19-P-1645 Appeals Court

COMMONWEALTH vs. KAREN K., a juvenile.

No. 19-P-1645.

Suffolk. October 15, 2020. - February 19, 2021.

Present: Green, C.J., Vuono, Milkey, Blake, & Henry, JJ.[1]

Firearms. Practice, Criminal, Juvenile delinquency proceeding, Motion to suppress. Threshold Police Inquiry. Constitutional Law, Stop and frisk, Reasonable suspicion, Investigatory stop. Search and Seizure, Protective frisk, Reasonable suspicion, Threshold police inquiry.

Complaint received and sworn to in the Suffolk County Division of the Juvenile Court Department on November 2, 2018.

A pretrial motion to suppress evidence was heard by Joseph F. Johnston, J., and conditional pleas of delinquent were accepted by him.

Eva G. Jellison for the juvenile.
Kathryn Sherman, Assistant District Attorney, for the Commonwealth.

[1] This case initially was heard by a panel comprised of Justices Milkey, Blake, and Henry. After circulation of a majority and 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 (1993).

BLAKE, J. On November 1, 2018, members of the Boston Police Department's youth violence strike force were conducting surveillance at the Mildred C. Hailey Apartments[2] (housing complex) based in part on a call from a concerned citizen that "kids" were displaying a firearm. The officers stopped and pat frisked the juvenile and found a loaded firearm, ammunition, and a high capacity magazine concealed in the waistband of the juvenile's pants. The juvenile was charged with unlawful possession of a firearm, unlawful possession of ammunition without a firearm identification card (FID), unlawfully carrying a loaded firearm, and unlawfully possessing a large-capacity firearm.[3] Following an evidentiary hearing, a Juvenile Court judge denied the juvenile's motion to suppress. Thereafter, the juvenile pleaded delinquent to all of the charges, conditioned

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[2] The parties and the motion judge referred to the housing complex as the Bromley-Heath housing development or the "Heath Street Development," but it has been renamed.

[3] The Commonwealth concedes that the adjudication of delinquency by reason of possession of ammunition without an FID card is duplicative of the adjudication for carrying a loaded firearm and should be vacated. We agree that it was duplicative and vacate the adjudication of delinquency on count two of the complaint, charging possession of ammunition. See Commonwealth v. Johnson, 461 Mass. 44, 51-53 (2011). The adjudication of delinquency by reason of possession of a large capacity magazine, however, is not duplicative of the charge of unlawful possession of a firearm. This is so because the juvenile was charged with possessing a large capacity feeding device, a detachable magazine that could hold twelve rounds of ammunition.

on her right to appeal the denial of her motion to suppress. See Commonwealth v. Gomez, 480 Mass. 240 (2018). On appeal, the juvenile argues that her motion to suppress was improperly denied because the investigatory stop was not supported by reasonable suspicion and there was no justification for the patfrisk. We conclude otherwise and affirm the order denying the motion to suppress.

"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 (2019). We also "accept the [motion] judge's . . . determination of the weight and credibility [of the evidence]." Commonwealth v. Contos, 435 Mass. 19, 32 (2001), quoting Commonwealth v. Eckert, 431 Mass. 591, 592-593 (2000).

1. Facts. We recite the facts as found by the motion judge, supplemented by undisputed testimony from the suppression hearing that the motion judge appeared to credit.[4] See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015). On November 1, 2018, a concerned citizen who lived at the housing

[4] Although our dissenting colleagues claim that most of the judge's findings are unimpeachable, post at , in effect they do not accept those findings. Instead, they impermissibly engage in their own fact finding.

complex called the Boston Police Department and reported that a group of "kids" was loitering and displaying a firearm outside the housing complex. Officer Samora Lopes, a member of the Boston Police Department's youth violence strike force, learned of the call at the start of his shift at approximately 4 or 5 P.M. and headed to the area. Lopes was very familiar with the housing complex as he had made multiple firearms arrests there in the past. He also knew that shots had been fired at the complex the day before, and that police had responded to multiple shots fired at the complex that week. When he arrived, Lopes learned that another group of officers was also in the area and that there was a group of six or seven kids "hanging around" on a pathway where kids had been seen in the past with firearms.

Lopes positioned his vehicle on the street so that he had a clear view of the group. From about sixty feet away, Lopes saw two people, including the juvenile, walk in the direction of the other officers. It appeared that once the two saw the officers, they "broke right" into an alley and headed back toward the housing complex. As the juvenile walked, she continuously looked back and forth over her shoulder at the officers before changing direction, adjusted her waistband, and turned her body away from view. During Lopes's testimony at the hearing on the motion to suppress, he stood and demonstrated the juvenile's

behavior.[5] The judge found that the juvenile "bladed" her body so as to conceal something on her person.[6]

Based on the training he had received from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on common characteristics of an armed gunman, Lopes believed that the juvenile's movements were consistent with carrying an unholstered firearm in her waistband. Lopes and his partner, Officer Norman Teixeira, then got out of their vehicle and walked toward the juvenile and her companion. The juvenile and her companion turned left away from Lopes and toward the other officers. Once the juvenile saw the other group of officers, she abruptly turned around, left her companion behind, and walked quickly back in Lopes's direction. The juvenile tried to walk around Lopes, but he grabbed her arm. The juvenile immediately responded, "I'm a female. You can't search me." Lopes called for a female officer to conduct a patfrisk. As the patfrisk began, the juvenile turned to a woman who was in charge

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[5] The attorneys' characterization of this demonstration is of no consequence as the evidence was what the judge observed, not how the attorneys interpreted it. And, we defer issues of weight and credibility of the evidence to the motion judge. See Commonwealth v. Weidman, 485 Mass. 679, 683 (2020).

[6] Although the dissent characterizes the term "blading" as "jargon," post at note 7, blading is a term of art that has been recognized and defined in our appellate cases. For example, blading is characterized as "hiding one side of the body from the other person's view." Commonwealth v. Resende, 474 Mass. 455, 459 & n.8, 461, S.C., 475 Mass. 1 (2016).

of a nearby youth program and said, "Tell my mom I love her." In the course of the patfrisk, the female officer found, among other things, three cell phones and a loaded gun in the juvenile's waistband.

2. Discussion. The motion judge ruled that Lopes had reasonable suspicion to conduct a threshold inquiry and a reasonable belief that the juvenile was armed and dangerous based on the following facts. At the time that Lopes stopped the juvenile, he knew that a concerned citizen had reported young people with a gun at the housing complex; shots had been fired at the housing complex the day before; and there were many prior firearm incidents in the area. And, based on his experience patrolling that area, Lopes also knew that people used the laundry room at the housing complex to hide guns, and as a result, expressed concern about "kids" hanging around that area. Lopes saw the juvenile twice change her direction to avoid the police; pivot her hip away from the officers' view; continuously look over her shoulder as she walked; and adjust her waistband when she first encountered the police and continue to do so as she moved through the housing complex. And, Lopes knew, based on his training and experience, that people often carry illegal, unholstered guns in their waistbands and when doing so they will often touch the gun with their hands and pull

up on the waistband, moving the firearm to the side in order to "make sure it's there, so it won't slide down [their] pants."

The juvenile does not challenge any of the judge's findings as clearly erroneous, save one.[7] Rather, she contends that the investigatory stop was not supported by reasonable suspicion and that Lopes did not have reasonable suspicion that the juvenile was armed and dangerous.[8] Here, the same findings of fact, none

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[7] Both the juvenile and the dissent, by parsing Lopes's testimony, contend that the judge's finding that the juvenile bladed her body to conceal something from view was clearly erroneous. See post at . We disagree. On cross-examination, Lopes testified that the juvenile, while "holding her waist and turn[ing] . . . that's blading." Then, on redirect examination, Lopes agreed that the juvenile was "blading," and testified that she "turn[ed] to her left side and look[ed] back at the officers several times, back and forth."

[8] On appeal, the juvenile relies on law review articles and studies in support of her proposition that her race, age, and gender are relevant considerations in determining whether Lopes's suspicion of criminal activity was reasonable. Indeed, in the opening argument of her brief, the juvenile asks the following question: "Can a black child in the [c]ity of Boston touch her waist area in the presence of police officers without giving up her constitutional right to be free from seizure?" This argument, however, was not developed before the motion judge. The dissent ignores the fact that the only reference to these issues is contained in the final paragraph of the juvenile's memorandum of law in support of her motion to suppress where she included citation to Commonwealth v. Meneus, 476 Mass. 231 (2017), and Commonwealth v. Warren, 475 Mass. 530 (2016), without discussion or further elaboration. (Appellate counsel did not represent the juvenile in the motion to suppress proceedings.) Accordingly, these issues, however pertinent they may be, are waived. Commonwealth v. Harris, 481 Mass. 767, 774 (2019). See Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004).

of which are clearly erroneous, support both the stop and patfrisk of the juvenile.

a. The stop. A police officer is legally permitted to stop someone under art. 14 of the Massachusetts Declaration of Rights if there is reasonable suspicion at the time of the stop that the person has committed, is committing, or is about to commit a crime. See Commonwealth v. Matta, 483 Mass. 357, 360 (2019); Commonwealth v. Pinto, 476 Mass. 361, 363-364 (2017). Here, it is uncontested that the juvenile was stopped when Lopes placed his hand on her arm. The question is whether Lopes had a reasonable suspicion, "grounded in 'specific, articulable facts and reasonable inferences [drawn] therefrom,'" that the juvenile was committing the crime of carrying an unlicensed firearm. Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007), quoting Commonwealth v. Scott, 440 Mass. 642, 646 (2004). At the time of the stop, Lopes was aware of the telephone call from a concerned citizen as well as reports of shots fired at the housing complex the day before the stop and in the recent past. He also made observations of the juvenile, which, based on his training and experience, were consistent with people who carry unholstered firearms. These facts, taken together and not in

isolation, provided Lopes with constitutional justification to stop the juvenile.[9]

b. The patfrisk. In order to justify a patfrisk, a police officer needs more than a concern for his safety; he must also have a reasonable suspicion that the defendant is armed and dangerous. Commonwealth v. Torres-Pagan, 484 Mass. 34, 37-39 (2020).[10] "Without a more particularized fear that the suspect is presently armed and dangerous, the officer cannot take the more intrusive step of pat frisking the suspect." Id. at 37-38, citing Terry v. Ohio, 392 U.S. 1, 24-25 (1968).[11]

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[9] Even "discount[ing]" the juvenile's actions in seeking to avoid the police, see Commonwealth v. Evelyn, 485 Mass. 691, 709 (2020), we reach the same result after taking into consideration all of the facts found.

[10] In Torres-Pagan, the court held that although the defendant was properly stopped for a motor vehicle violation, the subsequent patfrisk was not justified because the defendant's actions did not indicate that he was armed and dangerous. Although the defendant got out of his car without being asked to do so and turned to look at the front seat of his car, the defendant made no furtive movements, he was compliant with all police commands, and his body was visible at all times. Although the stop was in a high crime area and the events unfolded quickly, the court concluded that the patfrisk was not supported by reasonable suspicion. Torres-Pagan, 484 Mass. at 39-42.

[11] That Lopes acknowledged that he stopped the juvenile in order to conduct a patfrisk to determine whether she had a firearm is of no moment, as the standard is an objective one. See Meneus, 476 Mass. at 235 ("Reasonable suspicion is measured by an objective standard").

Here, the confluence of the juvenile's movements, the presence of firearm activity at the housing complex both the day before and that week, along with Lopes's specialized knowledge regarding the indicia of someone carrying an unholstered firearm amounted to reasonable suspicion to patfrisk the juvenile.

We note that only people age twenty-one or over can be issued a license to carry firearms. See G. L. c. 140, § 131 (d) (iv). It therefore follows that anyone under the age of twenty-one cannot lawfully carry one. As a member of the youth violence strike force, Lopes's duties, which included taking an active role in the community such as playing basketball with the "kids," and attending school meetings, required him to interact with local youth. Here, Lopes could reasonably infer that the juvenile was under the age of twenty-one. Consequently, possession of a firearm by the juvenile was presumptively illegal. See Commonwealth v. Shane S., 92 Mass. App. Ct. 314, 323 (2017). See also Commonwealth v. Gunther G., 45 Mass. App. Ct. 116, 119 (1998) ("the possession of a firearm by a minor may be viewed as presumptively illegal"). Put another way, the juvenile was engaged in criminal activity simply by carrying a firearm. Commonwealth v. Costa, 448 Mass. 510, 513 n.7 (2007).

The juvenile's conduct also provided a basis for Lopes's reasonable suspicion that she was illegally carrying a gun. As the motion judge found, the juvenile twice changed direction to

avoid any encounter with police, see Commonwealth v. Grandison, 433 Mass. 135, 139-140 (2001) (pedestrian's change of direction to avoid police factor to consider in determining reasonable suspicion), and continuously looked over her shoulder toward them. See Commonwealth v. Anderson, 366 Mass. 394, 395-396, 400 (1974) (reasonable suspicion found where defendant looked back over shoulder and made gesture as if attempting to dispose of bag). Commonwealth v. Warren, 475 Mass. 530 (2016), is not to the contrary, as there the issue was interpretation of the defendant's flight in the absence of other information indicating the defendant had committed a crime. Id. at 538-540.

Most significantly, even if we give less weight to consideration of the juvenile's evasive behavior, see Commonwealth v. Evelyn, 485 Mass. 691, 709 (2020), the judge found that the manner in which the juvenile adjusted and manipulated her body was designed to conceal something from the police. See Shane S., 92 Mass. App. Ct. at 322-323 (reasonable suspicion supported where juvenile first ran with arms held against body and, after bending down, resumed running with arms swinging freely). See also Commonwealth v. Pagan, 63 Mass. App. Ct. 780, 783 (2005) (defendant reaching toward waistband while walking away supported finding of reasonable suspicion). Lopes's informed interpretation of the juvenile's actions was based on his training and experience in recognizing the behavior

of someone carrying an unholstered gun. See Commonwealth v. Resende, 474 Mass. 455, 461, S.C., 475 Mass. 1 (2016) (State trooper "observed the defendant holding his hand at his waist in a manner that [the trooper] believed from his training and experience was consistent with someone holding a gun in the waistband of his pants"). Compare Commonwealth v. Silva, 440 Mass. 772, 784 (2004) (police may rely on experience and training as basis for probable cause). During his testimony, Lopes explained that there are two ways a person carrying a firearm may check to ensure that a gun is where it is supposed to be. With a holstered gun, the person uses their elbow to do a "check point." On the other hand, if the gun is unholstered, the person does a "secure check" by touching the gun "with [her] hands, pulling up, pulling to the side." With an unholstered firearm, the secure check is designed to make sure that the gun is where it is supposed to be, and "won't slide down [their] pants." In fact, Lopes testified that when he is off duty, he does these checks with his own gun because "[i]t's something that is naturally done." Lopes's application of his training and experience, including more than twenty arrests involving the recovery of a gun on a person, cannot be discounted. Accordingly, the judge's finding that the juvenile bladed her body in an effort to conceal something from the police was based

on Lopes's reasonable and informed belief that the juvenile was illegally carrying a firearm, and is not clearly erroneous.

We recognize that the area in which the stop occurred is not the most critical factor in the analysis, but it was not improper for the motion judge to consider it. See Commonwealth v. Meneus, 476 Mass. 231, 238 (2017); Commonwealth v. Johnson, 454 Mass. 159, 163 (2009) (that particular area is known for firearm activity may serve as factor in reasonable suspicion analysis). But even if we exclude this factor in our analysis, see Evelyn, 485 Mass. at 709, the remaining facts known to Lopes were sufficient to establish reasonable suspicion. Here, the totality of the circumstances -- not one isolated factor -- established reasonable suspicion to believe the juvenile was carrying a firearm.[12] DePeiza, 449 Mass. at 371-372.

Our dissenting colleagues parse the facts too thinly and discount the judge's findings. Indeed, it bears repeating that police officers do "not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion." Commonwealth v. Isaiah I., 450 Mass. 818, 823 (2008). And, we do not consider the facts in isolation but rather, "through the eyes of experienced police officers and as a whole[;] even seemingly innocent activities may take on a

[12] "[R]easonable suspicion is a lower standard than probable cause." Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998).

sinister cast and give rise to reasonable suspicion." Commonwealth v. Cabrera, 76 Mass. App. Ct. 341, 346 (2010). In order to fit their narrative, our dissenting colleagues reduce each fact to its most granular form in order to eliminate it from the reasonable suspicion analysis. Such splintering of the facts is contrary to our jurisprudence. See, e.g., Commonwealth v. Hernandez, 448 Mass. 711, 715 (2007), citing Commonwealth v. Santaliz, 413 Mass. 238, 240 (1992). Indeed, here, in determining that Lopes had reasonable suspicion, the motion judge assessed the firsthand observations of an experienced police officer, and considered the situational context known to the police at the time of the stop. There was no error.

In Commonwealth v. Matta, 483 Mass. 357 (2019), the court held that police had reasonable suspicion to stop and pat frisk the defendant based on circumstances similar to those presented here. There, the court concluded that "at the time of the stop, the [police] officer was aware of [an] anonymous tip regarding a concealed firearm in a motor vehicle in an area known for violent crime, drug sales, and shootings. The officer . . . observed the defendant get out of the automobile in which he was seated, adjust the right front area of his waistband with both hands, and walk toward some bushes not on the sidewalk[,] where one would expect a person to walk. When the officer called out to the defendant, the two looked at one another, and then the

defendant began to run" (quotations omitted). Id. at 365. The court also considered the officer's training and experience in determining whether an individual lawfully possessed a gun. Id. at 366 n.8.

Once Lopes suspected that the juvenile was armed and dangerous, it was reasonable for him to be concerned for his safety and that of the other officers and citizens in the area. See Commonwealth v. Narcisse, 457 Mass. 1, 8-9 (2010). "A police officer does not have to testify specifically that he was in fear of his own safety so long as it is clear that he was aware of specific facts which would warrant a reasonable person to believe he was in danger." Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 n.7 (1997). Here, all of the attendant circumstances, including the report from the concerned citizen and the firearm activity in the area that week and the prior day, permit an inference that Lopes was concerned for his safety and for the safety of those in the area. See Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301, 306-308 & n.5 (1986).

3. Conclusion. The order denying the motion to suppress is affirmed. On count two of the complaint, charging possession of ammunition without an FID card, the adjudication of delinquency is vacated, and the complaint as to count two is to be dismissed.

So ordered.

MILKEY, J. (dissenting in part, with whom Henry, J., joins). When Boston Police Officer Samora Lopes first spotted the sixteen year old juvenile outside the Mildred C. Hailey Apartments, he had no reason to suspect her of any crimes. He then observed her trying to avoid a phalanx of approaching police officers. As she was walking away, Lopes saw the juvenile looking over her shoulder and moving her hand in the area near her waist. Based almost entirely on those limited observations, Lopes laid his hands on the juvenile in order to search her. The majority's upholding what occurred here effectively signifies that anyone in a high crime area observed by police to move his or her hand in the area near his or her waist, without more, may legally be stopped and frisked. Because I believe this is at odds with both existing case law and the constitutional principles on which those cases are based, I respectfully dissent.[1]

Standard of review. The motion judge found Lopes credible, and we, of course, are bound by that determination.[2] In

[1] I agree that count two of the complaint, charging possession of ammunition without an FID card, is duplicative of the adjudication of delinquency by reason of carrying a loaded firearm.

[2] Although unnecessary to the disposition of this case, I note that the record provides no reason to question Lopes's veracity and good faith.

addition, as the majority correctly observes, we are bound by the motion judge's findings of subsidiary fact except to the extent that they are clearly erroneous. Commonwealth v. Bruno-O'Leary, 94 Mass. App. Ct. 44, 49 (2018). However, this is not a rule of blind deference. "A finding is clearly erroneous [and thus not binding on us] when there is no evidence to support it, or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made.'" Id., quoting Care & Protection of Olga, 57 Mass. App. Ct. 821, 824 (2003). To the extent the facts are in dispute, we may not make additional findings based on our own view of the evidence; rather, we can supplement a trial judge's findings only where "the evidence is uncontroverted and undisputed and where the judge explicitly or implicitly credited the witness's testimony." Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007), S.C., 450 Mass. 818 (2008). Where, as here, the judge expressly credited a witness's testimony, there is nothing prohibiting us from accepting admissions that the witness made. Nor are we required to ignore an absence of evidence on any key points.

While our review of the motion judge's fact finding is highly deferential, our review of his application of the law to the facts is not. Instead, we are required to conduct an

independent review of "the application of constitutional principles to the facts found" (citation omitted). Commonwealth v. Warren, 475 Mass. 530, 534 (2016).

Background. Most of the judge's findings are unimpeachable. For example, the findings that the juvenile was trying to avoid the multitude of officers approaching her is well supported by Lopes's testimony and therefore binding on us. The same is true of the judge's finding that as the juvenile was walking away, she repeatedly looked over her shoulder and moved her hand in the area of her waist.

In recounting what occurred outside the Hailey Apartments, the judge highlighted that Lopes's presence there was in response to a tip that a group of youths had been seen displaying a gun there (a point the majority underscores even more than the judge did). While that fact is accurate, much is lost in the telling. According to Lopes's own testimony, the tip came in at least three hours before he arrived at the scene.[3] Moreover, there was no information provided at the suppression hearing about the identity of the caller other than that Lopes

[3] On November 1, 2018, Lopes began his shift at 4 P.M. At a 4 or 5 P.M. roll call, he learned that a tipster had reported that a group of youths outside the Hailey Apartments had been seen displaying a gun. The call did not come through the 911 system; instead, the caller contacted Lopes's sergeant directly. Lopes went to the scene at least three hours after learning of the tip.

had been told that the caller lived at the Hailey Apartments. Nor was any information provided as to the time of the call; the circumstances of the caller's observations; or the identity, number, or identifying characteristics of the youths who allegedly had been displaying the gun.

Once at the scene, Lopes trained his attention on the juvenile and another youth walking away from a group of five to seven approaching officers while the youths were looking back.[4] With respect to the juvenile, the judge found that "[a]s the Juvenile was walking, she continuously looked over her shoulder and adjusted her waistband." This finding appears to be based on Lopes's testimony that the juvenile "kept looking back over [her] shoulder and adjusting the waistband" of her sweatpants as she was walking away. However, after making that statement, Lopes went on to clarify the limited nature of what he actually could see. Directly after providing the quoted testimony, Lopes left the witness stand to demonstrate for the judge what he saw the juvenile do. The prosecutor described the demonstration for the record as follows: "[T]he record may reflect that the witness specifically, Officer Lopes, has stood and demonstrated

[4] The majority notes that a laundry room and a specific pathway at the Hailey Apartments were causes of particular concern. See ante at , . However, the judge did not make any finding that the juvenile was seen near the laundry room or that specific pathway, nor did Lopes testify to that.

for the Court a reaching towards his waistband area motion and looking back over his shoulder as he was walking."[5] The judge agreed that the record could so reflect. Defense counsel immediately stated that given Lopes's vantage point, Lopes could not have observed the juvenile's front to see what she was doing with her hand. Laudably, the prosecutor acknowledged that Lopes had said he was making these observations from "the back of [the juvenile]" and had Lopes confirm that at the time he observed the juvenile move her hand toward her waistband area and look over her shoulder, he was seated in his cruiser approximately sixty feet from where she was and could see her only from behind. Lopes also expressly acknowledged during cross-examination that "[a]ll [he] did was, [he] saw her from behind making a hand movement on her waist." Thus, Lopes admitted that he did not actually see the juvenile "adjust her waistband" (much less do so "continuously," as the motion judge found); rather, he saw her moving her hand in the area of her waist in a manner that was consistent with her adjusting her waistband, and

[5] The majority states that the prosecutor's description of what the witness was demonstrating "is of no consequence" (ante at note 5), and it suggests that because the demonstration was not recorded, we must defer to what the judge drew from it. Putting aside whether that notion of unreviewability is at odds with the rule of law, Lopes himself went on to clarify the limited nature of what he was able to observe, as we discuss below.

he surmised that this was what she was doing.[6] As discussed below, the distinctions are subtle but important.

The judge also embellished Lopes's observations with respect to whether the juvenile was "blading." See Commonwealth v. Resende, 474 Mass. 455, 459 n.8, S.C., 475 Mass. 1 (2016) (characterizing "blading" -- based on the trial record there -- as "hiding one side of the body from the other person's view"). Critical to the judge's ruling was his finding that "[t]he Juvenile turned her body away, referred to by Officer Lopes as 'bladed' her body, so as to conceal something on her person." Lopes himself never suggested, much less stated, that the juvenile was turning her body "so as to conceal something." In fact, up until the point that defense counsel awkwardly inserted the loaded term "blading" into the case, Lopes himself avoided using it, laudably confining himself instead to the objective details of how the juvenile's body was positioned.[7] On cross-

[6] The juvenile emphatically argues how the judge's findings regarding what Lopes observed go beyond his testimony, even if she does not specifically phrase the argument as one that the findings are clearly erroneous.

[7] The justice system would be better served if motion judges, attorneys, and witnesses avoided loaded terms such as "blading" and just addressed what happened. When such jargon is used, it should be defined, as Lopes effectively did here. Rather than limiting itself to how Lopes used the term, the majority relies on a characterization offered by the Supreme Judicial Court based on the record in another case: "hiding one side of the body from the other person's view." See Resende, 474 Mass. at 459 n.8.

examination, defense counsel tried to solicit from Lopes that he never observed the juvenile "blading," without defining what he meant by that term. Lopes declined to agree with counsel's characterization, and he indicated his view that the juvenile's particular movements, "holding her waist and turn [sic]," could be characterized as blading. On redirect, the prosecutor sought to have Lopes specify what he meant by saying that the juvenile's movements could be characterized as "blading." Lopes answered: "As she's walking, she turns to her left side and looking back at the officer several times, back and forth while she's walking on that pathway before she taking [sic] a left turn."

Lopes made certain other admissions regarding his observations that were not mentioned by the motion judge, nor by the majority. In particular, Lopes confirmed that he never saw on the juvenile a "bulge" or "weighted pocket," and that he never saw her run from the police (with a stiff arm or otherwise).

Discussion. As framed by the parties, the key question presented is whether the Commonwealth demonstrated that Lopes had reasonable suspicion to stop the juvenile.[8] See Warren, 475

[8] Where the police have reasonable suspicion to stop someone, and a reasonable belief that the person stopped is armed and dangerous, they generally may conduct a patfrisk in order to protect themselves while they conduct a threshold

Mass. at 534. The parties agree that the stop occurred at the point Lopes grabbed the juvenile by the arm.[9] The question then is whether the police had a reasonable suspicion, "based on specific, articulable facts and reasonable inferences therefrom," that the juvenile had committed, was committing, or was about to commit a crime. Commonwealth v. Hernandez, 448

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inquiry. See Commonwealth v. Narcisse, 457 Mass. 1, 5, 9-10 & n.7 (2010). In fact, Lopes here acknowledged that he stopped the juvenile in order to pat frisk her to see whether she had a gun. Thus, the search for the gun was the very purpose of the stop, not an adjunct action necessary for officer safety. I recognize that the correctness of a search is measured by objective standards, not by an officer's belief. See Commonwealth v. Mercado, 422 Mass. 367, 369 (1996). Nevertheless, where the sole purpose of a stop unquestionably was to search someone for a gun, I fail to see how that can be justified absent probable cause. See Commonwealth v. Rosario-Santiago, 96 Mass. App. Ct. 166, 189 (2019) (Milkey, J., dissenting), quoting Commonwealth v. Buckley, 478 Mass. 861, 872 & n.15 (2018) ("where the Commonwealth is seeking to justify a search without probable cause, 'consideration of an officer's "purpose" for conducting the search is relevant to an assessment of the lawfulness of the search itself'"). See also Commonwealth v. Lek, 99 Mass. App. Ct. 199, 205-206 (2021) (inventory search following traffic stop invalid in part because traffic stop was done as pretext for investigative purpose). Otherwise, we have created a new exception to the general principle that all investigatory searches require probable cause, and one that is not grounded in the need for officer safety.

[9] In fact, I believe that the stop occurred slightly before that, when Lopes intentionally blocked her path. Compare Commonwealth v. Barros, 435 Mass. 171, 174 (2001) (no seizure where police stayed in cruiser and did not impede defendant's freedom of movement), with Commonwealth v. Thompson, 427 Mass. 729, 732, cert. denied, 525 U.S. 1008 (1998) (seizure occurred when police parked cruiser to block defendant's car). However, nothing of consequence occurred between Lopes's blocking of the juvenile's path and his grabbing of her arms.

Mass. 711, 714 (2007), quoting Commonwealth v. Lyons, 409 Mass. 16, 19 (1990).

The majority is, of course, correct that we must be mindful of the principle that "seemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry." Commonwealth v. Grandison, 433 Mass. 135, 139 (2001), quoting Commonwealth v. Watson, 430 Mass. 725, 729 (2000). However, as the Supreme Judicial Court has made abundantly clear, before assessing the facts as a whole, it is appropriate to analyze the individual factors on which a motion judge relied. See Commonwealth v. Evelyn, 485 Mass. 691, 704-710 (2020); Warren, 475 Mass. at 535-540. I therefore begin by examining those factors in light of governing law and the testimony that the judge credited. As explained below, none of the factors deserves much weight in the reasonable suspicion analysis.[10]

The motion judge identified four factors that led him to conclude that the Commonwealth met its burden of demonstrating that the police had reasonable suspicion to stop the juvenile.

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[10] The majority cites the boilerplate statement that appellate judges are required to "accept the motion judge's determination of the weight and credibility of the evidence." Ante at , citing Commonwealth v. Contos, 435 Mass. 19, 32 (2001). That principle goes to the judge's resolution of disputed subsidiary facts. As is discussed below, recent cases could not be clearer that the law constrains the weight that a motion judge may give to the relevant factors.

They are: "1) the Juvenile's repeated evasive movements and changes in direction upon seeing police, 2) her constant looking back and forth over her shoulder and blading her body as she walked, 3) her continuous adjustments of her waistband, and 4) the known firearm activity that had occurred in the area both that day and on many days leading up to the incident." I examine each in turn.

1. Avoidance of police. As the judge accurately observed, there was significant evidence that the juvenile was actively concerned with the approaching police officers and affirmatively tried to avoid them. The legal significance of such actions is a question of law for which no deference to the motion judge is due.

The Supreme Judicial Court addressed this issue in Warren, 475 Mass. at 538. The court observed that there is an

> "irony in the consideration of flight as a factor in the reasonable suspicion calculus. Unless reasonable suspicion for a threshold inquiry already exists, our law guards a person's freedom to speak or not to speak to a police officer. A person also may choose to walk away, avoiding altogether any contact with police. . . . Yet, because flight is viewed as inculpatory, we have endorsed it as a factor in the reasonable suspicion analysis."

In order to safeguard the rights of a "suspect [who] is under no obligation to respond to a police officer's inquiry," the court instructed "that flight to avoid [such] contact should be given little, if any, weight as a factor probative of reasonable

suspicion." Id. at 539. In addition, based on the documented history of racial profiling by police, the court concluded that the flight of an African-American man from the police "is not necessarily probative of . . . consciousness of guilt." Id. at 540.

In Evelyn, 485 Mass. at 709, the court recently reaffirmed this principle, stating that "the reasoning of Warren remains relevant to the analysis of reasonable suspicion [and t]hat reasoning applies equally to other types of nervous or evasive behavior in addition to flight."[11] "Just as an innocent African-American male might flee in order to avoid the danger or indignity of a police stop, the fear of such an encounter might lead an African-American male to be nervous or evasive in his dealings with police officers." Id. Accordingly, the court concluded that in assessing whether the police had reasonable suspicion, "the weight of the defendant's nervous and evasive behavior" should be "significantly discount[ed]." Id.

In the case before us, there is no indication that the juvenile was under any obligation to respond to a police inquiry

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[11] The majority, ante at , mischaracterizes Warren as a narrow case involving the weight given to flight in the absence of other information suggesting that the defendant had committed a crime. Warren, however, also addressed "the weight to be given" to flight in the cases where flight is an appropriate factor. Id. at 538. And Evelyn emphatically reaffirmed the principles of Warren. See Evelyn, 485 Mass. at 708-709.

at the time that Lopes seized her,[12] and it is uncontested that the juvenile is black.[13] Therefore, following Warren and Evelyn, I believe that we should significantly discount the fact that the juvenile sought to avoid the police and looked over her shoulder at them more than once as she was walking away. That is especially appropriate where, as here, the police were approaching in such numbers. I recognize that the juvenile is female, unlike the people stopped by the police in Warren and Evelyn. See Evelyn, 485 Mass. at 692; Warren, 475 Mass. at 530. However, I discern no compelling reason not to apply the guidance of those cases to African-American females.[14] But even

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[12] The juvenile argued on her motion to suppress that minimal weight should be assigned to her seeking to avoid the police, and she cited to the cases that bear on the relevance of race and age. At the hearing on the motion, her race and age were apparent to the judge. Even if her counsel could have done a better job arguing how race and age bore on how her actions should be viewed, I do not believe she irretrievably waived these issues.

[13] Although the transcript of the motion to suppress hearing does not memorialize the juvenile's race, the Commonwealth has stipulated that she is black. On the other hand, whether the juvenile had a youthful appearance is not in the record, yet the majority maintains that her appearance strengthened Lopes's belief that she was breaking the law, because people her age cannot legally possess firearms. See ante at .

[14] This is particularly so where, as here, there was evidence suggesting that the juvenile understood that the officer might have perceived her as male. After being stopped, the juvenile pointedly asserted to Lopes that she was female. Even after knowing the juvenile's gender and while she was present in the court room, Lopes occasionally referred to the

putting aside issues of race, age, and gender, law abiding citizens and criminals alike might well walk the other way to avoid five to seven oncoming police officers.

2. "Blading." The only remaining issue with regard to the first two considerations on which the judge relied is what, if anything, the references to the juvenile's "blading" add to the mix. The judge appears to have found this significant, treating it as a separate action that the juvenile took in an apparent effort to hide something from the police. The majority places even more emphasis on this finding, singling it out as the "most significant[]" finding. Ante at . As set forth above, Lopes himself made no claim that the juvenile had turned her body "so as to conceal something on her person," as the judge found. Rather, he addressed the blading issue only insofar as he disagreed with defense counsel's suggestion that the manner in which the juvenile's body was positioned could not be characterized as blading.[15]

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juvenile as "he" during his testimony. The record does not indicate the juvenile's gender identity.

[15] The majority reasons that the judge's finding that the juvenile was turning her body so as to hide something from the police is not clearly erroneous, because it "was based on Lopes's reasonable and informed belief that the juvenile was illegally carrying a firearm . . . ." Ante at . In this manner, the majority engages in circular logic: the judge's finding about "blading" supports Lopes's belief that the juvenile was secreting a gun, and Lopes's belief, in turn, supports the judge's finding.

In evaluating the significance of the juvenile's actions, it is important to keep in mind that it is nearly impossible for someone to look behind herself without turning her body to the side in a manner that might be characterized as blading. In the circumstances of this case, any evidence that the juvenile intentionally positioned her body so as to hide something from the police was slight at best. Contrast Evelyn, 485 Mass. at 708 (fact that defendant, while police sought to converse with him, "proceeded to turn his body away from the officers in a manner that blocked them from seeing the object" that he was holding in his pocket supported reasonable suspicion that he possessed firearm).

3. Hand near waistband. The third factor relied upon by the judge was that the juvenile made movements with her hand in the area of her waistband. As confirmed by Lopes's testimony, which was based in part on a four-hour training course he had taken, people who carry handguns without the benefit of a holster often do so by tucking the gun inside their waistband. I therefore agree with the majority that where someone is observed to be checking her waistband, or adjusting it, this is some evidence that she might be carrying a firearm there. That said, caution is warranted in how much probabilistic weight can be assigned to such observations. As this case illustrates, it is important to look behind the veil of expertise created by the

talismanic recitation of what police officers have learned from their training and experience.[16]

As noted in detail above, Lopes effectively admitted that all he was able to see from his position behind the juvenile and sixty feet away was the juvenile taking actions consistent with "adjusting [her] waistband," not actually doing so.[17] The force of what Lopes observed is therefore diminished. See Commonwealth v. Barreto, 483 Mass. 716, 721 (2019) (mere fact that observed movement of pedestrian's hand into parked car was "consistent with [a hand to hand] exchange" of narcotics is of little force where "the observed movements were just as consistent with any number of innocent activities"). It takes little imagination to think of other things the juvenile could

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[16] The majority touts Lopes's "specialized knowledge regarding the indicia of someone carrying an unholstered firearm." Ante at . In fact, he took one four-hour course on the subject twice. His experience making "more than twenty" arrests for carrying an illegal firearm, ante at , occurred over nine years. Nowhere in the record is there evidence of how many patfrisks Lopes conducted over that period to secure those "more than twenty" arrests, so we have no empirical basis for judging the accuracy of his predictive abilities using his "specialized knowledge." The deeper issue is not that the majority inflates Lopes's expertise, but that they inflate the bearing that any such expertise had on the likelihood that the juvenile was carrying a gun based only on Lopes's limited observations.

[17] Again, our duty as appellate judges to defer to the motion judge's fact finding role does not require us to ignore clarifying concessions a Commonwealth witness has made during his testimony, or to respect factual findings that are unsupported by testimony.

have been doing with her hand when Lopes observed her move it around the area near her waist. Manipulating a cell phone springs immediately to mind. And, of course, even if the juvenile was adjusting her waistband, there are many reasons why someone walking briskly away might do so apart from ensuring that a gun kept there not fall. See Commonwealth v. Matta, 483 Mass. 357, 366 (2019) ("defendant's adjustment of his waistband alone did not create reasonable suspicion for a seizure[, as i]t is not uncommon for anyone to adjust his or her clothing upon getting out of a motor vehicle").[18]

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[18] Quoting from Commonwealth v. Isaiah I., 450 Mass. 818, 823 (2008), the majority notes that police officers need not "exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion." Ante at . True enough. However, as Barreto and Matta make clear, the extent to which there may be alternative innocent explanations remains quite relevant.

The Matta court ultimately found reasonable suspicion, and the majority, ante at , correctly notes that the factual scenario there bears some similarities to the one here. See 483 Mass. at 367. There are also important distinctions, however. There, the police arrived at a particular location in Holyoke three to four minutes after being dispatched to investigate a report of a gun being placed under the seat of an automobile. Id. at 359. After they pulled up behind a car in that area, they observed a man "get out of the vehicle[,] . . . reach with both hands to the right side of his body[,] . . . adjust his waistband," and begin walking away from the sidewalk and toward nearby bushes. Id. When they tried to speak with him, the man ran from them while "he held onto his waistband." Id. Confronted with these facts, the court declared the question of reasonable suspicion "close." Id. at 365. The Matta defendant's behavior was appreciably more suspicious than that of the juvenile here. Thus, Matta supports the juvenile, not the Commonwealth.

In addition, basic principles of logic and probability reinforce the limited value of Lopes's observations, as a familiar analogy from the medical field drives home. The fact that people who suffer from an exotic disease are likely to exhibit a particular symptom (say, a fever) hardly means that someone observed to exhibit that symptom is likely to have that disease. As generations of medical students learning to be diagnosticians have been taught, "When you hear hoofbeats behind you, don't expect to see a zebra."[19] Here, the notion that people walking away from police while carrying an illegal handgun in their waistband likely would check to see whether that gun was secure is sound. However, the fact that someone is both walking away from police and has her hand near her waist says remarkably little about the probability that the individual is in possession of an illegal firearm. Conflating such probabilities is an error known by many names, including -- as particularly apt here -- "the prosecutor's fallacy." See, e.g., Meester, Collins, Gill & van Lambaigen, On the (Ab)Use of Statistics in the Legal Case against the Nurse Lucia de B., 5

[19] The aphorism has been attributed to Dr. Theodore Woodward, a medical professor at the University of Maryland in the 1940s. See J.G. Sotos, Zebra Cards: An Aid to Obscure Diagnoses 1 (3d ed. 2006).

Law, Prob. & Risk 233, 241 (2006).[20] In the end, while the juvenile's hand motions deserve some weight in the reasonable suspicion analysis, that weight is far less than what might first appear.

4. Earlier firearm activity in area. The final factor the judge considered was the history of firearm incidents in the area. As the Supreme Judicial Court recently has emphasized, "[t]he characterization of an area as 'high crime' cannot justify the diminution of the civil rights of its occupants." Evelyn, 485 Mass. at 709, citing United States v. Wright, 485 F.3d 45, 54 (1st Cir. 2007). Accordingly, judges are to "consider this factor only if the 'high crime' nature of the area has a 'direct connection with the specific location and activity being investigated.'" Evelyn, supra, quoting Commonwealth v. Torres-Pagan, 484 Mass. 34, 41 (2020). In Evelyn itself, even though there was testimony of "an ongoing feud between gangs in the area," as well as evidence "of other police reports of alleged gang-related crimes in the vicinity in the months prior to the shooting," "[t]he dates, precise locations, and alleged perpetrators of those incidents were not

[20] It is also known as the "base-rate fallacy," and the "false-positive paradox." See Bar-Hillel, The Base-Rate Fallacy in Probability Judgments, 44 Acta Psychologica 211, 212 (1980); Parra-Arnau & Castelluccia, On the Cost-Effectiveness of Mass Surveillance, 6 IEEE Access 46538, 46540-46541 (2018).

provided." Evelyn, supra. In this manner, the Commonwealth failed to "demonstrate a 'direct connection' with the defendant or the shooting at issue," and therefore the court ruled that it would "not consider the 'high crime' nature of the area in [its] analysis." Id.

In the case before us, there was evidence of other firearms violations in the vicinity of the Hailey Apartments, including a shots fired incident the previous day and an anonymous report of youths displaying a gun on the day the juvenile was searched. However, virtually no detail was provided about such incidents, an absence that is particularly notable in light of the scale of the area encompassing the Hailey Apartments. In any event, there was no information tying the juvenile to any prior firearm incidents. Moreover, no evidence whatsoever was presented establishing the basis of knowledge or reliability of the anonymous tip that a group of youths had been seen displaying a gun earlier in the day, or that would tend to suggest that the juvenile and her companion were associated with that group. See Commonwealth v. Upton, 394 Mass. 363, 371-376 (1985) (Commonwealth cannot rely on informant's tip unless reliability of tip demonstrated pursuant to Aguilar-Spinelli test).[21] See also Commonwealth v. Meneus, 476 Mass. 231, 236-237 (2017), and

[21] See Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

cases cited ("a general description such as 'a group of young black males' falls far short of the particularity necessary to establish individualized suspicion that a suspect is committing, has committed, or is about to commit a crime"). The three-plus-hour gap between the anonymous report of the gun and the police investigation further vitiates the significance of the call. For all of these reasons, any evidence that the area in the vicinity of the Hailey Apartments was a "high crime area" where arrests for firearm incidents occur with some frequency is at best of limited weight.

Having looked at the relevant considerations individually, it remains to consider whether they, taken together, add up to reasonable suspicion. Lopes traveled to an area where firearm violations were prevalent and where shots had been fired the previous day. He was arriving to investigate a resident's tip that had come in no fewer than three hours prior that a group of "multiple kids hanging around" had displayed a firearm. As far as Lopes was aware, that tip contained no other details on the youths or the caller. When Lopes arrived, between five and seven officers were already on site. Informed that there was a group of six or seven "kids" nearby, Lopes nonetheless focused on a pair of "individuals" who appeared to be attentive to the presence of the police and attempting to avoid a close encounter. From sixty feet away, Lopes observed that one of

them was repeatedly moving a hand in the vicinity of his or her waist. And that is all.

In light of the fact-intensive nature of the inquiry, our assessment of the confluence of factors here necessarily entails comparisons to reported cases. The facts recounted above are similar to those presented in Commonwealth v. Wright, 48 Mass. App. Ct. 912, 912 (1999). There, in a rescript opinion, we concluded that the police lacked reasonable suspicion to stop and frisk a young defendant on the street where, "[v]iewed objectively, nothing more happened in this case than that a youth in a high crime area put his hand in his pocket and walked away upon seeing the police." Id. at 913. In the end, however, I believe that perhaps the strongest support for the juvenile's position comes from comparing the circumstances present here to those in cases where the Supreme Judicial Court found reasonable suspicion while characterizing the question as "close." Two examples will suffice.

In Commonwealth v. DePeiza, 449 Mass. 367, 368, 371 (2007), the police noticed the defendant walking in an "odd way" after midnight "in a high-crime neighborhood with increasing incidences of firearm violence." Specifically, while holding his "[cell] phone to his ear with his left hand, he held his right arm stiff and straight, pressed against his right side." Id. at 368. Through their training, "the officers had learned

that this distinctive 'straight arm' gait was one sign of a person carrying a firearm." Id. The officers next engaged the defendant in conversation during which he "continually shielded his right side from the view of the officers, as if trying to hide something." Id. at 368-369. The police also "noticed that the right pocket of his jacket appeared to contain 'something heavy.'" Id. at 369. In addition, at one point, the defendant reached into a different pocket while "he continued to turn his right side away from them in an awkward motion." Id. Based on all these indicia that the defendant was carrying a firearm, the court concluded that the police had reasonable suspicion to stop him, while characterizing this as a "close" question. Id. at 371.

In Evelyn, thirteen minutes after a shooting, the police came upon the defendant walking on a sidewalk a half-mile away. 485 Mass. at 692. The officers sought to engage him in conversation while they trailed him in their cruiser. Id. at 695. During this encounter, as in DePeiza, the police observed several indicia that the defendant was both carrying a firearm and attempting to hide it from police view. Evelyn, supra at 694-695, 708. First, the defendant "appeared to be holding an object in his right jacket pocket that was consistent with the size of a firearm." Id. at 694-695. Second, he "kept his hands pressed against his body, which, based on the officers' training

and experience, indicated that he might be trying to conceal a weapon." Id. at 708. Third, he "proceeded to turn his body away from the officers in a manner that blocked them from seeing the [firearm-sized] object [in his pocket]." Id. The defendant rebuffed the officers' efforts to engage him in conversation, and then, when one of the officers got out of the cruiser, the defendant sprinted away. Id. at 695. The police gave chase and eventually caught up with him, locating a firearm along the path of travel. Id. at 695. Because the court concluded that the defendant was seized at the point that one of the officers opened the cruiser door, the issue was whether the police had reasonable suspicion at that point in time. Id. at 703-704. The court ultimately concluded that the police had reasonable suspicion to stop the defendant, while again pointedly noting that this was a "close" question. Id. at 710. The court explained that it was relying predominantly on two factors. Id. at 709. The first was the defendant's proximity to the shooting that had just occurred. Id. On this point, the court emphasized that the serious ongoing public safety risks posed by the recent shooting weighed in favor of finding reasonable suspicion. Id. at 705, and cases cited. The second was the set of specific indications that he was secreting a firearm. Id. at 709.

In the case before us, the evidence that the juvenile was carrying a firearm is far less robust than what was presented in the "close" cases of DePeiza and Evelyn.[22] In addition, unlike in Evelyn, this is not a case where there was evidence linking the juvenile to a shooting that had just occurred. For that matter, there was no evidence linking the juvenile to the hours-old call to Lopes's sergeant. As noted, the fact that the stop occurred in a high crime area, while relevant, is of limited value, and the fact that the juvenile attempted to evade the phalanx of officers approaching her adds little, if anything, to the calculus. The Commonwealth's case largely rests on Lopes's surmise that the juvenile's movements of her hand in the area of her waist indicated that she was adjusting her waistband, and that this in turn made it sufficiently likely that she was carrying a gun there to justify his stopping her to conduct a patfrisk. Viewing his observations together with the other circumstances, I do not believe they provide reasonable suspicion. See Warren, 475 Mass. at 540 ("[v]iewing the

[22] The judge thought this case's facts resembled those of Commonwealth v. Sykes, 449 Mass. 308, 314 (2007). Sykes, another "close" case, involved a black man fleeing the police, id. at 309-310, 314-315, but predated Warren and Evelyn, somewhat diminishing its precedential value. There are important factual distinctions as well. In Sykes, the defendant had abandoned his bicycle to flee the police, a fact which the Supreme Judicial Court found "significant." Id. at 315. The defendant also "clenched" his waistband as he ran. Id. The facts here are considerably less dramatic.

relevant factors in totality, we cannot say that the whole is greater than the sum of its parts"); Commonwealth v. Torres, 424 Mass. 153, 161 (1997) ("[a]dding up eight innocuous observations -- eight zeros -- does not produce" reasonable suspicion).

Conclusion. The majority's holding sends a message that the police can stop and frisk anyone in a high crime area who is seen walking away from them while moving a hand near his or her waist. This is directly contrary to my understanding of the relevant constitutional principles. As the Supreme Judicial Court has often admonished, "[M]any 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." Meneus, 476 Mass. at 238, quoting Commonwealth v. Gomes, 453 Mass. 506, 512 (2009). I therefore respectfully dissent.