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19-P-943

Appeals Court

COMMONWEALTH vs. ROBERT STALEY.

No. 19-P-943.

Middlesex. March 16, 2020. - August 6, 2020.

Present: Milkey, Lemire, & McDonough, JJ.

Robbery. Threshold Police Inquiry. Constitutional Law,  
Investigatory stop, Search and seizure, Stop and frisk.  
Search and Seizure, Threshold police inquiry. Practice,  
Criminal, Motion to suppress.

Indictments found and returned in the Superior Court Department on January 23, 2018.

A pretrial motion to suppress evidence was heard by Joshua I. Wall, J., and the case was heard by C. William Barrett, J.

Thomas D. Frothingham for the defendant.  
Timothy Ferriter, Assistant District Attorney, for the Commonwealth.

MCDONOUGH, J. The defendant is an African-American man who was convicted of unarmed robbery following a jury-waived trial in the Superior Court. On appeal, the defendant's sole contention is that his motion to suppress should have been

allowed under the principles of Commonwealth v. Warren, 475 Mass. 530 (2016), because, he claims, the description of the robbery suspect conveyed by a Cambridge police dispatcher lacked particularity. The defendant claims that the judge who denied the motion to suppress (motion judge) erred in finding that (1) the description was sufficiently detailed, and (2) the officers had reasonable suspicion to stop the defendant and conduct a threshold inquiry. We affirm.

Background. Cambridge Police Officers Charles McNeeley and Sean Norton testified at the hearing on the defendant's motion to suppress, and the motion judge credited their testimony. We summarize the motion judge's pertinent findings.

Around 9:30 A.M. on November 7, 2017, the Citizens Bank in Harvard Square was robbed by a person described by the police dispatcher as a tall, thin, black male, aged fifty to seventy, wearing sunglasses and a black jacket. McNeeley, on foot patrol in Central Square, heard the dispatch reporting an armed robbery with a gun, along with the prior description of the suspect. He went directly to the Central Square Massachusetts Bay Transportation Authority (MBTA) station because he knew that the Citizens Bank was across the street from the Harvard Square MBTA station, and that those committing crimes in this busy area often used public transportation to flee the scene. The Central Square station is the next inbound stop from the Harvard Square

station. McNeeley learned that immediately after the robbery the police had stopped trains from leaving the Harvard Square station, and he surmised that the train he saw entering the Central Square station had departed from Harvard Square just before that shutdown. Thus, McNeeley ordered that the train be stopped. With Norton's assistance, McNeeley walked through each train car to see if any of the passengers matched the description of the suspect provided by the dispatcher. The train was crowded and included a number of black male passengers. However, no one matched the description of the perpetrator until the officers reached the last car, where McNeeley saw the defendant - a tall, thin, black male, between fifty and seventy years old, with a black jacket draped across his lap. Noticing that the defendant had a thin moustache and a goatee, McNeeley momentarily stepped off the train and called the dispatcher to get more information about the suspect's facial hair. McNeeley learned from the dispatcher that the perpetrator "might have a thin moustache." He then approached the defendant and asked him to step off the train. The defendant agreed and stepped off the train with the jacket draped over his arm. McNeeley told the defendant that a bank robbery had occurred nearby, and that he matched the description of the robber. McNeeley added: "If everything is okay, I will release you immediately and you will be on the next train to

leave." During this exchange, McNeeley noticed money sticking out of the pocket of the jacket.

Once on the platform, the officers conducted a threshold inquiry of the defendant. McNeeley, who was concerned with safety, first informed the defendant that he would be pat frisked. McNeeley then asked the defendant to place the jacket on the platform. McNeeley pat frisked the defendant while Norton picked up the jacket. Norton saw green papers sticking out of the left pocket and "felt a bulge" in that pocket. Looking into the pocket, which was "stuffed full," Norton saw dollar bills "neatly stacked and bound in packets." McNeeley handcuffed the defendant and walked him up to the street. Unprompted by the officers, the defendant volunteered that he "jumped someone for the jacket in Harvard Square." After McNeeley read the defendant his Miranda rights, the defendant stated that he did not want to talk to the police. The motion judge found that McNeeley spoke in a calm tone throughout the encounter.

The motion judge concluded that McNeeley's request that the defendant step off the train was based on an objectively reasonable suspicion that the defendant perpetrated the robbery, because (1) he matched the description provided by the dispatcher, which, the motion judge found, was sufficiently detailed to distinguish the defendant from the other black males

on the train, and (2) the officers encountered the defendant "close in time and distance to the crime." The motion judge further concluded that the officers acted reasonably by conducting the threshold inquiry on the platform.

Standard of review. "[A] police officer may stop an individual and conduct a threshold inquiry if the officer reasonably suspects that such individual has committed, is committing, or is about to commit a crime." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996). "Reasonable suspicion may not be based on good faith or a hunch, but on specific, articulable facts and inferences that follow from the officer's experience." Commonwealth v. Grandison, 433 Mass. 135, 139 (2001). The reasonable suspicion standard is an objective one. Mercado, supra.

In reviewing the decision to deny a motion to suppress, "we adopt the motion judge's subsidiary findings of fact absent clear error, but we independently determine the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Catanzaro, 441 Mass. 46, 50 (2004). "The clear error standard is a very limited form of review," Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990), wherein we defer to the judge "in matters of credibility," Commonwealth v. Bush, 71 Mass. App. Ct. 130, 133-134 (2008).

Discussion. The defendant claims that the motion judge erred in finding "that the description of the suspect transmitted by the police dispatcher was sufficiently detailed and particularized that it was reasonable for the police to stop any person matching that description." Commonwealth v. Depina, 456 Mass. 238, 245 (2010).<sup>1</sup> We disagree.

Unlike the "vague description" at issue in Warren, 475 Mass. at 535, which "[l]ack[ed] any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics," id., the dispatch in this case contained "detailed information" about the perpetrator's facial features, skin tone, height, weight, age, and clothing, Commonwealth v. Barros, 425 Mass. 572, 584 (1997). Contrast Warren, supra (victim described three black males; two wearing "ubiquitous and nondescriptive 'dark clothing'" and one wearing a red "hoodie"). The information was so detailed that -- save for the defendant -- the officers were able to eliminate as

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<sup>1</sup> To the extent that the defendant challenges other factual findings by the motion judge, we note that his arguments are supported by citations to the Commonwealth's memorandum in opposition to the motion to suppress or to trial testimony, neither of which we consider. Here "we must judge the motion to suppress solely on the record made at the suppression hearing" (citation omitted). Commonwealth v. Johnson, 481 Mass. 710, 726 n.14, cert. denied, 140 S. Ct. 247 (2019). See Bush, 71 Mass. App. Ct. at 133 n.5 (court "do[es] not consider evidence presented at trial in reviewing a judge's decision on a motion to suppress decided before trial").

suspects every black male on the crowded train. Contrast Commonwealth v. Cheek, 413 Mass. 492, 496 (1992) (no reasonable suspicion to stop defendant where officers "possessed no additional physical description of the suspect that would have distinguished the defendant from any other black male in the area such as the suspect's height and weight, whether he had facial hair, unique markings on his face or clothes, or other identifying characteristics"). Of "great significance" here, as the motion judge recognized, was the defendant's presence on the only train to leave Harvard Square after the robbery.

Commonwealth v. Acevedo, 73 Mass. App. Ct. 453, 458, S.C., 455 Mass. 1013 (2009). McNeeley's and Norton's reasonable suspicion that the defendant was the perpetrator was not undermined by the fact that the robber was not described as wearing a hat, or that the defendant was not wearing sunglasses. Such items are easily worn, taken off, and discarded, and they have no bearing on the defendant's age, height, weight, skin tone, or facial hair.

Viewing the facts and circumstances as a whole, Commonwealth v. Williams, 422 Mass. 111, 116 (1996), the police had ample reason to suspect that the defendant perpetrated the robbery, and they acted both lawfully and reasonably when they

asked him to step from the train in order to conduct a threshold inquiry.<sup>2</sup>

Judgment affirmed.

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<sup>2</sup> We decline to address the defendant's claim, made at oral argument but not in his brief, that the threshold inquiry exceeded the scope of constitutional limits because it took place on the platform, see Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1629-1630 (2019), except to note that the officers were not required to make a train crowded with people wait while they inquired of the defendant.