SJC-13103

COMMONWEALTH vs. EARL GARNER.

Bristol. September 10, 2021. - June 24, 2022.

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

Firearms. Constitutional Law, Stop and frisk, Reasonable suspicion. Search and Seizure, Protective frisk, Reasonable suspicion. Practice, Criminal, Motion to suppress, Interlocutory appeal, Findings by judge.

Indictments found and returned in the Superior Court Department on June 29, 2017.

A pretrial motion to suppress evidence was heard by Thomas F. McGuire, Jr., J., and a motion for reconsideration was considered by him.

An application for leave to prosecute an interlocutory appeal was allowed by Kafker, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

David B. Mark, Assistant District Attorney, for the Commonwealth.

Brian A. Kelley for the defendant.

Rebecca Kiley & David Rassoul Rangaviz, Committee for Public Counsel Services, Katharine Naples-Mitchell, Chauncey B.

Wood, & Radha Natarajan, for Charles Hamilton Houston Institute for Race and Justice & others, amici curiae, submitted a brief.

BUDD, C.J. The defendant, Earl Garner, was charged with two firearm offenses as the result of a traffic stop. After an evidentiary hearing, a judge in the Superior Court granted the defendant's motion to suppress, having concluded that the firearm was discovered during an unlawful patfrisk.[1] The Appeals Court thereafter reversed the judge's decision in response to an interlocutory appeal by the Commonwealth. We granted the defendant's petition for further appellate review and now affirm the motion judge's order granting the motion to suppress.[2]

Background. We summarize the facts as found by the motion judge, leaving some details for later discussion. Three State police troopers were on patrol one night in Taunton when they observed a motor vehicle with tinted windows make two abrupt turns. The troopers activated the cruiser's blue lights, and the motor vehicle stopped.

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[1] In the motion judge's initial memorandum of decision and order, he ruled that the traffic stop was improper and that all evidence resulting from the stop must be suppressed. Upon the Commonwealth's motion for reconsideration, the motion judge concluded that the traffic stop was proper based on a civil motor vehicle infraction. That ruling is not before us on appeal.

[2] We acknowledge the amicus brief submitted by the Charles Hamilton Houston Institute for Race and Justice, Committee for Public Counsel Services, Massachusetts Association of Criminal Defense Lawyers, and New England Innocence Project.

As the officers approached the car, the defendant and one of the troopers, Paul Dunderdale, recognized one another. This stop was the fifth time Dunderdale had stopped the defendant over the course of several years;[3] as a result of the first of those stops, the defendant was arrested for possession of a firearm. Moreover, Dunderdale was aware that the defendant had been convicted twice of unlawful possession of a firearm. During the encounter, one of the defendant's legs was shaking, and he was trying to call someone with a cell phone as he spoke to Dunderdale.

In response to questions from the trooper, the defendant stated that he was on his way to buy marijuana from a friend but had become lost. The defendant repeated several times, "Come on, Dunderdale." The trooper asked if the defendant "'messed' with firearms anymore?" The defendant said, "No," and then said, "Take a look if you want." When the defendant indicated that he did not mind getting out of the vehicle, Dunderdale responded, "Okay. Hop out."

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[3] The four previous encounters all stemmed from traffic stops. The first, in 2011, resulted in the recovery of a firearm and a conviction in 2012 of possession of a firearm, subsequent offense. The second stop, which occurred approximately one week after the defendant was released from prison in 2014, resulted in a charge for operating with a suspended license. Trooper Paul Dunderdale did not issue a ticket or make an arrest during the latter two stops, and the interactions were "friendly" on those occasions.

The defendant emerged from the vehicle and took two or three steps away from Dunderdale. As he did so, a second trooper positioned himself behind the defendant and instructed the defendant to move toward the rear of the vehicle. The defendant called out for someone to come out of a nearby home but received no response.[4] The second trooper then grabbed the defendant, pat frisked him, and found a gun in his waistband.

Discussion. Under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, individuals are protected from unreasonable searches and seizures at the hands of the government. Because a patfrisk, i.e., a "carefully limited search of the outer clothing of a person to discover weapons for safety purposes," is a "serious intrusion on the sanctity of the person," it "is not to be undertaken lightly" (alterations omitted). See Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020), quoting Terry v. Ohio, 392 U.S. 1, 30 (1968), and Commonwealth v. Almeida, 373 Mass. 266, 270-271 (1977), S.C., 381 Mass. 420 (1980).

A patfrisk is permissible only where an officer has a "reasonable suspicion," based on specific articulable facts, "that the suspect is [both] armed and dangerous." Torres-Pagan,

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[4] The defendant called out, "Yo, L.T. Yo, L.T. Come outside."

484 Mass. at 36, citing Arizona v. Johnson, 555 U.S. 323, 326-327 (2009), and Terry, 392 U.S. at 27. The Commonwealth has the burden to show that the patfrisk "was within constitutional limits." Commonwealth v. DePeiza, 449 Mass. 367, 369 (2007). The Commonwealth argues that the defendant's prior criminal record, together with his behavior during the stop, created reasonable suspicion that the defendant was armed and dangerous.

1. The defendant's criminal record. The defendant had been convicted twice of unlawful possession of a firearm, and Dunderdale was aware of the defendant's record. Knowledge that a suspect's criminal record includes weapons-related offenses may factor into the reasonable suspicion calculus. See Commonwealth v. Gomes, 453 Mass. 506, 512-513 (2009), citing Commonwealth v. Dasilva, 66 Mass. App. Ct. 556, 561 (2006). However, here, Dunderdale was familiar with the defendant, and in fact had arrested the defendant on a prior occasion for firearm possession without incident. Further, Dunderdale testified that he believed he and the defendant had a "really good rapport." In these circumstances, the defendant's somewhat stale criminal record[5] carries little weight. Contrast Commonwealth v. Nutile, 31 Mass. App. Ct. 614, 617-618 (1991) (patfrisk upheld where officers knew of defendant's prior

[5] The defendant's most recent conviction at that point, in 2011, was six years prior to the stop at issue here.

firearm convictions, witnessed driver enter car with firearm, and observed defendant "hurling object out his window" during police chase).

2. The defendant's behavior. At any rate, a suspect's criminal record alone will not justify a patfrisk. See Commonwealth v. Cordero, 477 Mass. 237, 246 (2017). The Commonwealth argues that the most salient factor in the reasonable suspicion calculus was the defendant's behavior during the stop. Specifically, the Commonwealth contends that the defendant's behavior was unusual and suspicious and that he was preparing to flee the scene.

To support its position, the Commonwealth includes details drawn from portions of the troopers' testimony that are not included in the judge's findings of fact. Ordinarily, "[w]hen reviewing the denial of a motion to suppress, we accept the judge's findings of fact and will not disturb them absent clear error." Commonwealth v. Tremblay, 460 Mass. 199, 205 (2011). However, here the Commonwealth suggests that we may consider the additional testimony culled from the hearing because the judge indicated in his June 11, 2018, memorandum of decision that "[t]he court credits the testimony of the troopers, except where they speculate about the defendant's thoughts."

Relying upon Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007), S.C., 450 Mass. 818 (2008), which states in part that

"[a]ppellate courts may supplement a judge's finding of facts if the evidence is uncontroverted and undisputed and where the judge explicitly or implicitly credited the witness's testimony," the Commonwealth contends that the judge's statement allows for the presumption that the judge adopted the entirety of the troopers' testimony, including portions omitted from his findings of fact.[6] This argument is misplaced.

The Commonwealth accurately quotes the decision; however, Isaiah I. goes on to cite Commonwealth v. Butler, 423 Mass. 517, 526 n.10 (1996), for the proposition that any additions to the findings of fact may "fill out the narrative" but may not contradict the motion judge's findings. Isaiah I., 448 Mass. at 337. Later, in Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015), we emphasized more directly that "[a]lthough an appellate court may supplement a motion judge's subsidiary findings with evidence from the record that is uncontroverted and undisputed and where the judge explicitly or implicitly credited the witness's testimony, . . . it may do so only so long as the supplemented facts do not detract from the judge's ultimate findings" (emphasis added; quotations and citations omitted).

[6] The Commonwealth interprets the statement to mean that the judge did not accept the troopers' inference that the defendant actually intended to flee, but he credited their representations that they thought the defendant was going to flee.

In a hearing on a motion to suppress, the judge is the fact finder. Because the judge observes the witnesses as they testify, appellate courts rely upon his or her determination of the credibility of each witness, as well as the amount of weight to give the testimony. See Commonwealth v. Scott, 440 Mass. 642, 646 (2004); Commonwealth v. Yesilciman, 406 Mass. 736, 743 (1990). "[A] finding of fact is the judge's declaration that it is a fact." Isaiah I., supra at 338-339, quoting J.J. George, Judicial Opinion Writing 134 (4th ed. 2000). "Findings of fact are factual deductions from the evidence, essential to the judgment in the case. . . . Such findings should be stated clearly, concisely[,] and unequivocally, and be worded so that they are not susceptible of more than one interpretation." Isaiah I., supra at 339, citing George, supra at 110, 133-134, 144.

A statement generally crediting witness testimony is not the same as making factual deductions based on the evidence presented. Further, such a statement is susceptible of more than one interpretation. That is, if a motion judge indicates that he or she credits a witness's testimony, that could mean that the judge has accepted everything a witness said as true, including the witness's characterization of the evidence. Alternatively, it could signify a belief that the witness told the truth to the best of his or her knowledge, but not

necessarily that the judge accepted wholesale the witness's version of the facts. Thus, we do not agree that a general statement crediting witness testimony means that every statement the witness makes on the stand is automatically a fact found by the motion judge.

Moreover, the judge's findings of fact paint a very different picture of the stop from the Commonwealth's version. For example, based on Dunderdale's testimony, the Commonwealth describes the defendant's demeanor as "excessively nervous,"[7] his explanation for being in the area as suspicious,[8] and his offer to allow a search of his vehicle as insincere.[9] To demonstrate that the defendant was in "fight or flight mode," the Commonwealth points to Dunderdale's testimony that when the defendant got out of the vehicle, he was "kind of blading away" from Dunderdale, and that he "start[ed] walking backwards across

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[7] Dunderdale testified that, in his view, the defendant's nervousness was unusual because, based on previous motor vehicle stops, Dunderdale believed that he and the defendant had a good rapport.

[8] Dunderdale testified that his "sense of level of safety" rose after the defendant said he was there to buy marijuana from a friend but had gotten lost, and the defendant continued to plead, "Come on, Dunderdale," although Dunderdale did not believe that the defendant had a reason to plead with him, and that, at the time of the stop, all of the houses on the street were dark.

[9] Dunderdale testified that the defendant's offer, "Take a look if you want," was "sudden" and "[a]lmost as if . . . [the defendant did not] really want [Dunderdale] to take a look."

the street," and looked around in "a panicked manner." The Commonwealth also notes that both Dunderdale and a second trooper testified that the defendant backed away in a manner that, in their experience, suggested he was about to flee.

In contrast, although the judge found that the defendant was "possibly" nervous, he did not find the defendant to have been excessively so.[10] Further, the judge did not characterize the defendant's answers to Dunderdale's questions as suspicious, nor did he find the defendant's offer to allow the troopers to search the vehicle to be disingenuous. Instead, the judge found that the defendant was "not confrontational or belligerent" and that he "made no threats." The judge further found that the defendant "made no furtive gestures" and did not "reach for anything" at any point during the encounter. As for the defendant's behavior once he got out of his car, the judge made no finding that the defendant was "panicked," was "kind of blading away" from Dunderdale, or was attempting to flee. Rather, the judge found that, "[g]iven the narrowness of the area between the vehicle and the edge of the street, the

[10] Dunderdale's opinion regarding the defendant's state of mind notwithstanding, the judge noted that "nervousness in dealing with police is 'common' and does not indicate a threat." See Commonwealth v. Cruz, 459 Mass. 459, 468 (2011).

defendant could not have moved very far" and that he "could not have taken more than two or three steps, at most."[11]

Finally, the judge did not credit the troopers' testimony "where they speculate[d] about the defendant's thoughts." Both troopers testified that they believed that the defendant was in "flight or fight mode." Testimony concerning what the defendant may have been thinking, the judge found, added nothing to the analysis because the troopers did not articulate a factual basis to support the conclusion.

Given the stark difference between the Commonwealth's version of the encounter and the judge's own findings, the facts the Commonwealth seeks to add plainly are not "uncontroverted and undisputed." See Isaiah I., 448 Mass. at 337. In fact, the Commonwealth's supplemental facts tip the reasonable suspicion calculus in the opposite direction. See Jones-Pannell, 472 Mass. at 431 ("supplemented facts [may] not detract from the judge's ultimate findings" [quotation and citation omitted]). That is, had the judge made the findings suggested by the Commonwealth, he likely would have concluded that the officers' suspicion that the defendant was armed and dangerous was reasonable.

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[11] The judge also made a specific finding that the defendant "did not run."

"[A]s our long-standing jurisprudence makes plain, in no event is it proper for an appellate court to engage in what amounts to independent fact finding in order to reach a conclusion of law that is contrary to that of a motion judge who has seen and heard the witnesses, and made determinations regarding the weight and credibility of their testimony." Jones-Pannell, 472 Mass. at 438. We therefore decline to supplement the findings made by the judge with the additional facts that the Commonwealth would have us consider.

Relying solely upon the judge's findings, including that the defendant "was not confrontational or belligerent," "made no furtive gestures" or "threats," and was "known to the police, [had] a 'really good rapport' with the police and [had] never engaged in or threatened violence against the police," we agree with the judge that the defendant's behavior did not create reasonable suspicion that he was armed and dangerous.

Our recent decision in Commonwealth v. Sweeting-Bailey, 488 Mass. 741 (2021), does not compel a different result. In Sweeting-Bailey, a divided court upheld the judge's determination that the police officers had reasonably inferred from the circumstances that the front seat passenger intended to divert attention from the vehicle,[12] and concluded that the

[12] Those circumstances included, inter alia, the front seat passenger's "erratic, uncharacteristic behavior, combined with

police officers therefore were justified in pat frisking the defendant, a rear seat passenger. Id. at 742, 755-756. The dissenters believed that the officers used an unreasonable and speculative inference concerning the front seat passenger's behavior to establish reasonable suspicion to pat frisk the defendant, who sat quietly in the rear seat, id. at 772-773 (Gaziano, J., with whom Georges, J., joined, dissenting), and that the risk of accepting an unwarranted inference is that it "invites officers to pat frisk first and invent explanations later," id. at 770 (Budd, C.J., dissenting).

Here, however, we unanimously agree with the judge's conclusion that the defendant's seemingly uncharacteristic behavior did not raise a reasonable inference that he was armed and dangerous. The judge did not credit the troopers' "speculat[ive]" testimony "about the defendant's thoughts" and flatly rejected as unreasonable the proffered inference that the defendant might take "flight or fight" where it was unsupported by objective facts.

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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." Sweeting-Bailey, 488 Mass. at 755.

Because the defendant's reactions to the traffic stop did not justify the subsequent patfrisk, we affirm the judge's decision to allow the motion to suppress.

So ordered.