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19-P-457

Appeals Court

COMMONWEALTH vs. RAEKWAN K. PARIS.

No. 19-P-457.

Bristol. January 17, 2020. - July 2, 2020.

Present: Desmond, Wendlandt, & McDonough, JJ.

Motor Vehicle, Firearms. Firearms. Constitutional Law, Search and seizure, Reasonable suspicion, Investigatory stop. Search and Seizure, Motor vehicle, Reasonable suspicion, Fruits of illegal search. Practice, Criminal, Motion to suppress.

Complaint received and sworn to in the New Bedford Division of the District Court Department on June 6, 2016.

A pretrial motion to suppress evidence was heard by Edward H. Sharkansky, J., and the case was tried before John P. Stapleton, J.

Joseph R. Smith for the defendant.
Robert P. Kidd, Assistant District Attorney, for the Commonwealth.

DESMOND, J. Detectives from the New Bedford Police Department, relying on information from an informant, located two gang members near a car parked in their own gang territory and conducted a search of the car that yielded a gun from the

center console. The question before us is whether the police had reasonable suspicion to conduct an investigatory stop and subsequent search of the car. The defendant, Raekwan K. Paris, appeals after being convicted of carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a), and carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10 (n). On appeal, he argues that the judge erred in denying his motion to suppress. Because we conclude that the police did not have reasonable suspicion to conduct an investigatory stop,¹ we reverse.

Background. We summarize the evidence presented at the suppression hearing. At approximately 7:20 P.M. on the evening of June 3, 2016, Detective Roberto Dacunha of the New Bedford Police Department's gang unit was eating dinner at a restaurant with four other detectives when he received a cell phone call from a confidential informant (CI).² The CI told Dacunha that two gang members of the United Front, also known as the West End gang, had gone to Central Kitchen restaurant -- located in the heart of rival South End gang territory -- and that one of them had a gun. The CI said that one of them was Shazan Gilmette,

¹ This is true whether the investigatory stop is viewed as a stop of the car or a stop of the men.

² This was the first time the detective had received a tip from the CI, but the two had spoken previously, and the detective was aware of the CI's name and address.

whom Dacunha knew as a prominent West End gang member.³ The other gang member was unfamiliar to the CI but was described as a "dark-skinned male with a white T-shirt." The tip did not specify which individual had the gun and did not describe the gun in any detail. The CI told Dacunha that the police "should get down there quick."

Dacunha relayed the information to the other detectives, and they immediately drove in the direction of Central Kitchen. While they were en route, the CI contacted Dacunha again through a text message to say that the two males had left Central Kitchen in a gray Kia and were headed south on Acushnet Avenue. As a result of this second tip, the detectives split up, with one cruiser continuing to the area of Central Kitchen and another altering its route in the direction of Acushnet Avenue. Less than one minute later, the detectives heading toward Acushnet Avenue observed a gray Kia parked near a housing complex that was located in known West End gang territory. The detectives pulled in behind the Kia and activated their cruiser's blue lights.

The detectives observed that the Kia was parked with the engine running and both front doors slightly ajar. They also

³ Another detective testified that he had knowledge that Gilmette did not have a license to carry a firearm.

observed Gilmette standing on the sidewalk directly by the Kia. Two other known West End gang members were on the grass nearby. Neither was wearing a white T-shirt. The defendant, who had a dark complexion and was wearing a white T-shirt, was within five feet of the individuals on the grass, and he was walking "with a purpose" away from the Kia.⁴ The detectives got out of the cruiser, and one of them moved toward Gilmette and pat frisked him for weapons while the other began following the defendant.⁵ The detective caught up to the defendant and brought him back to the grassy area, where now all the individuals were sitting. At this point, the group of men were read the Miranda warnings. After the warnings were read, the detective asked the group who owned the Kia. The defendant responded that it belonged to his grandmother. Meanwhile, another detective had begun conducting a search of the Kia and discovered a loaded revolver located in the middle console.

None of the individuals at the scene was arrested immediately. After the gun had been recovered, Dacunha arrived on scene with additional information that he had received from a third tip from the CI, specifically, that the "dark-skinned male

⁴ Regarding his first view of the defendant, one of the detectives testified that "what kind of caught my eye was the -- the manner he was walking. He was like walking with a purpose, you know?"

⁵ No weapon was recovered from the patfrisk of Gilmette.

with a white T-shirt" had pointed the firearm from the Kia at people standing at Central Kitchen. The defendant was then placed in handcuffs and read the Miranda warnings again.⁶ The defendant told Dacunha that rival gang members were "a bunch of bitches" and that if he had parked the Kia around the corner, the police would not have found the weapon.

The defendant was charged with (1) carrying a firearm without a license, pursuant to G. L. c. 269, § 10 (a); (2) possession of a firearm without a firearm identification card, pursuant to G. L. c. 269, § 10 (h); and (3) carrying a loaded firearm without a license, pursuant to G. L. c. 269, § 10 (n). Prior to trial, the defendant filed a motion to suppress the evidence and all of the statements he made, arguing that the search and seizure of the Kia was unconstitutional.⁷ The judge denied the motion after an evidentiary hearing, finding that "the information regarding Shazan Gilmet[t]e's association with gang members in the west end coupled with his presence in the rival gang area of the south end along with the report of a gun being involved is more than sufficient to justify the stop and

⁶ At some point thereafter the defendant's grandmother arrived at the scene and informed the police that she was the owner of the Kia.

⁷ Attached to the motion was an affidavit from the defendant stating that he never waived his Miranda rights and did not consent to a search of the Kia.

inquiry of the [d]efendant." The judge concluded as a matter of law that the search of the Kia was justified on the ground that "police had reasonable safety concerns as to its occupants." The defendant was convicted of carrying a firearm without a license and carrying a loaded firearm without a license after a jury trial. He timely appeals.

Discussion. "In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given . . . [to] testimony presented at the motion hearing." Commonwealth v. Wilson, 441 Mass. 390, 393 (2004). However, "[w]e review independently the application of constitutional principles to the facts found." Id.

We conclude, and both the defendant and the Commonwealth agree, that the police effectuated a seizure under the Fourth Amendment to the United States Constitution when the cruiser pulled behind the Kia and the detectives activated the cruiser's blue lights. See Commonwealth v. Smigliano, 427 Mass. 490, 491-492 (1998). An "investigatory stop [is] justified if the Commonwealth proved that the police had a reasonable suspicion, based on specific, articulable facts and reasonable inferences therefrom, that an occupant of the . . . vehicle had committed, was committing, or was about to commit a crime." Commonwealth

v. Alvarado, 423 Mass. 266, 268 (1996). "Absent such a justification, the stop was unlawful" Commonwealth v. Mubdi, 456 Mass. 385, 395 (2010). "[I]f the police conduct an investigatory stop based on an informant's tip, our evaluation of the tip's indicia of reliability will be focused on the informant's reliability and his or her basis of knowledge. Independent police corroboration may make up for deficiencies in one or both of these factors. Because the standard is reasonable suspicion rather than probable cause, a less rigorous showing in each of these areas is permissible." Commonwealth v. Lyons, 409 Mass. 16, 19 (1990).

The Commonwealth alleges that the level of detail within the CI's tips reflected a strong basis of knowledge, and that the strength of the corroboration by the detectives, together with their reasonably drawn inferences, compensated for any deficiency in the CI's reliability. We disagree. When the detectives activated the cruiser's lights and effectuated the stop, they were aware of just two tips from the CI. The substance of those tips was that there were two gang-affiliated individuals with a gun at a restaurant located in rival gang territory, and that the two individuals left the restaurant without incident in a gray Kia heading south on Acushnet Avenue. Although the CI knew the full name of one of the individuals, they simply described the other as a "dark-skinned male with a

white T-shirt." There was no mention of which man possessed the gun, no description of the gun, and no mention as to what, if anything, the two gang members were doing beyond heading south on Acushnet Avenue.⁸ The CI did not claim to have seen the gun or explain how they knew a gun was involved. See Commonwealth v. Aarhus, 387 Mass. 735, 744 (1982) (precision of informant's tip can demonstrate reliability). Although Dacunha could not substantiate the CI's reliability or basis of knowledge at the suppression hearing, the Commonwealth asserts that details from the tips, such as Gilmette's full name and gang affiliation, reflected a familiarity with local gang culture sufficient to overcome the shortcomings.⁹ We are not persuaded. While (at least as to Gilmette) the information arguably was above the level that the average bystander could impart, the CI's tips "[did] not reveal any special familiarity with the defendants'

⁸ We also note that the judge's emphasis on "the report of a gun being involved" is misplaced. "Despite the fact that illegal firearms are a current social scourge, the fact that firearms are an ingredient of an informant's report neither slackens the reliability requirements nor itself provides reasonable suspicion of criminal activity" (quotation and citation omitted). Commonwealth v. Arias, 81 Mass. App. Ct. 342, 348 n.10 (2012).

⁹ With regard to a probable cause analysis, information from a first-time confidential police informant is, "standing alone, insufficient to satisfy the veracity prong of the Aguilar-Spinelli test." Commonwealth v. Monteiro, 93 Mass. App. Ct. 478, 481 (2018), citing Commonwealth v. Alfonso A., 438 Mass. 372, 376 (2003).

affairs that might substitute for explicit information about the basis of the caller's knowledge." Lyons, 409 Mass. at 20.

Although the CI's name and address were known to Dacunha,¹⁰ see note 2, supra, this was the first time Dacunha had relied on information provided by the CI, and Dacunha could not remember how he acquired the CI's contact information; the CI's reliability was therefore questionable. Nor was there any evidence regarding the CI's "reputation for honesty, or motivation." Mubdi, 456 Mass. at 396.

The Commonwealth also asserts that the portions of the tips corroborated by the detectives were "highly unusual and suspicious" observations that "corroborated the essential message of the [CI's] tip -- that Gilmette and his comrade had a gun and were likely up to no good." Again, we disagree. Before the cruiser's blue lights were activated, detectives were able only to confirm the color and model of the vehicle, the involvement of Gilmette, and the location of the vehicle in West End gang territory. Compare Commonwealth v. Va Meng Joe, 425 Mass. 99, 103 (1997) (where shortfall of credibility in tip provided by first-time informant was counterbalanced by "details of fairly specific information of the type not easily obtainable

¹⁰ "[O]ur case law assigns greater reliability to an eyewitness [or tipster] whose identity is known to police than to one who is anonymous." Commonwealth v. Depina, 456 Mass. 238, 243 (2010).

by a casual bystander"). These observations are closer to "obvious details" rather than "nonobvious details." Lyons, 409 Mass. at 21. Moreover, the detectives at no time ever observed the two men mentioned by the CI together, much less together in the Kia.

Conclusion. Given the scant and vague information provided by the CI to Dacunha, along with the CI's unsubstantiated basis of knowledge and reliability, we cannot conclude that these facts rise to the requisite level of "specific, articulable facts" necessary to justify reasonable suspicion for the investigatory stop.¹¹ Alvarado, 423 Mass. at 268. Because the police lacked reasonable suspicion for the investigatory stop, all evidence obtained after that point, including the firearm and statements made to Dacunha, should have been suppressed. The judgments are reversed, and the verdicts are set aside.

So ordered.

¹¹ Even assuming, arguendo, that reasonable suspicion existed to approach all of the men who were out of the Kia, probable cause did not exist to search the Kia at the time it was searched. The patfrisk of each individual was negative and none made probative statements regarding the likelihood of a gun being found in the Kia. The search was conducted before the detectives were notified about the CI's third tip. Additionally, the Commonwealth makes no argument that the detectives feared for their own safety, and indeed does not address the search at all in its brief. See Commonwealth v. Haynes, 83 Mass. App. Ct. 903, 905 (2013).