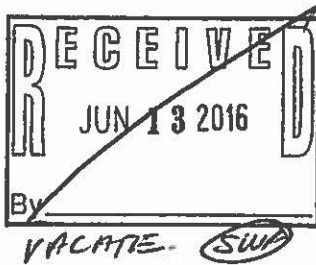


SUFFOLK, ss.

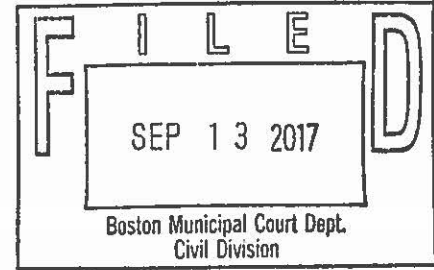
BOSTON MUNICIPAL COURT  
CENTRAL DIVISION  
DOCKET NO. 1607CR3699



COMMONWEALTH

v.

PEDRO DAVIEGA



**FINDINGS AND RULINGS ON DEFENDANT'S MOTION TO SUPPRESS**

The Defendant is charged with carrying a loaded firearm without a license. Defendant seeks to suppress the firearm and ammunition because he was stopped and searched unlawfully in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Articles XII and XIV of the Massachusetts Declaration of Rights. This matter came before the court on July 6, 2017 for hearing. The Commonwealth presented the testimony of Boston Police Officers Philip Bissonnette ("Bissonnette") and James Walsh ("Walsh").

After hearing, the motion to suppress is ALLOWED.

**FINDINGS OF FACT**

Based on the credible evidence presented at the hearing, which is limited to the facts stated below, the court finds the following.

On September 29, 2016, at about 6:30 p.m., Sergeant Bissonnette, Officer Walsh and Officer Conner Hardy ("Hardy"), members of the Youth Violence Strike Force ("Strike Force"), were en route to 55 Downer Avenue in Dorchester in order to conduct a "gang investigation" at a street memorial which had been erected in honor of an individual whose funeral had been held earlier that day. The officers believed that the person who had been killed, and for whom the group at 55 Downer Street were mourning was "possibly affiliated with 'the Cameron Street Gang'" and people attending the vigil might be associated with that group. The officers knew

that during the summer of 2016 there had been several shootings in the city resulting from what the officers believed was a “feud” between “the Cameron Street Gang” and “the Wendover Street Gang.” The officers had recently received “intelligence” that Cameron Street associates had “possibly come across” and were “possibly holding” firearms.<sup>1</sup> The officers did not know who would be present at the street memorial. The officers had no prior knowledge of defendant.

During the events leading up to and following defendant’s arrest, Bissonnette was wearing a body camera (“body cam”). His body cam recorded a significant portion of what occurred, was shown during the hearing and admitted into evidence. Exhibit 1. Upon arriving at 55 Downer Ave. the officers observed the memorial created by several clusters of white candles adjacent to a stone wall outside Downer Park. Seven or eight young black men are seen hanging around quietly and peacefully on the sidewalk nearby.<sup>2</sup> A few more people occupied a couple of cars which were legally parked on the side of the road in front of the memorial.

The three officers who were in plain clothes, were wearing sweatshirts and baseball caps and had their badges and guns displayed on their hips. The police pulled up and stopped the black SUV in the middle of the road and immediately exited with Hardy and Walsh splitting up and moving into to staggered positions in close proximity to some of the young men who can be seen standing or leaning on the stone wall. Meanwhile, Bissonnette, clearly in charge of the operation, began talking rapidly and loud enough for all to hear, “What’s up guys?” “Who’s in this car?” He shines his flashlight on the occupants of the car, “What’s your name?” “Any weapons in here?” “Sorry about your friend.” One of the men on the sidewalk holds a plastic cup

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<sup>1</sup> No specific details were provided regarding the source or reliability of the “intelligence.”

<sup>2</sup> Both officers testified there were about 30 people present when they pulled up but the video does not comport with their testimony and I find there to have been far fewer than 30, more like 8-10.

and appears to have been drinking. He approaches Bissonnette and says “everybody came here to pay their respects. Nobody should be getting detained.” He then says, if you want to arrest me for public drinking ...” Bissonnette says, “let me just check you out, ok?” Bissonnette reaches out to search his shirt. The man with the alcohol is not arrested for public drinking. Sgt. Bissonnette directs some people to get out of a car. He announces to the entire group “here’s how it’s gonna go down” then interrupts himself continuing to question people present in the area, “any weapons?” ... “Who’s in this car?” ... “Who’s this?” One young black man who exited his car as instructed looks frightened. Someone says “I’m leaving” and Bissonnette responds, “You’re not going anywhere.” Bissonnette states to the group, “Everybody is gonna get frisked.” “Everybody is getting frisked tonight.” Exhibit 1. No one is permitted to leave.

Although Bissonnette testified, “Saying [everybody is getting frisked] and doing it are two different things,” the video belies his account and I find him to be incredible on this point. The video clearly shows that the pat-frisking by Hardy and Walsh began almost immediately. Sgt. Bissonnette was facing in the direction of the two officers as they began pat-risking the young men. I find, based upon the evidence I credit and the body cam, these officers went to 55 Downer Ave. intending to conduct a “gang investigation” which included questioning and searching every person present at the vigil whether or not they were doing anything suspicious. I further find the officers had begun the process of frisking everyone prior to locating the firearm and that the discovery of the firearm in defendant’s possession was not part of the calculus in deciding to conduct this global pat frisk. Exhibit 1.

Officer Walsh testified about the circumstances which led up to him pat-frisking defendant. When Walsh exited the SUV he moved to the furthest position from Bissonnette, about 30 feet down the hill, with Hardy in between them. Officer Walsh positioned himself directly in

front of defendant who happened to be last in line along the stone wall. On the video, defendant can be seen leaning against the retaining wall, wearing a black sweatshirt with the hood up and his hands in his pockets. By this point, Bissonnette had announced that every person present was going to be searched. Officer Walsh can be seen on the video, next to defendant, wearing a gray sweatshirt, also with his hands in his pockets. Officer Walsh testified that he decided to search defendant because defendant: (1) had his hands in his pockets and looked nervous; (2) would not make eye-contact; (3) was not responding to the officer's questions about having any weapons; (4) eyes became "wide eyed" and chest was visibly pumping up and down; and (4) refused to take his hands out of his pockets when twice ordered to do so. However, the video does not support this testimony. The video shows in the moments leading up to the search in issue, Walsh is not observing defendant, or even facing toward him, rather he is standing with his hands in his pockets looking up the sidewalk toward Bissonnette as if waiting for Bissonnette to do or say something. Exhibit 1. I credit Walsh's testimony only in so much as defendant had his hands in his pockets, appeared nervous, and stated, "I just want to go home."

Although Bissonnette testified defendant was the first person on the scene to be pat frisked, the video shows otherwise. Officer Walsh testified defendant was not the first person pat-frisked, the police were searching everyone, and had already started pat-frisking when he began to search defendant, which I credit. The video shows defendant to be third. Exhibit 1.

Once the firearm had been retrieved and defendant arrested, the defendant was secured and placed into a BPD transport van.

The body cam continues to record the following events.<sup>3</sup> Exhibit 1.

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<sup>3</sup> There were egregious violations of the constitutional rights of the individuals who were doing nothing more than attending a memorial vigil. However, those violations are not in issue in

An officer who had arrived later asks Bissonnette what led up to defendant's arrest. Sgt. Bissonnette responds "[defendant] was the first guy we frisked...then they just started coming out of the woodwork." He points to the group of people whom he had earlier instructed were "not [to go] anywhere, and tells the responding officers that all of them need to be frisked. Sgt. Bissonnette informs the group of young men, "We're just going to do our thing," then you can go. The young men appear to understand what "their thing" means and begin raising their hands anticipating the pat-frisks before being allowed to leave. No one runs or argues with the police. Several officers begin searching everyone present.

Meanwhile the police vehicles had completely blocked the street and were attempting to gain "consent" to search a young man's car. Sgt. Bissonnette asks him, "Why'd you lock it?" The young man answers, "Because it's my car." One of the officers says, "Let's get the dog on this car." "Let us have a look in the car." Sgt. Bissonnette asks him, to let them look inside. A large officer in plain clothes approaches and confronts the young man, "Did you hear what he said?" The officers continue talking about the gun dog and tell the man that they "will just take it in to get a search warrant." Next, police can be seen searching inside the car. Presumably they received the desired voluntary consent. Nothing was recovered from the vehicle.

## RULINGS OF LAW

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this case. The facts are included here as they bear upon the credibility of the officers, and, because they are so troubling. "Searches that result in no weapons or contraband being found do not—as a practical matter—make it to the courthouse door. Yet, they are events of real constitutional and cultural significance that courts are almost free from addressing." *United States v. McKoy*, 402 F.Supp 2d 311, 314-315 (2004), *aff'd* 428 F. 3d 38 (2005); *See* Boston Police Department Releases Latest Field Interrogation Observation Data, BPD News (May 23, 2017) <http://bpdnews.com/news/2017/5/23/boston-police-department-releases-latest-field-interrogation-observation-data>

Defendant argues the firearm recovered during his search and seizure should be suppressed because the initial seizure was unlawful. The Commonwealth bears the burden of demonstrating that the actions of the police officers were within constitutional limits.

*Commonwealth v. Meneus*, 476 Mass. 231, 234 (2017); *Commonwealth v. DePeiza*, 449 Mass. 367, 369 (2007).

In order to assess the lawfulness of the stop, the court must first determine the precise moment at which the seizure occurred. *Commonwealth v. Sykes*, 449 Mass. 308, 314 (2007). Whether the scope of the encounter meets the threshold of a stop and seizure as defined by *Terry v. Ohio*, 392 U.S. 1 (1968), depends on the circumstances as a whole. *Commonwealth v. Stoute*, 422 Mass. 782, 789-790 (1996). “A person is seized by police only when, in light of all of the attending circumstances, a reasonable person in that situation would not feel free to leave.” *Commonwealth v. Jones-Pannell*, 472 Mass. 429, 432 (2015), quoting *Commonwealth v. DePeiza*, 449 Mass. 367, 369 (2007).

In the present case, the stop occurred when Walsh moved into position directly in front of defendant and Bissonnette announced to the group of young men, “[y]ou’re not going anywhere,” “[e]verybody is gonna get frisked,” and “[e]verybody is getting frisked tonight.” At this point, no reasonable person in defendant’s position would have felt free to leave. *Narcisse*, 457 Mass. at 6.<sup>4</sup> Defendant stated, “I just want to go home.”

Once a seizure has occurred, the issue to be determined is “whether the stop was based on an officer’s reasonable suspicion that the person was committing, had committed, or was about

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<sup>4</sup> Even if a Court were to find this was not the point of seizure, clearly the defendant was seized when Officer Walsh began to search him. *Terry v. Ohio*, 392 U.S. 1 (1968); *Commonwealth v. Narcisse*, 457 Mass. 1, 5-6 (2010).

to commit a crime.” *Meneus*, 476 Mass. at 235, quoting *Commonwealth v. Martin*, 467 Mass. 291, 303 (2014). That suspicion must be grounded in specific, articulable facts and reasonable inferences drawn therefrom rather than on a hunch. *Id.* at 235. Under the totality of the circumstances leading to the stop (pat-frisk) of defendant, the facts known to the police at the time of the seizure were not sufficient to establish reasonable suspicion that defendant was connected to any criminal activity whatsoever.

While peacefully attending a memorial vigil, defendant was confronted by the police, told he was not free to leave and that he, along with everyone else, was going to be pat-frisked. That the defendant may have appeared nervous, did respond to the officer’s questions, and expressed a desire to go home, is wholly insufficient to establish reasonable suspicion that he had committed, was committing, or was about to commit a crime. “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 may choose to walk away, avoiding altogether any contact with police.” *Commonwealth v. Warren*, 475 Mass. 530, 538 (2016). Furthermore, nervousness at the sight of approaching law enforcement, especially when told, “You are going to be searched,” is not unexpected and adds little to reasonable suspicion. *Commonwealth v. Gonsalves*, 429 Mass. 658, 669 (1999); *United States v. McKoy*, 428 F.3d. 38, 40 (1<sup>st</sup> Cir. 2005) (same).

Finally, the police may only conduct a pat-frisk if, in addition to a lawful investigatory stop based upon reasonable suspicion, the officer also reasonably suspects that the person stopped is armed and dangerous. *Commonwealth vs. Narcisse*, 457 Mass. 1, 7 (2010), quoting *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). “This is true even where the officer comes into contact with an individual solely to conduct a consensual interview.” *Id.* In other words, a police officer may not elevate a consensual encounter into a protective frisk absent a reasonable

suspicion that an individual is committing, has committed or is about to commit a crime *and* is armed and dangerous. *Id.* at 9-10. *Compare, Commonwealth v. Johnson*, 454 Mass. 159 (2009) (lawful to approach group which included defendant where police observed one member of the group to be committing a crime).

### CONCLUSION

For the reasons stated above, the defendant's motion to suppress is ALLOWED

DATED: September 13, 2017

A handwritten signature in black ink, appearing to read "Catherine K. Byrne", with a long horizontal flourish extending to the right.

Catherine K. Byrne  
Associate Justice, Boston Municipal Court