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488 Mass. 741
Supreme Judicial Court of Massachusetts,
Bristol.

COMMONWEALTH

v.

Zahkuan SWEETING-BAILEY.[1]

SJC-13086

Argued May 3, 2021.

Decided December 22, 2021.

Synopsis

Background: Following denial of motion to suppress, defendant was convicted on conditional guilty plea in the Superior Court Department, Bristol County - Fall River, Raffi N. Yessayan, J., of possession of firearm without license and possession of large capacity feeding device. Defendant appealed. The Appeals Court, 98 Mass.App.Ct. 862, 159 N.E.3d 205, affirmed. Defendant's application for further appellate review was granted.

Holdings: The Supreme Judicial Court, Cypher, J., held that:

inference drawn by police officers during traffic stop that passenger was attempting to distract them from discovering evidence of criminal activity inside vehicle was appropriate factor in determining whether officers had reasonable suspicion that defendant was armed and dangerous, as justification for patfrisk;

officers' involvement in passenger's prior arrest on firearms-related charges, coupled with knowledge at time of stop regarding defendant's prior juvenile adjudication for firearms offense and other passenger's photographs on social media, were relevant factors to "reasonable suspicion" analysis;

officers' awareness that defendant and other passengers of vehicle subject of traffic stop were known gang members, together with knowledge of their firearm-related arrests, were relevant factors in "reasonable suspicion" analysis; and

fact that traffic stop occurred in high-crime area was relevant factor in "reasonable suspicion" analysis.

Affirmed.

Lowy, J., filed concurring opinion.

Wendlandt, J., filed concurring opinion.

Budd, C.J., filed dissenting opinion.

Gaziano, J., filed dissenting opinion in which Georges, J., joined.

****359** Firearms. Motor Vehicle, Firearms. Constitutional Law, Search and seizure, Reasonable suspicion, Investigatory stop, Stop and frisk. Search and Seizure, Threshold police inquiry, Reasonable suspicion, Protective frisk. Threshold Police Inquiry. Practice, Criminal, Motion to suppress, Plea.

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.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Attorneys and Law Firms

Elaine Fronhofer, for the defendant.

Shoshana E. Stern, Assistant District Attorney, for the Commonwealth.

David Rassoul Rangaviz, Committee for Public Counsel Services, Radha Natarajan, Katharine Naples-Mitchell, Oren N. Nimni, Chauncey B. Wood, Erin Fowler, & Leon Smith, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Opinion

CYPHER, J.

****360** ***742** Following a routine traffic stop for an improper lane change, the defendant, Zahkuan Sweeting-Bailey, who had been a rear seat passenger in the vehicle, was ordered out of the vehicle and was pat frisked. Although

the stop began as routine, when officers approached the vehicle, the front seat passenger immediately got out of the car, engaged in an argument with the officers, and took a threatening fighting stance. The officers, who were familiar with that passenger from prior encounters, found his angry outburst highly suspicious and believed he was trying to distract them from the vehicle because there was a firearm inside. The three male passengers in the car, including the defendant, were known to the officers as gang members with prior involvement with firearms. During the patfrisk of the defendant, an officer found a firearm tucked into the waist of his pants, and he was arrested.

The defendant was indicted on a number of firearm offenses.[2] After a judge in the Superior Court denied the defendant's motion to suppress, he entered a conditional guilty plea to the charges of possession of a firearm without a license and possession of a large capacity feeding device, and the other charges were dismissed. The defendant appealed from his convictions, and the Appeals Court affirmed. We granted the defendant's application for further appellate review. After considering the facts and inferences as a whole, we conclude that the officers had reasonable suspicion, based on specific, articulable facts, that the defendant might have been armed and dangerous. Commonwealth v. Gomes, 453 Mass. 506, 511, 903 N.E.2d 567 (2009). Accordingly, we affirm the order denying the defendant's motion to suppress.[3]

Background. At approximately 7 p.m. on a February evening, three detectives from the New Bedford police department's gang unit, Kory Kubik, Gene Fortes, and Roberto DaCunha, observed ***743** a red sedan change lanes abruptly, causing another vehicle to slam on its brakes in order to avoid a collision. The officers followed the sedan as it turned into the parking lot of a fast food restaurant, activated their lights, and initiated a traffic stop. At that point, the officers did not know who was in the red sedan.

The vehicle was parked facing toward the restaurant, and the entrance to the restaurant was on the driver's side. Once ****361** the vehicle stopped, but before the officers approached, one of the passengers, Raekwan Paris, got out of the vehicle and began pacing between the officers and the vehicle on the passenger side, walking away from the entrance to the restaurant. Paris was angrily confronting them regarding the reason for the stop.

The officers were familiar with Paris from previous encounters, including field interrogations and arrests for firearm offenses. In the past, they had observed that he was cooperative and polite. At the time of this stop, Paris had been released on bail for a 2016 firearm charge.[4] Both Kubik and DaCunha had been involved in the 2016 arrest and recalled that Paris's demeanor had been calm and cordial during that encounter. Kubik also had interacted with Paris during two different traffic stops and had found his demeanor to be similarly cooperative and calm. Fortes, previously a school resource officer, had known Paris "since he was a young kid." Fortes had seen Paris at school events over the years and recalled that he had "always had a good rapport" with Paris. Additionally, Fortes had interactions with Paris during car stops and field interrogations. Fortes described Paris as "respectful" during all encounters.

During this encounter, however, DaCunha instructed Paris three times to reenter the car, but he refused. While two of the officers were occupied with Paris, the third attempted to approach the driver's window to speak with the female driver, but became concerned by the "escalating" situation between Paris and the other officers. The officers were unable to address the reason for the stop because of Paris's behavior. They observed that he was "becoming more angry." Fortes testified that, at this time, they were entirely focused on Paris: "his behavior was so agitated ... and different that all my focus was -- was really on him." Fortes also testified that Paris took "a bladed stance" and that he was ***744** unsure if Paris was "getting ready ... to attack" him. Fortes observed that Paris was "sizing [him] up" and found this behavior to be "very uncharacteristic of him." The officers also observed that Paris had "a closed, clenched fist" before he was handcuffed and that Paris did not appear to be intoxicated.

Paris was brought to the rear of the red sedan, handcuffed, and pat frisked. Only then were the officers able to turn their attention to the occupants of the car. The officers issued an exit order and conducted a patfrisk of the driver and the two remaining passengers.[5] Although Fortes testified that Paris "calmed down a little" after he was brought to the back of the car, it is important to note that from the time Paris had gotten out of the car to the time the defendant was asked to get out of the car, only ninety seconds had elapsed.

The three male occupants of the vehicle were familiar to the officers at the time of the stop. Two of the officers had been involved in an incident about eighteen months earlier in which Paris had been arrested on two firearms-related charges. Officers had information that the back seat passenger, Carlos Cortes, had posted pictures of a firearm on social media within

the previous month and were aware that the defendant had a three year old juvenile adjudication for an offense involving a firearm. Additionally, the officers were aware ****362** that Paris was a member of two gangs, the United Front and Bloods. The officers also were aware that the defendant was a member of the Bloods gang and that Cortes was a member of a gang in Fall River.

Discussion. A patfrisk is permissible only where an officer has reasonable suspicion that the stopped individual may be armed and dangerous. See Commonwealth v. Torres-Pagan, 484 Mass. 34, 36–37, 138 N.E.3d 1012 (2020). In assessing whether an officer has reasonable suspicion to justify a patfrisk, "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. Torres, 433 Mass. 669, 675-676, 745 N.E.2d 945 (2001), quoting Commonwealth v. Vazquez, 426 Mass. 99, 103, 686 N.E.2d 993 (1997). See Commonwealth v. Gonsalves, 429 Mass. 658, 666, 711 N.E.2d 108 (1999). An innocent explanation for an individual's actions "does not remove [those actions] from consideration in the reasonable suspicion analysis." Commonwealth v. DePeiza, 449 Mass. 367, 373, 868 N.E.2d 90 (2007).

In ***745** Torres-Pagan, 484 Mass. at 36 n.3, 138 N.E.3d 1012, we clarified that "reasonable suspicion" that an individual is armed and dangerous, not "reasonable belief," "is the preferred patfrisk standard" (citations omitted). See Commonwealth v. Narcisse, 457 Mass. 1, 9, 927 N.E.2d 439 (2010). We acknowledged, however, that "the two standards are interrelated and perhaps even interchangeable." Torres-Pagan, supra. "The purpose behind the protective measures allowed by Terry [v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968),] is to enable an officer to confirm or dispel reasonable suspicions" that the stopped individual may be armed and dangerous. Commonwealth v. Pagan, 440 Mass. 62, 68, 793 N.E.2d 1236 (2003).

In 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 [the judge's] ultimate findings and conclusion of law." Commonwealth v. Tremblay, 480 Mass. 645, 652, 107 N.E.3d 1121 (2018), quoting Commonwealth v. Clarke, 461 Mass. 336, 340, 960 N.E.2d 306 (2012). "The determination of the weight and credibility of the testimony is the function and responsibility of the judge who saw and heard the witnesses, and not of this court." Commonwealth v. Neves, 474 Mass. 355, 360, 50 N.E.3d 428 (2016), quoting Commonwealth v. Moon, 380 Mass. 751, 756, 405 N.E.2d 947 (1980). "[F]indings drawn partly or wholly from testimonial evidence are accorded deference and are not set aside unless clearly erroneous." Tremblay, supra at 655, 107 N.E.3d 1121. Here, the motion judge found the officers' testimony "credible in all relevant respects." The motion judge also concluded that the officers' inference that Paris was attempting to distract them from the vehicle was reasonable. We accept the motion judge's finding that the officers believed Paris was attempting to create a diversion; however, we review de novo the motion judge's conclusion that the officers' inference was objectively reasonable. See Commonwealth v. Mercado, 422 Mass. 367, 369, 663 N.E.2d 243 (1996) (we "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found").

Factors that the motion judge considered included Paris's "uncharacteristic" behavior during the traffic stop, which officers interpreted as an effort to draw their attention away from the vehicle and its contents, the prior involvement with firearms of the three male passengers in the car, their known gang affiliations, and the high crime area in which the traffic stop ****363** occurred. Although each of these factors standing alone would be insufficient to justify the patfrisk of the defendant, the totality of these factors justified not only the exit order, but also the patfrisk.

***746** We address in turn each of the factors that the motion judge considered, keeping in mind that "[t]he officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent [person] in the circumstances would be warranted in the belief that [his or her] safety or that of others was in danger." Terry, 392 U.S. at 27, 88 S.Ct. 1868. First, we consider what the motion judge found to be the most critical factor in the analysis: Paris's behavior during the stop. We defer to the finding of the motion judge, who heard and saw the testimony, that the officers' suspicion was based on a reasonable inference, in light of their training and experience, as well as their familiarity with Paris, that Paris was trying to distract them from the stopped vehicle. We further conclude that the officers' inference was objectively reasonable given these facts. See id. at 30, 88 S.Ct. 1868 ("where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous ..., he is entitled for the protection of himself and others in the

area to conduct a carefully limited search ... in an attempt to discover weapons").

"[An officer's] suspicion must be based on specific, articulable facts and reasonable inferences drawn therefrom." Commonwealth v. Moses, 408 Mass. 136, 140, 557 N.E.2d 14 (1990). In other words, reasonable suspicion that a defendant may be armed and dangerous derives not only from specific facts, but also from an officer's reasonable inferences drawn from those facts. See Sibron v. New York, 392 U.S. 40, 64, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) ("In the case of the self-protective search for weapons, [an officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous"); Commonwealth v. Silva, 366 Mass. 402, 406, 318 N.E.2d 895 (1974) ("we have required that the police officer's action be based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience"). See also Illinois v. Wardlow, 528 U.S. 119, 124-125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) ("In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior"). Police also may rely on their training and experience as a basis for reasonable suspicion. See ***747** DePeiza, 449 Mass. at 373, 868 N.E.2d 90. See also United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (officers should "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" [quotation and citation omitted]); United States v. Zambrana, 428 F.3d 670, 677 (7th Cir. 2005) ("in assessing the evidence presented by law enforcement officers, a district court should be mindful of the officers' experience, their training and the pressure-filled circumstances under which they fulfill their duties").

The motion judge credited the testimony of the three police witnesses entirely, including ****364** their testimony that they believed Paris's erratic behavior was intended to divert their attention from the car. See Neves, 474 Mass. at 360, 50 N.E.3d 428, citing Moon, 380 Mass. at 756, 405 N.E.2d 947. Specifically, the motion judge found that "[t]he officers had a legitimate concern at that point that there may be a weapon in the car because of the past dealing with [Paris] and his behavior on this date."[6] See Commonwealth v. Kennedy, 426 Mass. 703, 708, 690 N.E.2d 436 (1998) (deference to motion judge's assessment of credibility of testimonial evidence extends to inferences "derived reasonably from the testimony").

The defendant argues that the officers' conclusion that Paris's erratic behavior was an effort to draw their attention away from the vehicle and its contents was a "mere hunch," rather than a reasonable inference. Silva, 366 Mass. at 406, 318 N.E.2d 895.[7] A "hunch" is a subjective opinion that has no basis in fact. See Commonwealth v. Villagran, 477 Mass. 711, 715-716, 718, 81 N.E.3d 310 (2017). Although the ***748** officers may have had the subjective opinion that Paris was attempting to create a diversion, we consider whether the officers' actions were objectively reasonable. "The 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). See Commonwealth v. Kearse, 97 Mass. App. Ct. 297, 300, 146 N.E.3d 497 (2020), quoting Commonwealth v. Bacon, 381 Mass. 642, 643, 411 N.E.2d 772 (1980) ("The test is not whether the officer is acting in good faith. Rather, '[t]he test is an objective one' " [citation omitted]).

In Villagran, 477 Mass. at 716, 718, 81 N.E.3d 310, we concluded that a vice-principal's opinion that an individual on school property "[had] something on him" and that "[s]omething[was] not right" with no explanation for the basis of this claim was a mere "hunch" that did not justify a patfrisk. There, at the time of the frisk, there was no conduct of which the officer was aware that would give rise to a specific and articulable reasonable suspicion that the defendant may be armed and dangerous. Id. at 718, 81 N.E.3d 310. Similarly, in Gomes, 453 Mass. at 513, 903 N.E.2d 567, we concluded that officers' vague reference to shootings in the area in which the defendant had no apparent involvement was insufficient to give police reasonable suspicion to conduct a patfrisk.

Here, the officers' inference that Paris was attempting to distract them from criminal activity in the vehicle was based in fact. Immediately after the officers ****365** initiated the stop, Paris got out of the vehicle and began pacing between the officers and the vehicle. He appeared to be angry and was uncooperative. The officers informed Paris that it was a traffic stop, but Paris refused to get in the vehicle when the officers instructed him to do so multiple times. One officer testified that he was unable to approach the driver's window because of his concern for the "escalating" situation between Paris and

the other two officers. Paris appeared to become angrier in time, and as a result, the officers were focused entirely on him, unable to attend to the vehicle or the other occupants in the vehicle. As Paris became more agitated, officers noticed that he took "a bladed stance," and appeared to be preparing "to attack [Fortes]," whom he had known for years and with whom he had a good rapport. Officers also observed that Paris had "a closed, clenched fist."

As a result of the quickly escalating situation and their concern for their safety, the officers handcuffed and pat frisked Paris. Only then were they able to turn their attention to the other occupants of the car. Although Paris appeared to "calm[ ] down a little" after ***749** he was brought to the rear of the vehicle, only one and one-half minutes had elapsed since Paris initially got out of the vehicle. See Commonwealth v. Stampley, 437 Mass. 323, 326, 771 N.E.2d 784 (2002), quoting Gonsalves, 429 Mass. at 671, 711 N.E.2d 108 (Fried, J., dissenting) (considering constitutionally of exit order while "recognizing that law enforcement officials may have little time in which to avert the sometimes lethal dangers of routine traffic stops" [quotation and citation omitted]). See also Commonwealth v. Silvelo, 486 Mass. 13, 16, 154 N.E.3d 904 (2020) ("Even where the officers ask the defendant to get out of the vehicle, they may reasonably fear for their safety because any other occupant may access a weapon left behind by the defendant, or the defendant may access a weapon left behind upon returning to the vehicle").

As previously mentioned, the officers' suspicion that Paris's behavior was a diversion was compounded by the fact that the officers knew him from previous encounters and found his behavior to be especially uncharacteristic.[8] The dissenting justices attempt to lessen the weight of this factor by explaining that even on occasions when Paris was involved in criminal ****366** activity, he was polite and cooperative, suggesting that his behavior is no indication of whether he was engaged in criminal activity. However, Paris had been cooperative and friendly even during field interrogations that did not result in criminal charges. Additionally, as previously discussed, Fortes was a school resource officer and ***750** had known Paris for many years. Fortes testified that, in all his encounters with Paris over the years, "[i]t's always been pretty much the same. He's been respectful. We've always had ... a good rapport, him and I." The officers observed that his behavior during this stop notably was different from his behavior during all past encounters. Paris did not merely question the reason for the stop. He became angry and uncooperative. He took "a bladed stance," and appeared to be preparing to attack one officer. Even when one officer explained that the reason for the stop was a traffic violation, he refused to get back into the car. These facts support our conclusion that the officers' inference that Paris was attempting to create a diversion objectively was reasonable. See Commonwealth v. Jones, 83 Mass. App. Ct. 296, 299-300, 983 N.E.2d 253 (2013). Cf. United States v. Soares, 521 F.3d 117, 122 (1st Cir. 2008) (defendant's "movements could easily be seen as an attempt to create a diversion and confusion amongst the officers while he and the other passengers created an environment that was unsafe for the officers").

The facts discussed supra have a direct nexus both to Paris and to the other individuals in the car. See Gomes, 453 Mass. at 513, 903 N.E.2d 567. See also Narcisse, 457 Mass. at 12, 927 N.E.2d 439 ("neither the defendant nor his companion did anything that would arouse suspicion that criminal activity was 'afoot' "). Accordingly, there is nothing to suggest that the judge's findings were clearly erroneous or that he erred in concluding that it was reasonable for the officers to conclude that Paris's behavior at the time of this stop was unusual and was an attempt to divert the officers' attention from the vehicle and its contents.

Generally, the acts of a suspect's companions are not enough to establish a reasonable suspicion without more, but they may be considered in assessing whether a reasonably prudent person would be warranted in concluding that a suspect may be armed and dangerous. See Commonwealth v. Douglas, 472 Mass. 439, 443, 35 N.E.3d 349 (2015) (defendant shifting automobile into "drive" during course of stop should be "considered in the totality of the circumstances and in light of other information known to the officers"). See also Vazquez, 426 Mass. at 103, 686 N.E.2d 993 ("We have upheld searches and orders for occupants to leave an automobile when, given other suspicious circumstances which justified a stop, an officer had no information whatsoever that a gun may have been in the vehicle, but still had reason to be concerned with his and others' safety"); ***751** Commonwealth v. Wing Ng, 420 Mass. 236, 239-241, 649 N.E.2d 157 (1995) (officers justified in pat frisking defendant during execution of warrant to arrest alleged criminal riding in defendant's vehicle despite defendant's cooperation with police during stop); Moses, 408 Mass. at 144, 557 N.E.2d 14 (officers can take reasonable precautions for their own protection that are "minimally necessary to learn whether the suspect is armed and to disarm him once the weapon is discovered" [citation omitted]); United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007)

("A reasonable officer can infer from the behavior of one of a car's passengers a concern that reflects on the actions and motivations of the other passengers. The backseat passenger's behavior could only heighten [the officer's] concern that this ****367** was anything but a routine traffic stop"). When objectively viewed in light of the information known to the officers, Paris's actions were one important factor that contributed to the officers' reasonable suspicion that the defendant may be armed and dangerous. See Terry, 392 U.S. at 28, 88 S.Ct. 1868 ("We cannot say [the officer's] decision at that point to seize [the defendant] and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of [an officer] who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so").

Of course, the fact that a person has a criminal history is not "suspicious" automatically and at a certain point the effect of a previous conviction carries no weight in a reasonable suspicion analysis. However, in appropriate circumstances, it is a factor that may be considered. The circumstances of this stop warranted consideration of the passengers' criminal history. As earlier mentioned, two of the officers had been involved in an incident approximately eighteen months earlier in which Paris had been arrested on two firearms-related charges. Officers had information that the back seat passenger, Cortes, had posted pictures of a firearm on social media within the last month. Finally, officers were aware that the defendant had a three year old juvenile adjudication for an offense involving a firearm.

The defendant's relevant criminal history is relatively remote in time; however, an individual's criminal history may weigh more heavily in the analysis if it involves an offense close to the conduct at issue. Although the initial stop resulted from a traffic violation, officers quickly became concerned that there may be a firearm in the vehicle. The defendant's prior adjudication, and the ***752** other male passengers' previous interactions with law enforcement, all involved firearms. See, e.g., Commonwealth v. Mendez, 476 Mass. 512, 518 n.7, 69 N.E.3d 968 (2017). Alone, this evidence of the defendant's criminal record would not be sufficient to establish reasonable suspicion that the defendant may be armed and dangerous. See United States v. Torres, 987 F.3d 893, 904 (10th Cir. 2021), citing United States v. Hammond, 890 F.3d 901, 906–907 (10th Cir.), cert. denied, —— U.S. ——, 139 S. Ct. 390, 202 L.Ed.2d 298 (2018). However, the dissenting justices do not give this factor sufficient weight in the context of the totality of the circumstances.

Additionally, evidence of gang membership may be considered as a factor in the determination of reasonable suspicion, although, standing alone, it does not necessarily support a reasonable suspicion that a person may be armed and dangerous. This is especially true where, as here, the Commonwealth introduced no evidence regarding any known or ongoing gang violence in the area of the stop, police were not investigating gang-related crime when they initiated the traffic stop, and the Commonwealth did not link any efforts by Paris to distract the officers from the vehicle and its contents to any gang activity.

Nonetheless, "where ... the circumstances of the stop itself interact with an individual's criminal history to trigger an officer's suspicions, that criminal history becomes critically relevant for Terry-purposes." Torres, 987 F.3d at 904, quoting Hammond, 890 F.3d at 907. Paris was known to the gang unit officers as a member of both the United Front and Bloods gangs. The officers also were aware that the defendant "was validated as a Blood gang member" and that Cortes was a ****368** member of a gang in Fall River. The passengers' gang affiliations, combined with their previous involvement with firearms, are a factor that must be considered in the context of the totality of the circumstances analysis.

Finally, the fact that the stop occurred in a high crime area is a factor in the reasonable suspicion calculus, albeit one that contributes minimally. Although this factor should be given minimal weight, Justice Gaziano, in his dissent, see post at 777–79, 178 N.E.3d at 386–87, places too much focus on the fact that location alone does not suggest that the defendant may be armed and dangerous without considering the factor in the totality of the circumstances. See Narcisse, 457 Mass. at 13, 927 N.E.2d 439. See also DePeiza, 449 Mass. at 372, 868 N.E.2d 90 ("judge appropriately considered the high crime setting of the encounter, together with other factors, to conclude that the officers had reasonable ***753** suspicion that the defendant was committing a crime"). Much of the judge's findings regarding the high crime area related to the fact that Paris's previous firearm arrest took place approximately one-half mile away from the location of this stop. In considering the high crime area, the judge also noted that the stop occurred in a location known to be United Front gang territory.[9]

The dissents emphasize that the defendant was cooperative and sat quietly in the vehicle before the exit order and the

patfrisk. The dissenting justices suggest that because the defendant's conduct itself did not give rise to a reasonable suspicion, the other factors previously discussed, when considered as a whole, did not amount to specific articulable facts that the defendant might be armed and dangerous. "[T]he frisk of a person is constitutionally permissible if the arresting officer can point to specific, articulable facts that warrant a reasonable suspicion that the particular individual might be armed and a potential threat to the safety of the officer or others" (emphasis added). Wing Ng, 420 Mass. at 237, 649 N.E.2d 157. It is entirely possible that even where a defendant did not him-or herself behave in a suspicious manner at the time of the stop, other factors, including a companion's behavior, might be sufficient in light of the other factors to create specific, articulable facts that warrant a reasonable suspicion that the defendant may be armed and dangerous.

As discussed supra, although "mere propinquity" is insufficient, Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), "[a] suspect's companionship with or propinquity to an individual independently suspected of criminal activity is a factor to be considered in assessing the reasonableness of a seizure," United States v. Silva, 957 F.2d 157, 161 (5th Cir.), cert. denied, 506 U.S. 887, 113 S.Ct. 250, 121 L.Ed.2d 182 (1992). See United States v. Bell, 762 F.2d 495, 500-502 (6th Cir.), cert. denied, 474 U.S. 853, 106 S.Ct. 155, 88 L.Ed.2d 128 (1985), citing United States v. Sink, 586 F.2d 1041, 1047-1048 (5th Cir. 1978), cert. denied, 443 U.S. 912, 99 S.Ct. 3102, 61 L.Ed.2d 876 (1979) (patfrisk of defendant justified where defendant in car with individual known to be potentially armed and dangerous, defendant could not be ruled out as that individual's accomplice in previous incident, vehicle was parked in relatively crowded place, and defendant was noncompliant with officer's ***754** commands). To conclude, as the dissents imply ****369** we should, that every factor must be particularized directly to the conduct of the defendant at the time of the stop would defeat the purpose of the totality of the circumstances analysis. Furthermore, there is no doubt that the defendant's prior firearm adjudication and his known gang membership are sufficiently particularized to the defendant, even under the dissent's narrow interpretation of the requirement.

We must be careful not to overstate the distinction between the factors that justify an exit order and the factors that justify a patfrisk. The standard required to justify a patfrisk is not the same as that which is required to justify an exit order, see Torres-Pagan, 484 Mass. at 38–39, 138 N.E.3d 1012; however, the factors that justify an exit order also may be part of the consideration in the patfrisk analysis. The two standards are linked inextricably. See Commonwealth v. Washington, 449 Mass. 476, 482, 869 N.E.2d 605 (2007) ("under our State Constitution, neither an exit order nor a patfrisk can be justified unless 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" [quotation and citation omitted]). The defendant no longer challenges the exit order. Although the patfrisk, unlike the exit order, requires that police "have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous," the factors justifying an exit order are not necessarily insufficient to meet this standard. See Torres-Pagan, supra. Cf. Commonwealth v. Wilson, 441 Mass. 390, 394-395, 805 N.E.2d 968 (2004) (same facts that justified stop established reasonable suspicion that defendant may be armed and dangerous).

Both this court and the United States Supreme Court have recognized that "traffic stops are especially fraught with danger to police officers" (quotation and citation omitted). Arizona v. Johnson, 555 U.S. 323, 330, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009). See Stampley, 437 Mass. at 326, 771 N.E.2d 784, quoting Gonsalves, 429 Mass. at 665, 711 N.E.2d 108. See also Moses, 408 Mass. at 142, 557 N.E.2d 14 ("[W]hen approaching a stopped car, a police officer is to some degree impaired in seeing whether a person therein may be drawing a gun" [citation omitted]).

This court is very concerned about the disparate impact automobile stops have on persons of color and the national statistics on the fatalities suffered by such communities at the hands of police officers. See post at 756, 178 N.E.3d at 370 (Lowy, J., concurring); 757-58, 178 N.E.3d at 371-72 (Wedlandt, J., concurring); 769-71, 178 N.E.3d at 380-81 (Budd, C.J., dissenting); 778-79, 178 N.E.3d at 386-87 (Gaziano, J., ***755** dissenting). "All too frequently ... the prohibition against facially discriminatory laws has been inadequate to address the role played by racism and other invidious classifications in the way facially neutral laws actually are enforced." Commonwealth v. Long, 485 Mass. 711, 716, 152 N.E.3d 725 (2020). See Commonwealth v. Evelyn, 485 Mass. 691, 701, 152 N.E.3d 108 (2020). In announcing the "stop and frisk" rule in Terry, the Supreme Court concluded that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." Terry, 392 U.S. at 23, 88 S.Ct. 1868. Similarly, this court has made clear that we do not require police "to

accept the risk of [an objective] ambiguity." Commonwealth v. Johnson, 454 Mass. 159, 164, 908 N.E.2d 729 (2009).

Balancing the constitutional rights of all motorists, the objective of public protection, and police officer safety is difficult under the best of circumstances. In the ****370** context of a quickly evolving traffic stop, it is particularly difficult. We emphasize that the reasonable suspicion analysis is fact specific. This case does not stand for the proposition that every occupant of a vehicle may be pat frisked after a legal exit order based only on the conduct of a companion.[10] Here, the evidence established that police stopped the vehicle because of a traffic violation and did not, at that time, have reasonable suspicion that a crime had been committed or that any of the occupants of the vehicle were armed and dangerous. However, once Paris got out of the vehicle and angrily confronted the officers, the nature of the stop changed. Although this is a close case, Paris's erratic, uncharacteristic behavior, combined with the officers' knowledge of the three male passengers' prior involvement with firearms, their gang affiliations, and the high crime area in which the traffic stop occurred, and the fact that the officers were in jeopardy of losing control of the scene,[11] created a reasonable suspicion that the defendant might have been ***756** armed and dangerous.

The denial of the defendant's motion to suppress is affirmed.

So ordered.

LOWY, J. (concurring).

I agree with all the important concerns that the dissents raise. For example, there are issues of racial disparities in, and concerns about the of unreliability of, gang databases. Alleged gang membership and prior gun offenses alone are insufficient bases to give rise to the reasonable suspicion needed to exercise a patfrisk. In addition, the concerns raised by Chief Justice Budd regarding the impact of traffic stops on Black and brown people are serious ones that must be recognized and addressed.

I differ with the dissents on whether the inference that Raekwan Paris was attempting to divert attention from the car was reasonable. Since I believe that it was, I agree with the court's affirmance of the lower court's denial of the motion to suppress. See, e.g., United States v. Soares, 521 F.3d 117, 122 (1st Cir. 2008) (defendant's "movements could easily be seen as an attempt to create a diversion and confusion amongst the officers while he and the other passengers created an environment that was unsafe for the officers"); United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007) ("A reasonable officer can infer from the behavior of one of a car's passengers a concern that reflects on the actions and motivations of the other passengers. The backseat passenger's behavior could only heighten [the officer's] concern that this was anything but a routine traffic stop"); United States v. Goebel, U.S. Dist. Ct., No. 18-CR-2752 KG, 2018 WL 5995488 (D.N.M. Nov. 15, 2018), report and recommendation adopted, No. 18-CR-2752 KG, 2018 WL 6630509 (D.N.M. Dec. 19, 2018), aff'd, 959 F.3d 1259 (10th Cir. 2020) ("[Front seat passenger's] conduct lends ****371** further credence to [officer's] suspicion that the occupants of the car might be engaged in criminal activity. After [officer] parked his car north of the driveway, [passenger] -- without [officer] asking -- exited the Lincoln and approached the patrol car to speak with [officer]. [Officer] testified, 'From my previous experience with encounters with more than one suspect ... when one suspect or one subject approaches an officer, it's sometimes to divert the attention away from somebody else on-scene.... It's unusual for people to get out and come towards my car' ").

***757** The officers were entitled to rely on their training and familiarity with Paris in drawing this inference. See, e.g., United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (reasonable suspicion determination "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person" [quotation and citation omitted]); Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him"); United States v. Zambrana, 428 F.3d 670, 677 (7th Cir. 2005) ("It goes without saying, of course, that, in assessing the evidence presented by law enforcement officers, a district court should be mindful of the officers' experience,

their training and the pressure-filled circumstances under which they fulfill their duties").

Because in my view the officers' inference that Paris was intentionally creating a distraction from weapons in the car or on the persons of the other occupants was reasonable, the motion judge's adoption of that inference was not clearly erroneous. I therefore agree with the court that, in the totality of the circumstances, there was reasonable suspicion that the defendant was armed and dangerous. I respectfully concur.

WENDLANDT, J. (concurring).

As the studies and statistics cited by Chief Justice Budd in her dissent and by others indisputably show, there are racial disparities in the criminal justice system, including in who is stopped, who is pat frisked, and who is incarcerated.[1] The disparities are both stark and unacceptable. But today's decision does not allow officers to stop and pat frisk ***758** drivers or passengers simply because they are Black or brown, and today's decision does not rest on stereotypes. It neither solves systematic racism nor contributes to it. Indeed, the defendant does not contend that the traffic stop at issue was motivated by racial profiling or discrimination, see Commonwealth v. Long, 485 Mass. 711, 713, 152 N.E.3d 725 (2020); and, on appeal before ****372** this court, he no longer presses the issue whether the police officers' order that he exit the vehicle was grounded in a reasonable fear for officers' safety, see Commonwealth v. Gonsalves, 429 Mass. 658, 662-663, 711 N.E.2d 108 (1999). Instead, today we are called upon only to apply, to the rapidly evolving events of this case, the familiar test set forth by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and repeated recently by this court in Commonwealth v. Torres-Pagan, 484 Mass. 34, 37, 138 N.E.3d 1012 (2020), that an officer may not pat frisk an individual unless the officer has reasonable suspicion, based on specific articulable facts, that the individual is dangerous and may have a weapon. See Commonwealth v. Wing Ng, 420 Mass. 236, 237, 239, 649 N.E.2d 157 (1995) (permissibility of patfrisk under Federal and State constitution governed by same standard).

In our application, we are guided by the principle that reasonable suspicion to conduct a patfrisk exists where, based on the totality of the circumstances, see Commonwealth v. Fraser, 410 Mass. 541, 545, 573 N.E.2d 979 (1991), including the officers' training and experience, see Commonwealth v. DePeiza, 449 Mass. 367, 373, 868 N.E.2d 90 (2007),[2] a reasonably prudent person would be warranted in the belief that the suspected individual is armed and dangerous, see Terry, 392 U.S. at 27, 88 S.Ct. 1868; Commonwealth v. Narcisse, 457 Mass. 1, 7, 927 N.E.2d 439 (2010). Reasonable suspicion deals with degrees of likelihood; it "is not a requirement of absolute certainty." New Jersey v. T.L.O., 469 U.S. 325, 346, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). It requires more than an "inchoate and unparticularized suspicion or 'hunch,' " Terry, supra, but it is a less exacting requirement than probable cause, which itself requires only "a fair probability that contraband or evidence of a crime will be found," United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), quoting ***759** Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Ultimately, reasonable suspicion is "a pragmatic inquiry -- one that 'must be based on commonsense judgments and inferences about human behavior.' " United States v. Tiru-Plaza, 766 F.3d 111, 121-122 (1st Cir. 2014), cert. denied, 575 U.S. 952, 135 S.Ct. 1734, 191 L.Ed.2d 705 (2015), quoting Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). See Ornelas v. United States, 517 U.S. 690, 695, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (reasonable suspicion is "commonsense, nontechnical" conception dealing with "the factual and practical considerations of everyday life" [citation omitted]).

The specific articulable facts in this case are not hunches, speculations, or mere beliefs. They are instead as follows. Officers stopped a vehicle in which the defendant was a rear seat passenger after it cut off another vehicle, causing the latter vehicle abruptly to slam on its brakes. Within ninety seconds, the routine traffic stop transformed.

Before officers could approach the stopped vehicle to issue a civil citation for the traffic violation, Raekwan Paris, the front seat passenger, stepped out of the vehicle, flailing his arms, pacing away from the vehicle, and refusing to obey one of the officers' commands that he return to the vehicle. He continued to step away from the vehicle, an act reminiscent of his conduct ****373** eighteen months earlier during which two of the same three officers present here saw him walking away from a vehicle in which a firearm was found. Charges from that incident were pending at the time of this stop.

The officers, one of whom had known Paris for many years and since Paris was a "young kid", observed that Paris's erratic behavior not only was unusual, but also was unusually combative, even after officers had assured him that the reason for the stop was a traffic violation. Despite this explanation,

Paris escalated his conduct, clenched his fists, and assumed a fighting stance toward the one officer whom he had known for years and with whom he ordinarily had a "good rapport." Far from protesting continued harassment at the hands of police, the officers believed (reasonably so) that Paris was actively creating a distraction from the vehicle. See Terry, 392 U.S. at 27, 88 S.Ct. 1868 (reasonable suspicion does not require absolute certainty).[3]

***760** The distraction worked, at least temporarily. It was not until after Paris had drawn the attention of all three officers and had been handcuffed that the officers could attend to the validly stopped vehicle and its remaining occupants.

The officers found in the rear passenger compartment of the vehicle two other individuals. Each, like Paris, had engaged in either recent or remote firearms-related conduct. The officers knew that one passenger recently had been seen in a video recording holding what appeared to be a real firearm; additionally, one of the officers knew that the other passenger, the defendant, had a three year old juvenile adjudication for an offense involving a firearm. And, as mentioned, the officers knew that Paris had been arrested on firearms charges just eighteen months earlier and was currently out on bail awaiting trial.

In addition to the reasonable inference that Paris was distracting the officers from what lay in the vehicle and that the distraction regarded a firearm, the officers also knew, based on their years of training and experience,[4] and their knowledge of these particular individuals, that each of ****374** the three passengers had gang affiliations and that Paris and the defendant belonged to the same gang.[5] Moreover, the stop took place in a high-crime area,[6] within ***761** one-half mile of the location where Paris had been arrested eighteen months earlier for the aforementioned firearms charges. These facts, while seemingly innocuous in isolation, when taken together, and considering that they transpired within one minute and thirty seconds, warranted a reasonably prudent person's belief that the defendant was armed and dangerous.

BUDD, C.J. (dissenting).

A Black man got out of a vehicle that had just been pulled over for a traffic infraction. Despite the officers' orders to return to the vehicle, the man, Raekwan Paris, paced back and forth while flailing his arms, clenching his fists, and accusing the officers of harassment. Consequently, the officers placed Paris in handcuffs. They then pat frisked each of the vehicle's three other occupants (among them, the defendant here), none of whom had done anything on this night to arouse the officers' suspicions.

The court holds that the patfrisk of the defendant was constitutional because the officers had developed a reasonable suspicion ***762** that the defendant was armed following Paris's behavior. I believe that this decision, by deeming the officers' suspicion here objectively reasonable, allows for an encroachment upon an individual's right to be free from unreasonable search and seizure provided for in both art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. I therefore dissent.

****375** 1. The standard. A patfrisk constitutionally is "permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous." Commonwealth v. Torres-Pagan, 484 Mass. 34, 36, 138 N.E.3d 1012 (2020), citing Arizona v. Johnson, 555 U.S. 323, 326-327, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), and Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "Reasonable suspicion is measured by an objective standard...." Commonwealth v. Meneus, 476 Mass. 231, 235, 66 N.E.3d 1019 (2017). That is, an officer's belief qualifies as a reasonable suspicion where that belief arises from objectively reasonable inferences drawn from specific facts. See Terry, supra at 21, 88 S.Ct. 1868 ("it is imperative that the facts be judged against an objective standard"); Commonwealth v. DePeiza, 449 Mass. 367, 371, 868 N.E.2d 90 (2007).

An inference is objectively reasonable where either it is based on an officer's special training or personal experience, see United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), or it is a matter of commonsense judgment, see Kansas v. Glover, —— U.S. ——, 140 S. Ct. 1183, 1189-1190, 206 L.Ed.2d 412 (2020); Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). Conversely, where what an officer infers merely has some conceivable connection to the facts before the officer, that inference is pure speculation and cannot justify a patfrisk. See, e.g., Commonwealth v. Villagran, 477 Mass. 711, 718, 81 N.E.3d 310 (2017); Commonwealth v. Martin, 457 Mass. 14, 20-21, 927 N.E.2d 432 (2010); Commonwealth v. Gomes, 453 Mass. 506, 507-508, 513-514, 903 N.E.2d 567 (2009). See also Terry, 392 U.S. at 28, 88 S.Ct. 1868 (officer's

suspicion that person is armed must be more than "the product of a volatile or inventive imagination").

2. Application. The conduct that precipitated the defendant's patfrisk is as follows.[1] The defendant, his companion Paris, and a third male were passengers in a vehicle that made an improper lane change. Officers activated their lights and followed the vehicle into the parking lot of a fast food restaurant. Paris stepped out of the vehicle and refused to step back inside, despite the officers' orders to do so. He appeared angry and, with a raised ***763** voice, questioned the reason for the stop and accused the officers of harassing him. Paris stood "with one foot slightly in front of the other" and his fists clenched, which made the officers concerned that he was going to throw a punch. He "flailed his arms a few times" and paced back and forth, walking away from the vehicle and back. In response, the officers handcuffed Paris, after which Paris continued to talk about the legality of the stop and to question why the officers had stopped him. These events transpired in less than ninety seconds.

From this behavior, interpreted in light of the location of the stop and the suspected gang affiliations and histories of weapon possession of the vehicle's three male occupants, the officers inferred that Paris intended to distract the officers from the vehicle. They further inferred that the reason that he sought to do so was because there was contraband in the vehicle, that the contraband was a weapon, and that the weapon might be on the defendant's person.

The court concludes that it was reasonable, given the totality of the circumstances, to infer from Paris's behavior that ****376** he sought to distract the officers from the vehicle in order to prevent them from discovering a weapon therein. However, because this inference was grounded in pure speculation rather than the officers' training, experience, or commonsense judgment, it objectively was not reasonable. Contrast Glover, 140 S. Ct. at 1189-1190; Arvizu, 534 U.S. at 273, 122 S.Ct. 744; Wardlow, 528 U.S. at 125, 120 S.Ct. 673.

The officers did not testify that they had received any training that informed the inference that they drew from Paris's behavior. Contrast Arvizu, 534 U.S. at 273, 122 S.Ct. 744; DePeiza, 449 Mass. at 373, 868 N.E.2d 90. And although the officers testified that they were familiar with Paris, they likewise described no experiences with him that would support the reasonableness of inferring from his behavior that there was a weapon in the vehicle. The officers testified that Paris generally had been cooperative and cordial whenever they had previously encountered him. They also testified as to one specific encounter with Paris that resulted in the recovery of a firearm. During that encounter, Paris obeyed the officers' instructions and made no attempt to distract them from the vehicle in which he had been despite knowing that it contained a firearm.[2] Thus, because the officers previously had never experienced Paris either ***764** acting confrontationally or attempting to distract them from hidden contraband, their past experiences with Paris provided no basis for them to infer that his confrontational behavior here was an attempt to distract them from the vehicle because it contained a firearm.

As for common sense, it cannot seriously be maintained that it was simply a matter of common sense to interpret Paris's behavior as a ruse to draw the officers' attention away from the vehicle in order to avoid their detection of a firearm hidden therein. A commonsense inference is one that "does not require any specialized training" but rather "is a reasonable inference made by ordinary people on a daily basis." Glover, 140 S. Ct. at 1189 (considering it common sense to infer "that the driver of a car is its registered owner"). An ordinary, reasonable person would not interpret Paris's "uncharacteristic" behavior as such a ruse,[3] especially in light of the alternative, straightforward explanation that Paris contemporaneously provided for this behavior: his belief that the police were harassing him and that the stop was unfair. Given the well-documented history of the role that racial profiling plays in traffic stops throughout this country,[4] a Black man's expression of frustration ****377** at being stopped for a lane-change violation is readily comprehensible. Cf. Mandala v. NTT Data, Inc., 988 F.3d 664, 669 (2d Cir. 2021) (Pooler, J., dissenting) ("Most Americans understand that the criminal justice system has quite clear racial biases that create disparate outcomes for [B]lack Americans"). To conclude that the commonsense judgment here was that Paris was feigning frustration at being stopped ***765** as a tactical maneuver to distract the officers from hidden contraband is to not only ignore the reality of race-based policing, but also perpetuate it. See Commonwealth v. Evelyn, 485 Mass. 691, 708, 152 N.E.3d 108 (2020) ("long history of race-based policing likely will remain imprinted on the group and individual consciousness of African-Americans for the foreseeable future").

Nor is this inference transformed into a commonsense judgment when the totality of the circumstances is considered. First, the court concedes that the location of the stop deserves minimal weight in the officer's reasonable suspicion calculus.

I agree. This is the case even though Paris was arrested for unlawful firearm possession several blocks from the fast food restaurant parking lot where the stop occurred and even though this location is near the housing development associated with Paris's gang. Neither aspect of this location made it a commonsense judgment (when, as explained supra, it otherwise was not) to interpret Paris's behavior as a ruse to distract the officers from a hidden firearm.

Second, the three male occupants' histories of firearm possession and suspected gang affiliations similarly do not transform into a commonsense judgment the inference from Paris's behavior to the defendant's weapon possession. The court disagrees because, in its view, the circumstances of this stop "interact with" these factors, making them "critically relevant" to the officers' suspicion that the defendant was armed. Ante at 752, 178 N.E.3d at 367–68. See United States v. Torres, 987 F.3d 893, 904 (10th Cir. 2021), quoting United States v. Hammond, 890 F.3d 901, 907 (10th Cir.), cert. denied, —— U.S. ——, 139 S. Ct. 390, 202 L.Ed.2d 298 (2018). I do not see how this is so.

A person's suspected gang affiliation or criminal history is minimally relevant on its own. See Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 841, 934 N.E.2d 837 (2010) ("gang membership alone does not provide reasonable suspicion"). Cf. United States v. Mathurin, 561 F.3d 170, 177 (3d Cir. 2009) ("a past criminal conviction, never mind an arrest record, is not sufficient alone for reasonable suspicion" for investigatory stop). But these factors may significantly contribute to an officer's suspicion that a person is armed where there is a connection between the person's gang affiliation or criminal history and the circumstances of the particular stop. See Hammond, 890 F.3d at 907.

In Hammond, for example, the fact that the defendant was "a gang member who had recently been arrested for weapons possession" interacted with the fact that, at the time that the defendant was stopped and frisked, he was "wearing colors commonly ***766** associated with [his] gang" and "there was a feud ongoing" between his gang and a rival gang. Id. Likewise, in Torres, 987 F.3d at 905, the defendant not only was believed to be a gang member but also had "recently refused to cooperate with the police after being shot" in a gang-related incident. Because the defendant's suspected gang affiliation interacted with this recent occurrence, the United States Court of Appeals for the Tenth Circuit ****378** determined that "the police could reasonably infer" that the defendant may have been carrying a gun for protection at the time that he was stopped and frisked. Id. at 904. The reasonableness of the officers' inference that the defendant may have been armed was bolstered by the fact that the police had, just prior to the stop, observed him "drive[ ] [his] passenger to a place where she had tried to buy heroin." Id. at 904-905. In contrast, here, nothing about the male companions' suspected gang affiliations or histories of firearm possession "interacted with" Paris's behavior such that either of these factors should have significantly contributed to the officers' suspicion that the defendant was armed given that behavior.

Because none of the prior incidents of firearm possession known to the officers involved conduct similar to Paris's during this traffic stop, those prior incidents provided no reason for the officers to understand Paris's behavior as an indication that a firearm was in the vehicle. Cf. Commonwealth v. Cordero, 477 Mass. 237, 239, 244, 246, 74 N.E.3d 1282 (2017) (motorist's prior convictions for drug offenses did not make it reasonable for officer to interpret motorist's evasive answers about his travels as indication of his engagement in illegal drug activity).[5] Although the officers' knowledge of the companions' histories of firearm possession may have rationally predisposed the officers to suspect that the companions might be armed, whatever the circumstances in ***767** which the officers encountered them, see, e.g., Commonwealth v. Mendez, 476 Mass. 512, 518 n.7, 69 N.E.3d 968 (2017), this knowledge did not make it any more reasonable for the officers to infer from Paris's behavior that the defendant was armed.

The companions' suspected gang affiliations similarly do not interact with Paris's behavior so as to render any more reasonable the officers' inference from that behavior to the defendant's weapon possession. Although the officers' knowledge of the companions' gang affiliations likewise may have rationally predisposed them to suspect that the companions might be armed, whatever the circumstances in which the officers encountered them, this knowledge did not make it any more reasonable for the officers to infer from Paris's behavior that the defendant was armed. Nothing about Paris's behavior suggested gang activity, nor did the officers otherwise suspect that any gang activity was ongoing. Compare State v. Abel, 68 A.3d 1228, 1238 (Del. 2012) (defendant's gang affiliation did "not support a finding of reasonable, articulable suspicion that [defendant] was armed and dangerous" where "[officer] was aware of no facts that indicated gang activity was occurring nearby"). Contrast Torres, 987 F.3d at 905; Hammond, 890 F.3d at 907.

Thus, even considering the location of the stop and the histories of firearm possession and gang affiliations of the three male companions, it was not common sense ****379** to infer from Paris's behavior that the defendant was armed.[6] Compare Cordero, 477 Mass. at 244-247, 74 N.E.3d 1282 (even considering that motorist was traveling from "drug 'source city' " and that motorist had prior convictions ***768** for drug offenses, officer's suspicion that motorist was engaged in illegal drug activity because of motorist's evasive answers about his travels was not reasonable).

Because the officers' inference from Paris's behavior to the defendant's weapon possession did not result from their training and experiences, contrast Arvizu, 534 U.S. at 273, 122 S.Ct. 744; DePeiza, 449 Mass. at 373, 868 N.E.2d 90, nor from the application of commonsense judgment, contrast Glover, 140 S. Ct. at 1189-1190, that inference was not objectively reasonable and therefore did not properly contribute to the officer's suspicion that the defendant was armed,[7] see DePeiza, supra at 371, 868 N.E.2d 90.

This conclusion is bolstered by the fact that the inferential leap from Paris's behavior to the defendant's weapon possession is unlike any that we have previously accepted as objectively reasonable support for an officer's suspicion that a suspect is armed. Heretofore we have held that an officer had reasonable suspicion that a defendant was armed where the defendant's movements directly suggested that the defendant was carrying, concealing, or reaching for a weapon. See, e.g., Commonwealth v. Goewey, 452 Mass. 399, 407, 894 N.E.2d 1128 (2008) (defendant appeared to "hide or retrieve something"); DePeiza, 449 Mass. at 373, 868 N.E.2d 90 (defendant walked with "straight arm" gait and attempted to hide pocket from view); Commonwealth v. Stampley, 437 Mass. 323, 327, 771 N.E.2d 784 (2002) (defendant appeared to reach for object on floor of vehicle); Commonwealth v. Fraser, 410 Mass. 541, 545-546, 573 N.E.2d 979 (1991) (defendant appeared to "pick[ ] something up or put[ ] something down, and then ... confronted the officer with his hands in his pockets"); Commonwealth v. Silva, 366 Mass. 402, 407, 318 N.E.2d 895 (1974) ("Most important of all, the defendant made a gesture as if to conceal something in his automobile and one of the officers thought it was a gun"). Cf. Torres-Pagan, 484 Mass. at 39, 138 N.E.3d 1012 (patfrisk unjustified where defendant "was not secreting anything, nor was he attempting to reach for anything").

****380** Where an individual has not made any movements directly suggesting that he or she was carrying, concealing, or reaching for a weapon, we nevertheless have determined that an officer had reasonable suspicion to pat frisk that individual for weapons where the officer had preexisting suspicion that the individual ***769** was a participant in recent or ongoing violent criminal activity. See Commonwealth v. Douglas, 472 Mass. 439, 441, 446, 35 N.E.3d 349 (2015) (defendant had been under surveillance by police for potential involvement in ongoing violence between rival groups); Commonwealth v. Wing Ng, 420 Mass. 236, 240-241, 649 N.E.2d 157 (1995) (defendant suspected to have participated in armed home invasion that occurred one week prior).

This case involves neither scenario. The officers did not observe any of the vehicle's occupants move in a manner suggesting that they were carrying, concealing, or reaching for a weapon. See Torres-Pagan, 484 Mass. at 39, 138 N.E.3d 1012. Nor did the officers have suspicion prior to initiating the stop that any of the occupants were engaging in, or recently had engaged in, violent criminal activity. Contrast Douglas, 472 Mass. at 446, 35 N.E.3d 349; Wing Ng, 420 Mass. at 240-241, 649 N.E.2d 157.

In short, without Paris's behavior, the officers, per their own admission, would have lacked reasonable suspicion to pat frisk the defendant. But as explained supra, this behavior did not give rise to an objectively reasonable inference that the defendant was armed. The inferences that the officers drew from Paris's behavior and that led the officers to conclude that the defendant may have been armed were the product of pure speculation rather than of training, experience, or common sense. The patfrisk was accordingly unlawful.

Today's decision greatly and, I believe, unwisely expands the circumstances in which officers may conduct a patfrisk. This expansion erodes critical constitutional protections against arbitrary searches and seizures by the police and unjustifiably broadens what is meant to be an officer's "narrowly drawn authority" to perform what has been described as a "severe ... intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience." Torres-Pagan, 484 Mass. at 36 n.3, 39, 138 N.E.3d 1012, quoting Terry, 392 U.S. at 24-25, 27, 88 S.Ct. 1868.

3. Implications of the court's decision. I write also to emphasize the adverse implications of today's decision for communities of color. "[A]nyone's dignity can be violated"

by an unconstitutional search; however, "it is no secret that people of color are disproportionate victims of this type of scrutiny." Utah v. Strieff, 579 U.S. 232, 254, 136 S.Ct. 2056, 195 L.Ed.2d 400 (2016) (Sotomayor, J., dissenting).[8] This disparity ***770** is due in part to the "powerful racial stereotype" that Black men are "violence prone." Buck v. Davis, —— U.S. ——, 137 S. Ct. 759, 776, 197 L.Ed.2d 1 (2017), quoting Turner v. Murray, 476 U.S. 28, 35, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986).[9]

Today's decision will worsen this disparity. It does not, of course, expressly authorize officers to pat frisk a person simply because of his or her race. The racial disparities in our criminal justice system are decreasingly the product of overt racism or facially discriminatory rules. These ****381** persistent disparities are, rather, more and more the product of neutral rules of deference that affirm the decisions of racially biased actors. Cf. Commonwealth v. Long, 485 Mass. 711, 716, 152 N.E.3d 725 (2020) ("All too frequently ... the prohibition against facially discriminatory laws has been inadequate to address the role played by racism and other invidious classifications in the way facially neutral laws actually are enforced"). Today's decision augments the considerable deference already afforded officers by uncritically accepting as reasonable the officers' suspicion that the defendant was armed because his companion aggressively confronted the officers about the legality of the stop. The court accepts this inference as reasonable although the officers provided no reasonable basis for it. The court thereby invites officers to pat frisk first and invent explanations later, for it assures that as long as officers can articulate a reason -- any reason -- for which a person's behavior indicated that a weapon was on the scene, that reason will be accepted and the patfrisk condoned.[10]

This court should require more. Such uncritical deference provides the space into which seeps the damaging influence of racial bias. Creating greater space for officers to act on their ungrounded intuitions that people are dangerous increases the risk that people of color will be subjected disproportionately to unjustified patfrisks.

***771** If we have any hope of mitigating racial disparities in our criminal justice system, it is imperative that we pay close attention to the effect that our law of search and seizure has on people of color.

The court's sanctioning of patfrisks founded upon objectively unreasonable suspicion is both unjustified and unjust. I therefore dissent.

GAZIANO, J. (dissenting, with whom Georges, J., joins).
The court today concludes that the police officers who stopped a vehicle in which the defendant was a rear seat passenger had a reasonable suspicion, based in large part on the behavior of the front seat passenger, that the defendant was armed and dangerous, such that they could order the defendant out of the vehicle and pat frisk him. The court's view of what a police officer must believe in order to establish "a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous," Commonwealth v. Torres-Pagan, 484 Mass. 34, 38-39, 138 N.E.3d 1012 (2020), eviscerates the standard of a reasonable police officer and replaces it with subjective, speculative beliefs that an officer might have, contrary to both our jurisprudence under art. 14 of the Massachusetts Declaration of Rights and that of the United States Supreme Court under the Fourth Amendment to the United States Constitution, see Arizona v. Johnson, 555 U.S. 323, 326-327, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009) ("to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous"); Commonwealth v. Wing Ng, 420 Mass. 236, 237, 649 N.E.2d 157 (1995), citing ****382** Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It also finds reasonable suspicion that the defendant was armed and dangerous, based on the actions of another individual, without any of the narrow indicia that the individuals might have been acting jointly, which this court previously has required be established, as it must to pass constitutional muster, that a suspicion is particularized and individual. Accordingly, I dissent.

In this case, the court reasons that the officers' inference that Raekwan Paris, the front seat passenger, was trying to distract them from the vehicle and its contents was objectively reasonable. Although the officers' beliefs were specific and articulable, they did not identify specific and articulable facts upon which to ground this inference. "Reasonable suspicion may not be based on good faith or a hunch...." ***772** Commonwealth v. Grandison, 433 Mass. 135, 139, 741 N.E.2d 25 (2001). See Commonwealth v. Lyons, 409 Mass. 16, 19, 564 N.E.2d 390 (1990), quoting Commonwealth v. Wren, 391 Mass. 705, 707, 463 N.E.2d 344 (1984) ("To meet the 'reasonable suspicion' standard in this Commonwealth, police action must be 'based on specific, articulable facts

and reasonable inferences therefrom' rather than on a 'hunch' "). See also Vasquez v. Maloney, 990 F.3d 232, 240 (2d Cir. 2021), quoting Terry, 392 U.S. at 27, 88 S.Ct. 1868 (speculation that warrant "might" be outstanding "is the quintessential 'inchoate and unparticularized suspicion or "hunch" ' ").

In particular, here, although Paris was acting in a manner that the officers perceived as notably different from the multiple other times in which they had encountered him, the fact that his behavior was different, and could be viewed as potentially threatening, did not lead to a reasonable, objective inference that he was attempting to distract the officers from a weapon concealed in the vehicle.[1] Indeed, the officers who conducted the stop and testified at the hearing on the motion to suppress had specific, actual knowledge and experience to the contrary. On a prior occasion when Paris actually had concealed a firearm in a vehicle, he calmly and cooperatively walked back to the vehicle to speak with the officer who had called him to a scene where he almost certainly was aware that he would be arrested, and was calm and polite while being arrested. During this stop, however, in addition to his noncooperation behavior and a confrontational physical posture, Paris argued loudly and angrily that police were harassing him, and repeatedly challenged the reason for the stop.[2]

An inference indeed may be objectively reasonable where it is based on an officer's specialized training or personal experience, ****383** ***773** see United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002), or is a matter of common sense, apparent to any lay person, see Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). See, e.g., Commonwealth v. Villagran, 477 Mass. 711, 717-718, 81 N.E.3d 310 (2017); Commonwealth v. Martin, 457 Mass. 14, 20-22, 927 N.E.2d 432 (2010). Here, however, whatever the officers speculated were Paris's motives for his unusual and confrontational behavior on this occasion were subjective, and too speculative to permit a reasonable inference. To conclude that, this time, when in possession of an unlicensed weapon, Paris would be likely to act in a confrontational and agitated manner to conceal evidence of a firearm would be "essentially random and arbitrary." Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 472, 671 N.E.2d 515 (1996). See United States v. Noble, 762 F.3d 509, 522 (6th Cir. 2014) ("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" [citation omitted]). Guesswork and hunches, regardless of good faith, do not equate to objective reasonable suspicion. The court's holding broadens what heretofore has been an officer's "narrowly drawn authority" to conduct what has been described as a "severe ... intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience." See Torres-Pagan, 484 Mass. at 36 n.3, 39, 138 N.E.3d 1012, quoting Terry, 392 U.S. at 24-25, 27, 88 S.Ct. 1868.

Even assuming that the officers' inferences were objectively reasonable, the court makes an unjustified leap from the supposition that Paris was attempting to distract the officers to the belief that the defendant was armed and dangerous. A determination of reasonable suspicion that a suspect is armed and dangerous must be particularized and individual. See Commonwealth v. Narcisse, 457 Mass. 1, 10-13, 927 N.E.2d 439 (2010), and cases cited. See also Wing Ng, 420 Mass. at 237, 649 N.E.2d 157, citing Terry, 392 U.S. at 27, 88 S.Ct. 1868. "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). As the United States Supreme Court observed more than seventy years ago, it was "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." United States v. Di Re, 332 U.S. 581, 587, 68 S.Ct. 222, 92 L.Ed. 210 (1948). Rather, and as the court acknowledges, this factor should be "considered in the totality of the circumstances and in light of other information known to the officers." See Commonwealth v. Douglas, 472 Mass. 439, 443, 35 N.E.3d 349 (2015).

***774** To be sure, in limited circumstances, where a clear link exists between the individual and the known criminal activity, this court has recognized that one individual's actions may be undertaken on behalf of a group, thereby making the actions of others in the group of relatively lesser importance in justifying a patfrisk of each of them. In Wing Ng, 420 Mass. at 240-241, 649 N.E.2d 157, for example, the court concluded that police were justified in pat frisking the driver of a vehicle where the driver was the brother of a person suspected of having committed an armed home invasion, that person was a passenger in the vehicle, and police reasonably could have inferred, from that and other factors, that the driver might have participated in the armed home invasion with his brother. ****384** In that case, the patfrisk of the driver was upheld notwithstanding the absence of any conduct by the driver himself that would have raised a reasonable

suspicion that he was armed and dangerous. See id. See also, e.g., Villagran, 477 Mass. at 718, 81 N.E.3d 310 ("principal's hunch combined with [officer]'s observations of the defendant's nervousness and [officer]'s testimony that both the principal and the vice-principal appeared to be 'rattled' still did not establish a 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").

Here, the court concludes that Paris's motive in undertaking his actions (insofar as it was understood in the subjective belief of the officers) could be imputed to the defendant, thereby providing reasonable suspicion that the defendant was armed and dangerous, and that Paris was attempting to distract police from becoming aware of this fact. Interpreting Paris's interactions with police, however, as motivated by a desire to protect a fellow gang member who was in possession of a gun, rather than, as he claimed them to be during the interaction, a request for information concerning the reasons for the stop and a protest of perceived police harassment, is too speculative to give rise to a reasonable suspicion.[3] See ***775** Commonwealth v. Stampley, 437 Mass. 323, 326, 771 N.E.2d 784 (2002) (defendant's initial behavior during routine traffic stop, although "peculiar" and "unusual," was not threatening). While, in certain circumstances, those in a vehicle together reasonably might be viewed as being engaged in a collective action, see Wyoming v. Houghton, 526 U.S. 295, 304-305, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), here, the officers were aware that three of the occupants of the vehicle belonged to three different gangs, and the driver, as far as they knew, was not associated with any gang. There was no evidence of recent gang violence, and the officers were not investigating any gang-related activity when they stopped the vehicle for an abrupt lane change as it pulled into the parking lot of a fast food restaurant. In the totality of the circumstances of which the officers were aware, there was nothing to suggest the likelihood of collective action by the passengers. Compare ****385** Wing Ng, 420 Mass. at 241, 649 N.E.2d 157. Contrast United States v. Thomas, 997 F.3d 603, 607, 610-611 (5th Cir. 2021) (officers reasonably suspected defendant and three others gathered around stolen vehicle were involved in criminal activity, where vehicle matched description of one stolen during armed robbery in which two men fled scene, license plate matched that of stolen vehicle, there were two men in vehicle, defendant was standing closest to driver, and all six men appeared to be talking to each other).

"[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his [or her] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of [the officer's] experience." Terry, 392 U.S. at 27, 88 S.Ct. 1868. As the United States Supreme Court has emphasized, although what constitutes reasonable suspicion is not "self-defining," the "demand for specificity in the information upon ***776** which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." United States v. Cortez, 449 U.S. 411, 417, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981), quoting Terry, supra at 21 n.18, 88 S.Ct. 1868. "The vice in interrogations and searches based on a hunch is their essentially random and arbitrary nature, a quality inconsistent, under constitutional norms ... with a free and ordered society." Bartlett, 41 Mass. App. Ct. at 472, 671 N.E.2d 515. See Ybarra, 444 U.S. at 90-91, 93, 100 S.Ct. 338 (patfrisk was unconstitutional where patron of bar, unknown to police, "made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening"); Torres-Pagan, 484 Mass. at 39, 138 N.E.3d 1012 (patfrisk was not justified where defendant "was not secreting anything, nor was he attempting to reach for anything"). Contrast United States v. Belin, 868 F.3d 43, 46, 50-51 (1st Cir. 2017), cert. denied, —— U.S. ——, 138 S. Ct. 703, 199 L.Ed.2d 576 (2018) (reasonable suspicion for stop and for frisk where officer knew defendant previously had carried firearm unlawfully, defendant was identified as gang member, and he had been acting "unusually nervous[ly]"); United States v. Roelandt, 827 F.3d 746, 748-749 (8th Cir. 2016), and cases cited (reasonable suspicion for patfrisk where known felon and gang member was walking quickly through high crime area and looking around suspiciously).

Furthermore, nothing in the defendant's own actions gave rise to a reasonable suspicion that he was armed and dangerous. It is undisputed that the defendant obeyed the officers' instructions, was quiet and polite, and sat in the vehicle without any movements or gestures to suggest that he was in possession of a firearm. So, too, with the driver and the other rear seat passenger. Contrast United States v. Bell, 762 F.2d 495, 496-497, 501 (6th Cir.), cert. denied, 474 U.S. 853, 106 S.Ct. 155, 88 L.Ed.2d 128 (1985) (reasonable suspicion to pat frisk defendant, front seat passenger in parked car officers approached to arrest driver pursuant to warrant, where defendant repeatedly refused to obey officers' instructions to keep his hands on dashboard where they

could be seen, and later to leave vehicle, so officers safely could execute arrest of driver; driver was being arrested for operating large scale food stamp trafficking ring and was known to have accomplice whose physical description roughly matched defendant's). Contrast also Commonwealth v. Johnson, 454 Mass. 159, 161-164, 908 N.E.2d 729 (2009) (defendant's refusal to take hands out of pockets as officers asked gave rise to reasonable concern for officer safety, where officers saw six young men, including defendant, ****386** standing in group outside apartment building, ***777** recognized one who had received no-trespass notice to stay away from building, and arrested him, while defendant stood nearby).

The court also emphasizes the gang affiliations of the vehicle's occupants. As the court points out, in some circumstances, such as where police are investigating gang-related violence or otherwise are aware of ongoing gang activity such as a feud among rival gangs in the area, gang affiliations may be highly relevant to a determination of reasonable suspicion. See, e.g., Commonwealth v. Smith, 450 Mass. 395, 398-399, 879 N.E.2d 87, cert. denied, 555 U.S. 893, 129 S.Ct. 202, 172 L.Ed.2d 161 (2008); United States v. Rios, 830 F.3d 403, 421 (6th Cir. 2016), cert. denied, —— U.S. ——, 138 S. Ct. 2701, 201 L.Ed.2d 1096 (2018). In this context, however, these affiliations were of limited relevance. See Douglas, 472 Mass. at 441, 35 N.E.3d 349 (defendant had been under surveillance by police for potential involvement in ongoing violence between rival groups); Wing Ng, 420 Mass. at 240-241, 649 N.E.2d 157 (defendant was suspected of having participated in armed home invasion that took place one week earlier).

This case involves neither scenario. The officers did not observe any of the vehicle's occupants move in a manner suggesting that they were carrying, concealing, or reaching for a weapon. Nor did the officers have a preexisting suspicion that any of the occupants were engaging in, or recently had engaged in, violent criminal activity. Rather, the officers explained that they pat frisked the defendant because Paris's behavior precipitated in their minds a chain of inferences: they inferred from Paris that he sought to draw their attention away from the vehicle; they further inferred that this was because the vehicle contained contraband; and, finally, they inferred that this contraband was a weapon. Contrast Arvizu, 534 U.S. at 273, 122 S.Ct. 744; Commonwealth v. DePeiza, 449 Mass. 367, 373, 868 N.E.2d 90 (2007).

Moreover, the Commonwealth introduced no evidence concerning recent gang violence in the vicinity of the stop, police were not investigating gang-related crime when they initiated the traffic stop, and the Commonwealth did not link any efforts by Paris to distract the officers from the vehicle and its contents to any gang activity. Compare United States v. Samnang Am, 564 F.3d 25, 32 (1st Cir. 2009), cert. denied, 559 U.S. 986, 130 S.Ct. 1724, 176 L.Ed.2d 203 (2010) (reasonable suspicion justified patfrisk where defendant was affiliated with gang, had lengthy criminal history, was on probation, and had established proclivity to carry weapons, and officer noted unusual occurrence of defendant walking alone in rival gang's ***778** territory), and United States v. Elmore, 382 F. Supp. 3d 136, 140-141 (D. Mass. 2019) (reasonable suspicion to justify patfrisk where defendant was near vehicle matching description of vehicle seen at recent gang shooting in high crime area linked to gang suspected to have been involved in earlier shootings; defendant moved away suddenly when officers approached; and defendant grabbed at his waistband several times), with State v. Abel, 68 A.3d 1228, 1237-1239 (Del. 2012) (no reasonable suspicion for patfrisk despite defendant's affiliation with motorcycle gang, in part due to absence of facts "that indicated gang activity was occurring nearby").

In Abel, 68 A.2d at 1237-1238, the Supreme Court of Delaware considered the extent to which gang membership alone supported a reasonable belief that an individual was armed and dangerous. An officer testified that he had stopped the defendant, who was riding a motorcycle and wearing Hells Angels insignia ("colors"). ****387** The experienced officer knew that Delaware is considered territory controlled by the rival Pagans motorcycle club. On the basis of an ongoing feud between these groups, the prosecution argued that "[a] gang member traveling unarmed through a rival gang's territory is subject to a serious risk to [his] safety; consequently, a police officer encountering a Hells Angels member flying colors in Pagans territory faces a heightened concern that the person has access to a weapon." Id. at 1235. The court rejected this argument; it reasoned that the prosecution's position would sanction a patfrisk for weapons whenever a Hells Angels member was stopped for a motor vehicle violation anywhere in Delaware, because the entire State was rival gang territory. Id. Here, the varied gang affiliations of the defendant and two of his companions did not significantly contribute to the supposition that the defendant was armed and dangerous.

Finally, I share the concerns articulated by Chief Justice Budd in her dissent, see ante at 769–71, 178 N.E.3d at 380–82;

the court disregards the adverse impact its decision will have on individuals and communities of color. It is an unfortunate reality that gang membership may serve as a pretext for racial bias. See Commonwealth v. Evelyn, 485 Mass. 691, 708-709, 152 N.E.3d 108 (2020); Commonwealth v. Warren, 475 Mass. 530, 538-540, 58 N.E.3d 333 (2016). In neighborhoods where gangs are present, the risk of racial disparities in police stops is heightened by the increased numbers of encounters between police and residents, many of whom are law-abiding citizens, and all of whom are entitled to the same protections against unreasonable ***779** searches and seizures as those who live in other areas. See Warren, supra at 539-540, 58 N.E.3d 333. See, e.g., Commonwealth v. Meneus, 476 Mass. 231, 238, 66 N.E.3d 1019 (2017); Commonwealth v. Jones-Pannell, 472 Mass. 429, 434-435, 35 N.E.3d 357 (2015); Commonwealth v. Gomes, 453 Mass. 506, 512-513, 903 N.E.2d 567 (2009). Cf. Commonwealth v. Wardsworth, 482 Mass. 454, 468-471, 124 N.E.3d 662 (2019).

In sum, the court's decision that, at the time of the patfrisk of the defendant, " '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,' " ante at 744, 178 N.E.3d at 361–62, quoting Commonwealth v. Torres, 433 Mass. 669, 675-676, 745 N.E.2d 945 (2001), because the defendant was armed and endangering them, improperly blurs the distinction between a subjective belief and reasonable suspicion to the point that establishing reasonable suspicion by an ordinary, reasonable officer no longer is the bedrock determination to be made. When the defendant was ordered out of the rear passenger seat and pat frisked, Paris was in handcuffs and surrounded by other officers at the rear of the vehicle. None of the other occupants of the vehicle had made any suspicious or nervous movements since the initiation of the stop, nor was there any reason to believe that they had instigated Paris's uncooperative or belligerent behavior. There was nothing that would have hindered the officers from returning to the purpose of the traffic stop -- the abrupt lane change -- and proceeding accordingly.

Because I would not veer from the well-established standard of Terry, 392 U.S. at 27, 88 S.Ct. 1868, and Torres-Pagan, 484 Mass. at 38-39, 138 N.E.3d 1012, I respectfully dissent.

All Citations

488 Mass. 741, 178 N.E.3d 356

Footnotes

1 As is our custom, we recite the defendant's name as it appears in the indictments.

2 The charges included (1) unlicensed possession of a large capacity firearm, G. L. c. 269, § 10 (m); (2) unlicensed possession of a large capacity feeding device, G. L. c. 269, § 10 (m); (3) carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a), when he "had been previously found delinquent in Juvenile Court of one or more violent crimes," G. L. c. 269, § 10G; and (4) carrying a loaded firearm without a license, G. L. c. 269, § 10 (n).

3 We acknowledge the amicus brief submitted by the Committee for Public Counsel Services; the Charles Hamilton Houston Institute for Race & Justice; the New England Innocence Project; American Civil Liberties Union of Massachusetts, Inc.; Lawyers for Civil Rights; Citizens for Juvenile Justice; Rights Behind Bars; and the Massachusetts Association of Criminal Defense Lawyers on behalf of the defendant.

4 Raekwan Paris subsequently was convicted of this charge, but the Appeals Court overturned the conviction, concluding that police lacked reasonable suspicion for an investigatory stop. See Commonwealth v. Paris, 97 Mass. App. Ct. 785, 790, 150 N.E.3d 350 (2020).

5 The defendant does not challenge the stop or the exit order.

6 In his dissent, Justice Gaziano faults the court for, as he puts it, "conclud[ing] that Paris's motive in undertaking his actions ... could be imputed to the defendant, thereby providing reasonable suspicion that the defendant was armed and dangerous, and that Paris was attempting to distract police from becoming aware of this fact." Post at 774, 178 N.E.3d at 384. The court makes no such mental leap. We conclude only, as the judge did, that Paris's conduct gave rise to a reasonable inference that Paris was attempting to distract the officers' attention from the car because there was a firearm somewhere inside the car.

7 The defendant in his brief and Justice Gaziano in his dissent make much of the fact that the officers testified that their actions were based on a hunch. This is a misrepresentation of the testimony. Defense counsel asked one officer: "[I]t's fair to say [your actions and the actions of the other detectives] were entirely based on a hunch?" The officer responded: "It was more of a fear, yes." The officer further stated that his actions were based on a fear for "officer safety." In any event,

how the officer described his perceptions is not legally meaningful, as we are not bound to accept his characterization of his suspicion.

8 In Commonwealth v. Torres-Pagan, 484 Mass. 34, 40, 138 N.E.3d 1012 (2020), we distinguished between furtive behavior that would warrant a suspicion that an individual may be armed and dangerous and surprising behavior. "[S]urprise in response to unexpected behavior is not the same as suspicion that the person is armed and dangerous." Id. Here, the Paris's behavior was not just surprising, it was aggressive. As Paris became more agitated, officers noticed that he took "a bladed stance" and appeared to be preparing "to attack [one officer]." Officers also observed that Paris had "a closed, clenched fist." Paris's behavior was one factor that gave rise to a heightened awareness of danger during the stop.

In Torres-Pagan, we did not consider whether the furtive or aggressive movements of one passenger may warrant reasonable suspicion that another passenger may be armed and dangerous. Given the officers' reasonable inference that Paris's behavior was a diversion, it is reasonable to conclude that this factor was an important part of the totality of the circumstances analysis relating to the defendant. See Commonwealth v. Stampley, 437 Mass. 323, 326, 771 N.E.2d 784 (2002), quoting Commonwealth v. Gonsalves, 429 Mass. 658, 665, 711 N.E.2d 108 (1999) ("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").

9 Specifically, the judge found that the "United Front Housing Development" was located near the point of the stop at issue in this case. The housing development was actually called "United Front Homes"; however, in 2011, it was renamed "Temple Landing."

10 Whether the driver properly was pat frisked is not before us.

11 In his dissent, Justice Gaziano concludes that the officers were no longer in jeopardy of losing control of the scene at the time the defendant was pat frisked because Paris was handcuffed and secured at the rear of the vehicle. See post at 779, 178 N.E.3d at 387. Detective Fortes stayed with Paris while the other officers approached the other occupants of the vehicle. Only then did the officers recognize the other passengers of the vehicle to be gang affiliated and to have prior involvement with firearms. Although Paris was handcuffed at the time, that did not change the fact that officers believed he had been attempting to distract them from criminal activity afoot in the vehicle. Furthermore, from the time Paris had gotten out of the car to the time the defendant was asked to get out of the car, only ninety seconds had elapsed.

1 See, e.g., E.T. Bishop, B. Hopkins, C. Obiofuma, F. Owusu, Criminal Justice Policy Program at Harvard Law School, Racial Disparities in the Massachusetts Criminal System (Sept. 2020); Fagan, Braga, Brunson, & Pattavina, Stops and Stares: Street Stops, Surveillance, and Race in the New Policing, 43 Fordham Urb. L.J. 539, 540, 598 (2016).

2 "[W]e appropriately grant respect to the ability of trained and experienced police officers to draw from the attendant circumstances inferences that would 'elude an untrained person' " (footnote omitted). United States v. Tiru-Plaza, 766 F.3d 111, 116 (1st Cir. 2014), cert. denied, 575 U.S. 952, 135 S.Ct. 1734, 191 L.Ed.2d 705 (2015), quoting United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981).

3 Importantly, as the court notes, ante at 755, 178 N.E.3d at 369–70, this case does not authorize officers automatically to pat frisk an individual based solely on the actions of the individual's companion. See Wing Ng, 420 Mass. at 237-238, 649 N.E.2d 157 (police do not have automatic right to pat frisk companion of lawfully arrested individual). See also United States v. I.E.V., 705 F.3d 430, 438 (9th Cir. 2012) (driver's "fidgety" behavior, without more, not enough to justify patfrisk of passenger); United States v. Wilson, 506 F.3d 488, 495 (6th Cir. 2007) (driver's "undeniably suspicious" behavior, without more, not enough to justify patfrisk of passenger).

However, a companion's actions cannot be ignored when conducting the totality of the circumstances analysis required by the reasonable suspicion standard. See Wing Ng, 420 Mass. at 241, 649 N.E.2d 157; United States v. Flett, 806 F.2d 823, 827 (8th Cir. 1986); United States v. Bell, 762 F.2d 495, 500 (6th Cir.), cert. denied, 474 U.S. 853, 106 S.Ct. 155, 88 L.Ed.2d 128 (1985). See also Tiru-Plaza, 766 F.3d at 121 (following traffic stop, discovery of firearm concealed in driver's waistband supported reasonable suspicion to pat frisk passenger); United States v. Lyons, 733 F.3d 777, 780 (7th Cir. 2013), cert. denied, 572 U.S. 1041, 134 S.Ct. 1779, 188 L.Ed.2d 607 (2014) (driver's two recent firearms arrests, as well as his decision to drive through red light after police activated lights, supported reasonable suspicion to pat frisk passenger); United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007) (behavior of one passenger can reflect on actions or motivations of other passengers); United States v. Dardy, 128 F. Supp. 3d 400, 411 (D. Mass. 2015) (flight of one passenger can inform officer's assessment of threat posed by remaining passengers).

4 The officers had approximately thirty-eight years of collective experience as police officers in New Bedford, including ten years of collective experience in the gang unit of the New Bedford police department.

5 While I recognize that research has shown that gang lists held by police departments may be overly inclusive, racially biased, or otherwise mistaken, see Blitzer, How Gang Victims Are Labelled as Gang Suspects, New Yorker (Jan. 23, 2018), https:// www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects [https://perma.cc/V64R-VTDN]; Citizens for Juvenile Justice, We Are the Prey: Racial Profiling and Policing of Youth in New Bedford (Apr. 2021), https://www.cfjj.org/s/We-Are-The-Prey-FINAL.pdf [https://perma.cc/F522-2RVJ]; Dumke, ProPublica, Chicago's Gang Database Is Full of Errors -- And Records We Have Prove It (Apr. 19, 2018), https://www.propublica.org/article/politic-il-insider-chicago-gang-database [https://perma.cc/55KV-55ZV], this is not a case where the defendant was either misidentified as a gang member or identified as a gang member based solely on his race. Indeed, the defendant's race is not in the record before us. Moreover, the officers collectively had multiple encounters with the defendant, and one of the officers had known him for years. One of the officers testified that he knew the defendant "from being around," that the defendant was "[a]ssociated" with other parties with whom the officer had spoken, and that he knew that the defendant was a "Blood" gang member. Another officer testified that he previously had encountered the defendant around a particular area of New Bedford and that he too knew that the defendant had ties to the Bloods gang. The third officer testified, moreover, that the defendant was a "validated" Bloods gang member; the defendant had been seen in pictures demonstrating well-known, documented Bloods gang hand signs and wearing red bandanas, as well as in pictures with other Bloods gang members. In fact, after the defendant was arrested, the defendant acknowledged his membership in the Bloods gang.

6 See Commonwealth v. Gomes, 453 Mass. 506, 512, 903 N.E.2d 567 (2009) ("We caution that while the character of a neighborhood as a high crime area can be considered as part of the aggregate circumstances that provide reasonable suspicion to justify a protective frisk, this factor must be considered with some caution because many honest, law-abiding citizens live and work in high-crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions, despite the character of the area" [quotation and citations omitted]).

1 The officers testified that, but for Paris's conduct, described infra, they would not have conducted the patfrisks.

2 See Commonwealth v. Paris, 97 Mass. App. Ct. 785, 786-788, 150 N.E.3d 350 (2020) (describing this previous encounter and determining that officers had lacked reasonable suspicion at that time to stop Paris). It is ironic that the court relies upon the fruits of an unconstitutional stop to support the constitutionality of the patfrisk in this case.

3 That officers perceived his behavior as "uncharacteristic" on this occasion is of no moment -- it is not difficult to imagine that a Black person may eventually express frustration at perceived racial profiling.

4 See, e.g., Fagan, Braga, Brunson, & Pattavina, Stops and Stares: Street Stops, Surveillance, and Race in the New Policing, 43 Fordham Urb. L.J. 539, 540 (2016) ("Minority neighborhoods [in Boston] experience higher levels of field interrogation and surveillance activity, controlling for crime and other social factors. Relative to [w]hite suspects, Black suspects are more likely to be observed, interrogated, and frisked or searched controlling for gang membership and prior arrest history"); Hetey, Monin, Maitreyi, & Eberhardt, Data for Change: A Statistical Analysis of Police Stops, Searches, Handcuffings, and Arrests in Oakland, Calif., 2013-2014, Stanford University, SPARQ: Social Psychological Answers to Real-World Questions, at 10 (2016) (after controlling for various factors, finding that Oakland police stop, search, handcuff, or arrest Black people at higher rates than white people).

5 The court errs when it additionally includes as a relevant similarity between the male occupants' histories of firearm possession and the conduct at issue here the fact that this challenged patfrisk revealed that the defendant had a firearm. Because the officers only learned that the defendant possessed a firearm after they pat frisked him, that possession cannot justify their decision to conduct the patfrisk. See Commonwealth v. Gentile, 466 Mass. 817, 826, 2 N.E.3d 873 (2014) ("our analysis of reasonable belief must not be influenced by what was learned after" challenged search).
To the extent that the court means to include as a relevant similarity between the male occupants' histories of weapon possession and the facts of this case that the officers here suspected (prior to the patfrisk) that the defendant was armed, that would problematically beg the ultimate question of this appeal.

6 Justice Lowy disagrees. See ante at 756–57, 178 N.E.3d at 370–71. However, in none of the cases that he cites did a court determine that an officer reasonably interpreted behavior like Paris's as a distraction from a hidden weapon in the absence of any other conduct directly leading up to or during the stop that suggested that a weapon was on the scene. See United States v. Soares, 521 F.3d 117, 118, 120-121 (1st Cir. 2008) (defendant made unusual, furtive movements that suggested weapon concealment and disobeyed orders to keep hands still and in sight); United States v. Rice, 483 F.3d 1079, 1081, 1084 (10th Cir. 2007) ("Based on the time of night [(2:30 a.m.)] and the unusual driving pattern, [officer] suspected [vehicle's] occupants might be preparing for a burglary or drive-by shooting," and "computer check identified [occupant] as 'known to be armed and dangerous' "); United States v. Goebel, U.S. Dist. Ct., No. 18-CR-2752 KG, 2018 WL 5995488 (D.N.M. Nov. 15, 2018), report and recommendation adopted, No. 18-CR-2752 KG, 2018 WL 6630509

(D.N.M. Dec. 19, 2018), aff'd, 959 F.3d 1259 (10th Cir. 2020) ("[officer] found it suspicious that at [2:45 a.m.], in an area ... known for high crime rates, with the vehicle parked askew, [defendant] bypassed the home's front door and entered the back yard through a closed gate").

7 Once Paris was handcuffed, the safety concerns directly presented by his behavior dissipated. Thus, after Paris was handcuffed, the officers were not justified in pat frisking each one of the vehicle's occupants on the ground that Paris's behavior had been aggressive.

8 See note 4, supra.

9 See Harrison & Willis Esqueda, Race Stereotypes and Perceptions about Black Males Involved in Interpersonal Violence, 5 J. Afr. Am. Stud. 81, 82 (Mar. 2001) (reviewing literature on negative stereotypes of Black men).

10 See Harris, Frisking Every Subject: The Withering of Terry, 28 U.C. Davis L. Rev. 1, 32-36 (1994) (urging judges not to uncritically accept officers' reasons for believing that suspect is armed and dangerous, and highlighting officers' incentives to engage in "creative hindsight or even perjury"); Rudovsky & Harris, Terry Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data, 79 Ohio St. L.J. 501, 505 (2018) (expressing concern about judge's uncritical acceptance of officers' empirically unmoored assumptions, especially because such assumptions "may be problematically reinforced by the fact that incriminating evidence was actually seized").

1 One of the officers testified that, but for Paris's actions, he "absolutely" would not have removed any of the other occupants of the vehicle and would have had no reason to do so based on their own actions, but as a result of Paris's behavior, he had a "hunch" that Paris was "using tactics to distract [the officers]." Another testified similarly that absent Paris's conduct, he would not have had any reason to order anyone from the vehicle. A third testified that, based on Paris's actions ("[i]t felt to me that he was trying to distract us for -- for something within that vehicle), he removed the other rear seat passenger and the other two officers removed the remaining occupants from the vehicle.

2 According to testimony by all three officers at the hearing on the motion to suppress, after he got out of the front seat, Paris "was becoming more angry towards [a detective], questioning the stop, accusing [the officers] of harassing him"; Paris argued as he walked away from the vehicle "something to the effect of 'Why you guys stopping us? You're harassing us"; and even after finally moving to the rear of the vehicle, "he calmed down a little, but he continued asking, you know, why we had stopped them and so on and so forth."

3 In his concurrence, Justice Lowy argues that, based on similar facts to those here, courts in other jurisdictions properly have concluded that police had a reasonable suspicion that an individual was armed and dangerous. See ante at 756, 178 N.E.3d at 370–71. The circumstances in those cases, however, are quite distinct. Unlike the facts here, for example, the police who conducted the patfrisk at issue in United States v. Soares, 521 F.3d 117, 118, 122 (1st Cir. 2008), observed the defendant and his companions engage in movements consistent with concealing something inside the vehicle in which they were traveling. Moreover, the defendant himself exhibited "erratic and uncooperative behavior," id. at 121, in marked contrast to the defendant's calm and cooperative behavior in this case. The circumstances in United States v. Rice, 483 F.3d 1079, 1085 (10th Cir. 2007), also are dissimilar. In that case, "[b]ased on the time of night and the unusual driving pattern, [the officer who initiated the vehicle stop] suspected the occupants might be preparing for a burglary or drive-by shooting." Id. at 1081. Similarly, in United States vs. Goebel, U.S. Dist. Ct., No. 18-CR-2752 KG, 2018 WL 5995488 (D.N.M. Nov. 15, 2018), report and recommendation adopted, No. 18-CR-2752 KG, 2018 WL 6630509 (D.N.M. Dec. 19, 2018), aff'd, 959 F.3d 1259 (10th Cir. 2020), the involved officers had grounds to suspect that the defendant and his companions were engaged in criminal activity. The officers who initiated the traffic stop at issue here expressed no such suspicions at the hearing on the motion to suppress, and the Commonwealth has provided no foundation for any such suspicion.

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:

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

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.

****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 they ordered the other ****208** occupants to exit the vehicle. The other occupants complied without incident.

The two back seat passengers (the defendant and one other) were both known to the police. The police knew that 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.

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).

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).

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.

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]

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 he 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.

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 that 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," *post* at 868, 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," *id.,* and that "the defendant did exactly what is asked of those stopped by police[, sitting] calmly and compl[ying] with police instructions." *id.*. at 869.

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, the facts 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 that 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.

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.)

COMMONWEALTH OF MASSACHUSETTS

Bristol, ss.

Bristol Superior Court
1873CR00090

Commonwealth

v.

Zahkuan Sweeting Bailey

Motion to Suppress Evidence Seized Without A Warrant

The defendant moves, pursuant to Mass.R.Crim.P. 13, to suppress all evidence, of every nature and description, whether tangible or intangible, seized from the person of the defendant or from an area of premises under the exclusive control of the defendant, or from an area in which the defendant enjoyed a reasonable expectation of privacy.

As reasons therefore, said evidence was 1) not seized pursuant to a lawful arrest, 2) it was not in plain view, 3) there was no probable cause, 4) no warrant, 5) no exigent circumstances, 6) not pursuant to a lawful stop-and-frisk, 7) not consented to, 8) in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article 14 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts and G.L. c. 276.

The defendant further moves to suppress from the use in evidence any statements she made subsequent to the illegal seizure of the evidence from her. As reasons therefore, such statements were the so-called "fruits of the poisonous tree". Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Zahkuan Sweeting Bailey
By His Attorney,

Michele L. Rioux
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New Bedford, MA 02740
BBO # 547573

Dated: June 1, 2018

Subject: SJC-13086 - Notice of Docket Entry
Date: Monday, February 14, 2022 at 4:00:06 PM Eastern Standard Time
From: SJC Full Court Clerk
To: Elaine Fronhofer

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: No. SJC-13086
COMMONWEALTH vs. ZAHKUAN SWEETING-BAILEY

NOTICE OF DOCKET ENTRY

Please take note that on February 14, 2022, the following entry was made on the docket of the above-referenced case:

DENIAL of Motion for Reconsideration. (By the Court)

Very truly yours,
/s/ Francis V. Kenneally
Francis V. Kenneally
Clerk

Dated: February 14, 2022
To: Shoshana Stern, A.D.A.
David B. Mark, A.D.A.
Daniel J. Walsh, A.D.A.
Elaine Fronhofer, Esquire
Erin Fowler, Esquire
Jessie J. Rossman, Esquire
Katharine Naples-Mitchell, Esquire
Radha Natarajan, Esquire
Chauncey B. Wood, Esquire
Oren N. Nimni, Esquire
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