. Thus, for example, it is now well recognized that a "routine traffic stop may not last longer than 'reasonably necessary to effectuate the purpose of the stop.'" Commonwealth v. Cordero, 477 Mass. 237, 241 (2017), quoting Commonwealth v. Amado, 474 Mass. 147, 151 (2016). And just last year, the Supreme Judicial Court recognized that even when a traffic stop initially presents safety concerns justifying the police in ordering an occupant to exit a vehicle, that by itself does not justify conducting a patfrisk. Torres-Pagan, 484 Mass. at 38-39. Instead, there needs to be a nuanced examination whether the facts as then known to police created a reasonable suspicion

---

[2] To be clear, nothing in the record suggests that the officers here were biased or acting in bad faith. But presumably, officers seeking to fulfill their mission to uncover evidence of illegality generally will make use of whatever constitutional leeway courts afford them. See Arizona v. Gant, 556 U.S. 332, 336-337 (2009) (noting that, "[w]hen asked at the suppression hearing why the search was conducted, [the officer] responded: 'Because the law says we can do it'"); Commonwealth v. Darosa, 94 Mass. App. Ct. 635, 638 n.8 (2019) ("When asked then why he searched the minivan, [the detective] replied, 'I have that right'"). The question here, as always, is where to draw the line between the authority given to police to fulfill their law enforcement mission and the right of the populace to be free from unwarranted searches and seizures.

that the defendant was armed and dangerous. Id. I believe the principles underlying Cordero and Torres-Pagan should be applied to sweeps like the one in this case.[3]

When the officers here spotted the gun holster lying directly next to the defendant's foot, they faced a "swiftly developing situation," a context in which they are allowed increased latitude (citation omitted). Commonwealth v. Feyenord, 445 Mass. 72, 80 (2005), cert. denied, 546 U.S. 1187 (2006). The officers were well justified in removing the defendant from the car in light of immediate safety concerns. For similar reasons, I also believe that once the defendant was out of the car, there was enough of a basis to consider him armed and dangerous so as to justify the patfrisk of his person.

From that point on, however, any immediate threat to the officers effectively was gone. The defendant had been taken from the car, handcuffed, pat frisked, and made to sit on the sidewalk. What remained was for the officers to complete the traffic stop by issuing the defendant a civil citation for

[3] To the extent that such an approach has been rejected by the United States Supreme Court applying Federal law, see Michigan v. Long, 463 U.S. 1032, 1051-1052 (1983), I note that the Supreme Judicial Court long has held that art. 14 of the Massachusetts Declaration of Rights provides greater protection against searches and seizures in some respects. See, e.g., Commonwealth v. Balicki, 436 Mass. 1, 11 n.11 (2002).

running the stop sign while he was detained outside his car.[4] The officers then could have told the defendant that he was free to go, released him, and gone about their other business.

Of course, it can be argued that the defendant in theory still could have posed a danger to the officers after they released him. But to make such a threat more than hypothetical, one would have to posit that after learning that he was being allowed to drive away while escaping detection of the gun he knew was hidden in the car, the defendant nevertheless would retrieve the gun and attack the police with it as they were leaving. In other words, the defendant posed a continuing threat to the officers only if we assume that he would react to his release in a completely irrational manner. Nothing known to the police justified such an assumption. Thus, any objective threat to officer safety had dissipated by the time that the

---

[4] The defendant was cooperative with the police throughout the traffic stop. Although he did not have his driver's license in his immediate possession, he provided the police his Social Security number, from which they could (and, after they searched for and found the gun, did) confirm that he had an active license. Once he provided his name, the police learned that he had the same last name as the person to whom the car was validly registered, which the officers testified they had obtained by querying the license plates even before approaching the car. At least once the defendant had been removed from the car, pat frisked, handcuffed, and placed on the ground outside his car, there was no longer any "swiftly developing situation" that interfered with the police confirming that the defendant was validly licensed and the car validly registered (citation omitted). Commonwealth v. Brown, 75 Mass. App. Ct. 528, 537 (2009).

police decided to conduct their thorough search of the interior of the car.[5] That search was necessary neither to complete what was left of the civil traffic stop, nor for officer safety.

When the search of the car is stripped of such trappings, the reality of what occurred here readily becomes apparent: the police were conducting an investigatory search for the firearm that they (correctly) surmised was somewhere in the defendant's car. But such an investigatory search of the car required something that the Commonwealth acknowledges the police never had: probable cause. See Commonwealth v. Motta, 424 Mass. 117, 124 (1997).

In my view, the search of the car survives only because the Supreme Judicial Court's pronouncements about police authority to conduct protective sweeps of cars during ordinary civil traffic stops have been broad. In particular, those cases do appear to say, without qualification, that if, under Terry v. Ohio, 392 U.S. 1 (1968), the police have a reasonable basis to pat frisk someone whom they have ordered out of a car during an

---

[5] A protective sweep of a car in theory is a limited search designed only to uncover weapons lying within the reach of the occupants of the car. See Commonwealth v. Manha, 479 Mass. 44, 50 (2018). In a typical passenger car, the reach of a driver or passenger extends virtually to the entire interior of the vehicle. Id. And a protective sweep of a car is hardly an unobtrusive search as this case well illustrates, involving, as it did, the discovery of a gun located inside of a case hidden under the driver's seat.

ordinary traffic stop, they also may conduct a protective sweep of the car whenever the person could be allowed to reenter it. See Commonwealth v. Silva, 366 Mass. 402, 409-410 (1974). Those pronouncements constrain us to reverse. And, although I believe that cases such as Cordero and Torres-Pagan provide a basis for adopting a more nuanced approach, I appreciate that this question does not properly fall to us as an intermediate appellate court. I therefore join with the majority.