

SUFFOLK, ss.

BOSTON MUNICIPAL COURT  
CENTRAL DIVISION  
DOCKET NO. 1607CR3711-FR  
1607CR3712-FR  
1607CR 3713-FR

COMMONWEALTH

v.

ANTHONY RIVERA  
MARQUISE RIVERA  
ASHA TOOMBS

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

On July 7, 2017 a hearing took place on Defendants' motion to suppress evidence seized as result of an unlawful arrest. Defendants seek to suppress all evidence seized from pat-frisks and a search of a vehicle on October 2, 2016, on the grounds that the searches were conducted in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights.

The Commonwealth presented the testimony of Boston Police Officer Gregory Eunis.

After consideration of all of the evidence the motion to suppress is ALLOWED as to all defendants.

**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 October 2, 2016, Boston Police Officers Jean-Louis and Gregory Eunis, both members of the Youth Violence Strike Force ("Strike Force"), were on patrol in Dorchester. The officers were in plain clothes. Officer Eunis was driving an unmarked police vehicle, a black

Ford Explorer (cruiser), which has multiple antennae on top, is equipped with lights and sirens, and has a laptop mobile data terminal (MBT) mounted to the dashboard. Officer Jean-Louis was the front seat passenger. Officer Jean-Louis was wearing a body camera (“body-cam”) which recorded a significant portion of the events in issue. The video from the body-cam, admitted during the hearing, was extremely helpful to the court in ruling on defendants’ motion. Exhibit 1(video).<sup>1</sup>

At about 4:47 p.m., Eunis and Jean-Luis received a radio call for “shots fired” on Mt. Bowdoin Green. See Exhibit 3. The information was based upon “Shot Spotter,” a device used by the police to pick up the sound and location of gunshots. The officers also received radio dispatch information that a person had been shot. No further details about the caller who provided this information, or about the person who had been shot, was provided and nothing more on this was presented at the hearing.

The officers responded to the area. While traveling from their base on Hancock Street, the officers received additional information; “person with a firearm seen fleeing that area [wearing] black top and jeans.” About a minute later, they arrived at Mt. Bowdoin Green, a residential street, and began patrolling the surrounding streets. See Exhibit 16. At a certain point, they turned from Mallon Road onto Mt. Bowdoin Terrace, driving in the wrong direction down this one-way street. Mt. Bowdoin Terrace is a residential street, running parallel to Mt. Bowdoin Green. The two streets are on either

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<sup>1</sup> I understand the BPD body camera program has ended and a review of the program is being conducted by Northeastern University to ascertain whether body cameras are in the best interest of the police and the community. In the present case, the body camera worn by Officer Jean-Louis was indispensable in understanding the events as they unfolded.

side of the block with houses and woods in between. See Exhibits 2, 15 and 16. The entire area is residential with multifamily homes, green spaces and trees.

As the officers were coming down Mt. Bowdoin Terrace, about seven minutes after receiving the dispatch, they observed several unoccupied vehicles parked on either side of the street, and one occupied vehicle, a Jeep Grand Cherokee which was also parked. As the officers closed in on the vehicle, they observed two young black men seated in the front seats, both wearing black tops. They activated the blue lights and pulled the cruiser in front of the Jeep, blocking its egress. The officers exited and approached the Jeep to investigate further. Officer Eunis approached the passenger, Anthony Rivera, and Jean-Louis approached the driver, Marquise Rivera. The officers asked them for identification. Officer Eunis observed a third passenger, a young black woman, Asha Toombs, seated in the back and also asked her for identification.

Officer Eunis returned to the cruiser with the identifications and ran the information through the MBT to obtain additional information about the occupants. 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).<sup>2</sup> None of the defendants were previously known to the officers. Officer Eunis confirmed the identities of

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<sup>2</sup> 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.

Marquise Rivera and Anthony Rivera, and found no indication that either was connected to gang activity or had outstanding warrants. Marquise Rivera had a valid driver's license, the car was properly registered, and had not been reported stolen. Officer Eunis also determined that the woman in the back seat provided a false name, most likely to prevent the police from learning about an outstanding warrant for Larceny over 250.00. It was at approximately this point when Jean-Louis activated the body-cam and it began recording and most of the following can be seen happening on the video.<sup>3</sup> The video portrays the events as they unfolded from this point forward. See Exhibit 1.

At the start of the video the first thing that is clear is numerous additional officers have responded to the scene of the stop. Now, in addition to being blocked in front by the Eunis and Jean-Louis, there is a marked cruiser pulled up next to the Jeep on the passenger side, which also has its blue lights flashing, with another marked cruiser behind that one. There are at six or more officers surrounding the Jeep, four in uniform. More unmarked SUVs that can be seen on Mt. Bowdoin Terrace in front and behind the Jeep. It also appears as if both passenger doors of the Jeep have been opened.

Officer Eunis can be seen outside the back passenger door of the Jeep obtaining Ms. Toombs correct information. After confronting her about the false name, she gave her true name, Asha Toombs. Officer Eunis returns to the cruiser to pull up Ms. Toombs true information. Meanwhile, Jean-Louis returns to the Jeep to speak with the occupants further. He asks the defendants how long they had been parked there. They respond 15-20 minutes. He also asks them whether they had seen or heard anything and they respond, they had not.

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<sup>3</sup> The video recorder in the body-camera is always on, even before it is activated. It operates in a loop. When the wearer turns it on, it records the previous 30 seconds without sound, then begins recording with sound until it is turned off.

Officer Jean-Louis can be seen informing Marquise Rivera the police are conducting an investigation into an incident. He then asks, "Do you mind if we take a look in the car?" Mr. Rivera responds, "No. I'm not consenting to any illegal search." Officer Jean-Louis then returns to the cruiser to discuss the matter with his partner, Eunis. At this time, Eunis informs Jean-Louis about Ms. Toombs and that she had initially given a false name but he now had her correct name, and, she had a warrant for Larceny over 250.00. Officer Jean-Louis does not appear to have much of a reaction to the information about the warrant. Instead, he appears focused on whether they would search the Jeep.

Officer Jean-Louis is seeking his partner's agreement to the search and attempts to convince Eunis it is justified for the following reasons: (1) the location of the Jeep which was parked only a block away, on a parallel street, from where the gun shots or shooting is alleged to have happened; (2) none of the occupants in the car resided on the street where they were stopped; (3) two of the occupants were wearing black tops which partially fit the description of the one man seen fleeing on foot with a gun after the shooting.<sup>4</sup> Officer Eunis seems reluctant and asks, "Do you think we should call our supervisor?" Officer Jean-Louis responds, "No" because they would "only be doing a pat-frisk" and then would "just document the stop." Officer Eunis, at some point agrees and says, "[we] could do a pat frisk."

They head back toward the officers who are standing guard around the car. Officer Jean-Louis gives them the signal that they are about to do a search of the occupants and the car. He approaches the driver Marquise Rivera again and says, "So you didn't see anyone?"

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<sup>4</sup> Meanwhile, the Jeep remains surrounded by police and they take no action regarding Ms. Toombs open warrant. She is not ordered to get out of the car or placed under arrest.

“[Be]cause the issue is, they put out a description and some of your clothes match. That’s why we asked, do you mind if we check in the car.” Officer Jean-Louis informs Marquise Rivera, “I don’t need your consent.” Marquise Rivera responds, “I’m not consenting to any search and seizure.” Next Jean-Louis tells him to exit the car, says “this is just protocol,” and pat frisks him. Marquise Rivera asks Jean-Louis for the description the police say he matches. Officer Jean-Louis responds, “blue jeans, and black hoodie.” Marquise Rivera points out that he has on black jeans. Next, Jean Louis begins searching inside the Jeep, starting with the driver’s seat, while other officers remove Anthony Rivera and Asha Toombs and Eunis searches the passenger side.<sup>5</sup> Moments later, Eunis locates a firearm inside the rear passenger seat pocket. All three defendants are placed under arrest for possession of a loaded firearm.

### **RULINGS OF LAW**

Defendants argue the firearm recovered during the search and seizure should be suppressed because the stop, exit order and search 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). That a person is stopped in a moving vehicle, or detained while sitting in a car, is irrelevant to the analysis.

This is not a routine traffic stop, therefore the first issue to be determined is the moment of the seizure. In this case, arguably, the police stopped the defendants for constitutional purposes when Officers Eunis and Jean-Louis drove toward them, the wrong way on a one-way street, with blue lights activated and pulled directly in front of the Jeep blocking its egress.

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<sup>5</sup> Nothing of significance was discovered during the pat-frisks of the defendants.

Exhibit 1. *Commonwealth v. Smigliano*, 427 Mass. 490, 491-492 (1998) (reasonable person, on the activation of a police car's blue lights, would believe that he is not free to leave). However, without question, defendants were seized when, moments later; (1) a marked cruiser with blue lights activated pulled up right beside the Jeep, followed by a marked SUV, (2) additional unmarked vehicles arrived and parked in the road behind and in front of the Jeep, (3) six or more officers surrounded the Jeep, at least four of whom were in uniform, and, (4) several additional officers in plain clothes can be seen standing in the area nearby.<sup>6</sup> Certainly, this was not a consensual encounter since, "in view of all of the circumstances surrounding the incident, any reasonable person would have believed that he was not free to leave." *Commonwealth v. Stoute*, 422 Mass. 782 (1996); See also *United States v. Mendenhall*, 446 U.S. 544, 554(1980).

Turning to the question whether the Commonwealth has met its burden of establishing that, at the time the police conducted this investigatory seizure, it was justified by reasonable suspicion, based on specific and articulable facts, that these defendants had committed, were committing, or were about to commit a crime.<sup>7</sup> See *Commonwealth v. Depina*, 456 Mass. 238, 242, 922 N.E.2d 778 (2010); *Commonwealth v. DePeiza*, 449 Mass. 367, 369-371, 868 N.E.2d 90 (2007). Absent such justification, the stop was unlawful, and the firearm recovered by the police during the search of the Jeep must be suppressed. See *Commonwealth v. Loughlin*, 385

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<sup>6</sup> Officer Eunis testified that exhibit 4 is a photograph of the cars as they appeared during the stop, except that it was taken at night. However, the video, Exhibit 1, shows the photograph to be misleading as it does not accurately portray the scene as it appeared at the time of the stop. Exhibit 4, is a photograph taken hours later, after defendants had been arrested and removed from the area, after the marked and unmarked police vehicles, and all of the officers had departed.

<sup>7</sup> My analysis under *Terry*, a stop based on reasonable suspicion. Because I find the Commonwealth has not met its burden there is no need to evaluate whether the actions of the police arose to the level of arrest requiring probable cause.



Mass. 60, 63, 430 N.E.2d 823 (1982); *Commonwealth v. Ferrara*, 376 Mass. 502, 505, 381 N.E.2d 141 (1978).

The Commonwealth argues the stop and searches were justified because minutes earlier, about a block away, shots had been fired (“shots spotter,” a device used by the BPD to alert them of gunshots and assist them locating the area, had activated), a person had been shot<sup>8</sup>, and someone with a firearm wearing a black hoodie or black top had been seen fleeing the area. Other factors to be considered are, the duration between the radio call and the stop, 5-7 minutes, and, the proximity of the stop to the location of the gunshots, one block away on a parallel street. In addition, the nature of the crime being investigated is a factor to be considered.

Given the nature of the crime being investigated and the circumstances described above, even though the information the police had at the time was scant, it was reasonable for the police to activate the blue lights and pull up in front of the Jeep. It was also reasonable to approach the Jeep to get a closer look at the occupants and the inside of the car. Likewise, it was reasonable for the police ask questions such as, how long defendants had been there, whether they had seen or heard anything, and to see their identification. See *Commonwealth v. Depina*, 456 Mass. 238 (2010) (911 caller just heard shooting in her backyard, gave her location, described person who fled as “tan” colored kid wearing a white shirt, blue jean shorts and a hat heading in a certain direction, and, police had corroboration when heard fellow officers requesting ambulance for person shot in same area); *Commonwealth v. Barros*, 435 Mass. 171 (2001). In addition, it was reasonable to ask defendants for permission to search their car. *Barros* at 174. However, once defendants made it clear they were not consenting to a search, it was unreasonable and

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<sup>8</sup> As stated above in the facts, the Commonwealth presented no further evidence or information the police had at the time about a person shot or about the source of the broadcast.



unjustified to detain them further<sup>9</sup>, which is exactly what happened. *Commonwealth v. Cordero*, 477 Mass. 237, 242 (2017), quoting *Commonwealth v. Cruz*, 459 Mass. 459, 465 (2011). Instead of releasing them, what began as an inquiry, quickly escalated into an arrest without probable cause or reasonable suspicion. Multiple police vehicles and officers descended on the scene, police surrounded the defendants, they were ordered to exit, pat-frisked, and then the Jeep was searched.

To make an investigatory stop based solely on a physical description, (black hoodie or top, and, blue jeans or jeans), the description need not be so particularized as to fit only a single person, but it cannot be so general that it would include a large number of people in the area where the stop occurs. *Commonwealth v. Depina*, 456 Mass. 238, 245-246 (2010). The only description of a person seen fleeing the scene was so general, “person wearing black top [or hoodie], and jeans,” that it would include a very large number of people in the area. See *Commonwealth v. Cheek*, 413 Mass. 492, 496 (1992). In *Cheek*, the Court found the description, “black male with ¾ length goose” jacket, not sufficiently particularized to support the stop. In the present case, the description is less specific.

When Jean-Louis tells Eunis they do not need to call their supervisor about whether to conduct a search because, they would “only be doing a pat-frisk” and would simply document the stop, he seems to misunderstand the permissible limits of the Field Interrogation and Observation procedure. “A ‘field interrogation observation’ (FIO) has been described as an interaction in which a police officer identifies an individual and finds out that person's business for being in a particular area.” *Commonwealth v. Warren*, 475 Mass. 530, n. 5, (2016) citing,

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<sup>9</sup> The exception is Ms. Toombs, who the police could have chosen to order from the car and arrest for the open warrant in case charging her with larceny over 250.00. They did not do so. Further, even if they had, the search of the car would have been unwarranted.

*Commonwealth v. Lyles*, 453 Mass. 811, 813 n. 6, 905 N.E.2d 1106 (2009). “FIOs are deemed consensual encounters because the individual approached remains free to terminate the conversation at will.” *Id.* and cases cited.

There was no evidence that prior to this stop that defendants were involved in having committed, committing, or preparing to commit any crime whatsoever. The Commonwealth has not met its burden of establishing sufficient articulable basis for conducting a *Terry* stop or pat-frisk.

Under these circumstances, the police were not justified in searching the car and all evidence seized as result must be suppressed. Defendants’ post arrest statements resulted from the improper stop and search. They too require suppression. See *Commonwealth v. Borges*, 395 Mass. 788, 795-796 (1985).

#### CONCLUSION

For the reasons stated above, defendants’ motion to suppress is ALLOWED.

DATED: October 26, 2017

A handwritten signature in cursive script that reads "Catherine K. Byrne". The signature is written in black ink and is positioned above a horizontal line.

Catherine K. Byrne  
Associate Justice, Boston Municipal Court