

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET NO. 1707CR0948-FR

COMMONWEALTH

v.

KEIARRI DYETTE

FINDINGS AND RULINGS ON DEFENDANT'S MOTION TO SUPPRESS

This matter came before the court on July 18, 2017, for hearing on Defendant's motion to suppress evidence seized as result of his arrest. Defendant argues he was unlawfully seized in violation of the United States Constitution and the Massachusetts Declaration of Rights when on March 18, 2017, three Boston Police Officers stopped a car in which he was a passenger, ordered him to exit and be subjected to a search in which a firearm was discovered. After hearing, the motion to suppress is ALLOWED.

FINDINGS OF FACT

One witness testified, Boston Police Officer R. Degrave. The recording ("video") from the body-camera ("body-cam") he wore during the events was introduced. Exhibit 1. I find the following facts based upon the credible evidence at the hearing.¹ If relevant facts are not included it is because I did not credit them.

On the night of March 18, 2017, officers R. Degrave, G. Eunis, and C. Franklin, members of the Boston Police Department (BPD) Youth Violence Strike Force (Strike Force), were patrolling in the Roxbury area of Boston. The three officers were wearing plain clothes, traveling

¹ Exhibit 1 was especially useful in deciding defendant's motion to suppress.

in an unmarked police vehicle, a black Ford Explorer (SUV). Officer Degraeves was wearing a body-cam on his chest. The SUV was equipped with lights and sirens as well as a laptop mobile data terminal.

That night, Officer Franklin was driving, Officer Eunis was the front seat passenger, and Officer Degrave was seated in the rear. At 11:45 p.m., the officers received a radio call announcing “shots fired” on Humphreys Street, a residential street in the “Roxbury area.”² The officers activated the blue lights and sirens and drove to the area, arriving within a few minutes. They patrolled Humphreys Street briefly, without observing anyone, so decided to proceed to Cushing Avenue in Dorchester. Cushing Avenue is about a mile away from Humphreys on the opposite side of Columbia Road (divided highway). The BPD has responded in the past to calls for “shots fired” in the area of Cushing Avenue they consider it a “hot spot.” No additional evidence or details were presented regarding any previous firearm related incidents in that area which is a residential neighborhood.³

As the police were proceeding up Cushing Avenue in the direction of BPD Strike Force “home base,” and were about two car lengths away from the intersection with Jerome Street, they observed a grey Chrysler make a “hard left” from Jerome into the right hand lane of Cushing, nearly colliding with their vehicle. The police activated their lights and sirens then stopped the motor vehicle for illegally turning into the lane of oncoming traffic.⁴ After stopping the Chrysler, all three officers exited the SUV and approached the car.

² The time at the start of the video reads 3:47 which is inaccurate. It was actually 11:45 p.m.

³ Exhibits 2, 3, 4 and 9 show the stop occurred in a residential neighborhood.

⁴ Officer Degrave testified that prior to the Chrysler making the illegal turn, he saw it fail to stop at the stop sign on Jerome Avenue. However, on cross-examination, when confronted with

It was freezing cold and the video depicts ice and snow on the road. Exhibit 1. The officers were bundled up, including outer layers and hats or hoods. Exhibit 1. Keiarri Dyette, defendant, a nineteen year-old Black male, was seated in the front passenger seat wearing a blue winter parka which at the time of the stop was zipped up to his throat. Exhibit 1. James Rodriguez was the driver. Officer Franklin pulled the SUV into a position at an angle facing the Chrysler and kept the headlights and blue lights activated as the three officers approached and interacted with the occupants. The officers were wearing black vests with the BPD logo on them and carrying flashlights which they shone into the back and front seat areas. Their firearms were visible on their belts and their badges displayed. Officer Franklin and Eunis approached the driver and asked for license and registration which he provided.

Officer Degrave approached defendant and motioned for him to lower the window which he did. Officer Degrave observed defendant was not wearing a seat belt and asked him for identification. Defendant did not have an identification card with him, however, he provided his name, "Keiarri Dyette," his social security number, and date of birth. Defendant spelled his name for Degrave, who wrote down. After receiving the information from defendant Degrave walked back to the SUV where he gave the information to Franklin. Officer Degrave informed Franklin he observed defendant "leaning on the console." Officer Franklin, who was inside the SUV using the mobile data terminal (MBT), replied, "I'm gonna see if they are Cameron dudes [and] if they are" He did not complete his sentence.

After providing defendant's identification information to Franklin, Degrave returned to his position near the Chrysler and continued to ask defendant questions, not to gain additional

photographs showing the location of the stop sign, he acknowledged, that he could not actually see the stop sign from his location on Cushing Road. See Exhibits 4 and 9. I do not credit the police observed the Chrysler fail to stop at the stop sign.

information to identify him, but, “so he could continue to observe him.” He asked defendant questions such as; “Have you been arrested before?”

By entering defendant and driver’s personal data into the MBT, Franklin was able to search for additional information. The MBT provided access to: the Criminal Justice Information System (CJIS) network, criminal history, warrant status, driver’s license and motor vehicle information (registration, stolen motor vehicle reports etc.), and the Boston Regional Intelligence Center database (BRIC).⁵ Defendant was not previously known to these officers and Franklin’s search did not turn up additional relevant information. There was no indication defendant was connected to any gang activity or had any outstanding warrants. After about ten minutes, having completed the data search on both individuals, Franklin returned the valid license and registration to the driver.

Officer Degrave testified, he observed defendant’s hand was “always on the center console,” he was breathing heavily, he did not make eye contact and kept looking around. He also testified to having seen defendant’s “chest [] rising and falling.” I do not credit that defendant’s arm never left the center console. The video, which captures much of this stop, shows defendant moving both of his hands. It further shows defendant doing other things such as: sitting still, resting his head on the head-rest and closing his eyes, picking up, looking at, and putting down his cell phone.⁶ I also do not credit defendant was so nervous that the officer

⁵ BRIC is an extensive data collection system created for gathering, organizing, and sharing information collected from a wide variety of sources by law enforcement officers; including, intelligence and surveillance of individuals suspected of involvement, or, of associating with others who are suspected or known to be involved in criminal activity. <http://bpdnews.com/bric> ; <http://raceandpolicing.issuelab.org/resources/25203/25203.pdf> , at page 2.

⁶ All of this can be seen on the video from the body-cam Officer Degraeves was wearing on his chest, presumably while he was observing defendant.

observed him breathing abnormally with his chest rising and falling in an unusual manner. On this issue, I credit so much of the testimony as defendant appeared nervous but not unusually so.

After returning the driver's documents, officers Franklin, Eunis and Degrave conferred about how to proceed. Officer Degrave informed his fellow officers "[defendant's] left hand is gripping the center console . . . never left center console" and he appeared very nervous. Officer Eunis said the driver also seemed nervous. Officer Degrave testified the officers "wanted to pat-frisk the car for their safety." However, prior to the exit order, there had been no gesture, furtive movement, or conduct, indicating the presence of a weapon either on defendant's person or in his immediate vicinity.

Once the police decided to conduct the search they directed the driver to start the Chrysler and back it up. They did this in order to have more room to remove the defendant from the car and frisk him. After the driver repositioned the car, the police ordered both men to exit so they could be searched. During the pat-frisk of defendant Degrave located and recovered a firearm from his waistband. The officers also searched inside the car, including the center console, and found nothing of consequence.

There is no indication that the defendant, James Rodriguez (driver) or the grey Chrysler had anything to do with the "shots fired" on Humphreys Street.

RULINGS OF LAW

Defendant argues the firearm recovered during the search and seizure should be suppressed because the exit order and pat frisk were 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).

There is no question that the officers validly stopped the Chrysler for making an illegal turn, a civil traffic infraction. See *Commonwealth v. Cruz*, 459 Mass. 459, 465 (2011) (police validly stopped car for parking in front of a fire hydrant, a civil traffic violation); *Commonwealth v. Bacon*, 381 Mass. 642, 644 (1980) (officer may validly stop a vehicle committing a traffic violation). Under these circumstances the officers were justified in approaching the car and asking the operator to provide his driver's license. G.L. c. 90C, § 2. The stop of the vehicle, however, "could not last longer than necessary to effectuate the purpose of the stop." *Commonwealth v. Cordero*, 477 Mass. 237, 242 (2017), quoting *Commonwealth v. Cruz*, 459 Mass. 459, 465 (2011).

The police were also permitted to ask defendant, the front seat passenger, for identification information. Although a police officer generally has no right to demand identification from a passenger in a motor vehicle, because defendant was not wearing a seatbelt, the police lawfully demanded his identification in order to issue a citation for a civil motor vehicle infraction punishable by a twenty-five dollar fine. *Commonwealth v. Washington*, 459 Mass. 32, 38 (2011); G.L. c. 90, § 13A. Here, while defendant could not produce an identification card, he provided his true name and date of birth. Defendant's inability to provide a license or ID card was unremarkable as he was not the driver and was not required to carry one.

Conversely, the exit order and pat-frisk that followed the initial inquiry were not permissible. The Supreme Judicial Court has concluded that exit orders during routine stops for ordinary traffic violations must be justified. *Commonwealth v. Gonsalves*, 429 Mass. 658 (1999). An exit order to a passenger in a validly stopped vehicle may be justified if there exists: (1) reasonable suspicion, based upon specific, articulable facts, that the defendant was committing, had committed or was about to commit a crime, or (2) an objectively reasonable concern that the

officer's safety, or the safety of others, is in danger. *Commonwealth v. Cruz*, 459 Mass. 459, 466-467 (2011). Here, the police stopped the Chrysler because it made an illegal turn. Once the driver's license and registration, and defendant's identity, were confirmed there was no further reason to detain them. *Commonwealth v. Gonsalves*, 429 Mass. 658, 663 (1999).

The government has not shown reasonable suspicion, based upon, specific and articulable facts, that the driver or defendant were involved in any illegal activity beyond the civil traffic infraction and the Commonwealth has not argued otherwise.

Instead, the Commonwealth contends the police were warranted in issuing the exit order and pat-frisking defendant based upon a reasonable fear for safety. While it does not take much for police to establish a reasonable basis to justify an exit order or search based on safety concerns, *Gonzalez* at 663-664, "the intrusiveness of the conduct must be proportional to the degree of suspicion that prompted it." *Commonwealth v. Daniel*, 464 Mass. 746, 752 (2013). The intrusion upon the driver or passenger's privacy "is not minimal," and a rule permitting exit orders at a police officer's discretion is an "invitation to discriminatory enforcement of the rule." *Gonzalez* at 663-664. Therefore, an exit order is justified only where there are "specific and articulable facts, from which a reasonably prudent [person] in the [officer's] position would be warranted" in the suspicion that the officer's safety, or the safety of others, is in danger. *Id.* at 664; *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833, 840 (2010). A "mere hunch is not enough;" instead, objective circumstances must make it reasonable to issue an exit order because of heightened awareness of danger. *Id.* at 666.

A routine traffic stop, like the one in this case, presents a situation where citizens, both the ... driver ... and passenger ... expect a police officer to get the government's business done quickly, so that those detained can go on their way. This expectation is a reasonable one. That a small percentage of routine traffic stops may result in detection of more serious crime is no reason to subject the vast majority of citizens to orders to get out of their vehicles.

Commonwealth v. Gonzalves, 429 Mass. 658, 663 (1999).

The Commonwealth argues the officers' actions were justified based on the following:

(1) defendant appeared extremely nervous, was not making eye-contact, and, was looking around; (3) defendant's left arm was on the console throughout the duration of the stop; (4) the location is considered a "hot spot" and police have responded to the Cushing Road area in the past on numerous occasions for calls pertaining to gun shots; and, (5) there had been a call a few minutes before this stop for "shots fired" in a different area of the city. The Commonwealth has clearly not met its burden.

Addressing the arguments, beginning with the "shots fired," Commonwealth agrees there was no evidence to support suspicion that defendant had any involvement. The information known to the police at the time of the stop was that the minutes earlier gunshots incident had occurred in a different neighborhood which is located on the on the opposite side of Columbia Road. Nothing whatsoever connected defendant, the operator, or the grey Chrysler to the alleged gunshots.

Regarding evidence of nervousness, I do not credit defendant appeared *extremely* nervous during the stop. However, that defendant exhibited signs of nervousness, even if it had been extreme nervousness, under the circumstances of this police encounter, is not surprising and seems entirely natural. See *Commonwealth v. Cordero*, 477 Mass. 237, 233-244 (2017), and cases cited. Defendant was riding as a passenger in a registered motor vehicle, operated by a licensed driver, when at midnight, as result of an illegal turn, the car was stopped by an unmarked black SUV police vehicle, with lights and sirens activated, then approached by three plain clothed officers wearing black BPD strike force vests, equipped with firearms and flashlights. Further, even after the operator provided valid license and registration and defendant

provide valid identification information, the police did not issue citations or warnings and permit the two young men to go on their way. Instead, they called for back-up, brought in more officers, and conferred about how to proceed. Even if defendant had become extremely nervous, under these conditions, is not unexpected, and adds little support for the argument the police had a legitimate fear for their safety. *Commonwealth v. Gonsalves*, 429 Mass. 658, 669 (1999); *United States v. McKoy*, 428 F.3d. 38, 40 (1st Cir. 2005).

Turning to the argument the defendant never removed his left hand from the center console. Since I do not credit the testimony, this does not add the analysis. See also, Exhibit 1.

Regarding past crime in this area, I credit BPD has responded to many calls for “shots fired,” and Officer Degraives considers it to be a “hot spot.” However, the Commonwealth provided no additional evidence or specific facts about the firearms crimes in the area. Based upon this limited information, it is difficult to reach any conclusions about the nature of the area. Still, even assuming the location is a “high crime area,” this would not add significantly to the Commonwealth’s position. Unfortunately, many law-abiding citizens live and work in areas of Boston which have been high in crime.

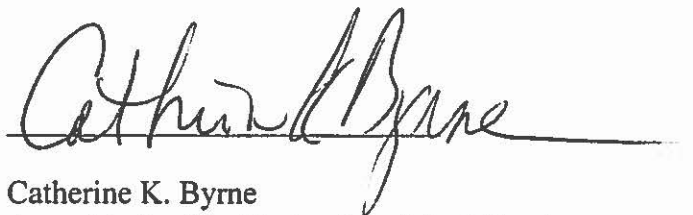
Finally, the facts in this case do not justify the exit order and pat-frisk. Compare, *Commonwealth v. Torres*, 433 Mass 669 (2001) (car failed to respond to police lights and sirens, drove erratically before stopping abruptly, one passenger fled with a backpack while others were observed bent over in the car); *Commonwealth v. Oriora*, 83 Mass. App. Ct. 55 (2013) (outnumbered trooper, late night stop, and occupant furnished false identification documents); *Commonwealth v. Elysee*, 77 Mass.App. Ct. 833(2010) (gang members with previous firearms arrests made furtive attempts to conceal something when stopped driving from scene of altercation with rival gang); *Commonwealth v. Hernandez*, 77 Mass. App. Ct. 259 (2010)

(defendant was shaking nervously, did not produce any identification when asked, and turned away from officer when asked if he had any weapons); *Commonwealth v. Ancrum*, 65 Mass. App. Ct. 647 (2005) (reasonable belief occupants of car had been involved in a recent shooting, driver took time to turn off ignition and put keys on roof after being asked to do so, passengers looked out rear window and ducked down when saw police).

CONCLUSION

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

DATED: October 16, 2017

A handwritten signature in black ink, appearing to read "Catherine K. Byrne", written over a horizontal line.

Catherine K. Byrne
Associate Justice, Boston Municipal Court