

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1081

COMMONWEALTH

vs.

TYRE J. WADE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was indicted by a grand jury for trafficking in fentanyl, ten grams or more, in violation of G. L. c. 94C, § 32E (c 1/2), and possession of a class B substance (oxycodone), in violation of G. L. c. 94C, § 34. The defendant moved to suppress evidence resulting from a motor vehicle stop, and following a hearing, his motion was denied. After a jury-waived trial, the defendant was convicted of possession of a class B substance and acquitted of the trafficking charge. He appeals, contending that the motion judge erred in denying his motion to suppress. We affirm.

Background. "We present the facts as found by the motion judge, supplemented by uncontroverted facts from the record that have been 'explicitly or implicitly credited' by the motion judge." Commonwealth v. Torres-Pagan, 484 Mass. 34, 35 (2020),

quoting Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015).

At around 11 P.M., while State Trooper Robert Clouse was commuting home from his shift, he stopped on Route 6 to assist Trooper Skribiski with a motor vehicle stop. Clouse pulled his cruiser behind Skribiski's on the right shoulder of the highway and sat inside his vehicle while Skribiski conducted the stop. Both vehicles had their blue emergency lights on. While Clouse was sitting in his cruiser, a black Toyota sedan sped past in the right travel lane, without slowing down or moving to the left lane to avoid the troopers' vehicles. Clouse testified that the Toyota "buzzed" by his cruiser, causing it to shake. In response, Clouse pulled behind the Toyota and conducted a stop of the vehicle. Skribiski completed the stop he was conducting, and came to Clouse's assistance.

Skribiski approached the driver's side of the Toyota, and Clouse approached the passenger side. There were four passengers in the car -- two in the front and two in the rear. The front passenger rolled his window down a few inches, and Clouse "immediately detected a strong odor of burnt marijuana emanating from the vehicle." The troopers requested the operator's license and the vehicle's registration, but the operator stated that he had lost his wallet and did not have his license. The operator then began to search for the vehicle's

registration. While he was searching, the troopers asked him who owned the vehicle and he stated that "it was his friend's." However, when asked for his friend's name, the operator stated that the vehicle was actually owned by the father of his friend. The troopers again inquired about the friend's name, and the operator stated that "he didn't know." The operator eventually located the registration, and it revealed that the vehicle was leased and registered to a titling company.

Around the same time, Skribiski observed, and commented to Clouse, that the rear passenger on the right had his hood "cinched" over his head. As soon as that comment was made, that passenger placed his hands into his pockets. Clouse ordered the passenger to remove his hands from his pockets, but instead, the passenger dug his hands in deeper. Clouse again instructed the passenger to remove his hands from his pockets, and when he did not do so, Clouse opened the rear door and issued a third command for the passenger to remove his hands. Clouse then pulled the passenger out of the vehicle, and Skribiski moved over to the passenger side to assist Clouse with securing and pat frisking the passenger.

Trooper Alldredge, who was travelling on the highway at the time, observed the troopers interacting with the passenger and pulled over to assist. Because both troopers were standing on the passenger side of the vehicle, Alldredge, without announcing

his presence, approached the driver's side and stood in the rear next to the trunk. From this standpoint, he observed the left, rear passenger, later identified as the defendant, reach his hands down the front of his pants. Upon making that observation, Alldredge ordered the defendant to exit the vehicle. He conducted a patfrisk for weapons in the area where he saw the defendant reach his hands -- down the front of his waistband -- and felt what he instantly recognized as a pill bottle in the defendant's waist area. Alldredge removed the pill bottle and continued the patfrisk for weapons. At some point, Alldredge handed the pill bottle to Clouse, who observed that the name on the bottle had been scraped off.

Discussion. "In reviewing the denial of a motion to suppress, we 'accept[] the judge's subsidiary findings of fact absent clear error, give[] substantial deference to the judge's ultimate findings and conclusions of law, but independently review[] the correctness of the judge's application of constitutional principles to the facts found.'" Commonwealth v. Quinones, 95 Mass. App. Ct. 156, 158-159 (2019), quoting Commonwealth v. Lujan, 93 Mass. App. Ct. 95, 100 (2018).

Following the hearing, the motion judge concluded that the stop, exit order, and patfrisk of the defendant were within permissible constitutional limits. The defendant does not contend on appeal that the stop or the exit order was unlawful.

The defendant instead challenges the constitutionality of the patfrisk, as well as the removal of the pill bottle from his pants following the patfrisk. We address each challenge in turn.

1. Patfrisk. The defendant contends that the motion judge conflated the standard for a patfrisk with the standard for an exit order, and that a patfrisk was not justified in these circumstances. While a concern for officer safety is sufficient justification for an exit order, "to justify a patfrisk, an officer needs more than safety concerns." Torres-Pagan, 484 Mass. at 37. In order to conduct a lawful patfrisk, the "police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous." Id. at 38-39. We conclude that the patfrisk was justified under this standard.

Here, the troopers were outnumbered by the passengers and were facing a fluid situation. See Commonwealth v. Vazquez, 74 Mass. App. Ct. 920, 923 (2009) ("During an investigation, unfolding events are often interconnected and dynamic, requiring facts to be considered in totality when determining reasonable suspicion"). Their attention was initially drawn to the Toyota because it unsafely sped past their cruisers while they were in the middle of conducting a traffic stop. Then, when they stopped the car, the driver could not and did not provide his license, telling the troopers that he had lost his wallet. The

driver also had difficulty providing the vehicle's registration and acted evasively by, at first, stating that the car belonged to his friend, but upon further inquiry, stating that the car was owned by his friend's father, but that he did not know his friend's name. That response was highly suspicious, and as the stop progressed, the behavior of the other passengers raised legitimate concerns that a weapon was potentially present. See Commonwealth v. Stampley, 437 Mass. 323, 327-330 (2002).

Once the driver handed the vehicle's registration to the trooper, the rear passenger seated next to the defendant, with his hood cinched over his head, dug his hands into his pockets and refused to remove them despite multiple commands to do so. As the troopers conducting the stop focused their attention on that passenger and away from the others, the defendant reached his hands down the front of his pants in the waistband area. Alldredge, who had just arrived on scene and had not made his presence known, observed this behavior. This sort of conduct -- a defendant's attempt to reach for something or hide his hands from police view -- is an important factor in assessing whether a patfrisk is warranted. See Torres-Pagan, 484 Mass. at 39-40 ("furtive movements may be considered in analyzing whether a patfrisk is justified"); Commonwealth v. Goewey, 452 Mass. 399, 407 (2008) (patfrisk justified during routine traffic stop where, in addition to other factors, defendant appeared to "hide

or retrieve something"). Upon making that observation, Alldredge ordered the defendant to exit the vehicle so that he could pat frisk him for weapons. Given these facts, the propriety of doing so was justified based on reasonable suspicion that the defendant was armed and dangerous. A patfrisk of the defendant's waist area was "proportional to the articulable risk to officer safety." Torres-Pagan, supra at 40.

2. Removal of pill bottle. The defendant next argues that, even if the patfrisk was lawful, the troopers exceeded its permissible scope by removing the pill bottle from his pants. As grounds for his motion to suppress, the defendant did not raise the issue of the trooper's removal of the pill bottle. The claim is thus waived, see Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004), and our review is limited to "whether there has been a substantial risk of a miscarriage of justice" from the failure to suppress evidence resulting from the removal of the pill bottle. Commonwealth v. Sawyer, 389 Mass. 686, 692 (1983). We conclude that there was no such risk.

Under the "plain feel" doctrine, "if, during a lawful patfrisk, it is immediately apparent to the police officer, in light of the officer's training and experience, that a concealed item is contraband," the officer is authorized to seize the item. Commonwealth v. Wilson, 441 Mass. 390, 396 (2004). The immediately apparent standard does not require that the officer

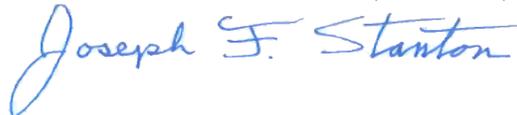
know with certainty what the object is; an object may be seized if the frisking officer has probable cause to believe in its incriminating character. Commonwealth v. Cullen, 62 Mass. App. Ct. 390, 402 (2004). "Probable cause to seize evidence rests on knowledge of the facts and circumstances that would have warranted a person of reasonable caution in believing that the thing possessed is evidence of crime." Id. "Requiring an officer who recognizes contraband by 'plain feel' to ignore this fact and walk away from the suspect without seizing the object flies in the face of logic." Wilson, supra at 397-398.

Given the circumstances that led to the patfrisk, as well as the location of the pill bottle, the police had probable cause to believe that the pill bottle contained contraband. In addition to the other suspicious behavior observed during the stop, Alldredge saw the defendant reach down the front of his pants when the troopers who initiated the stop had their attention focused on another passenger. He then felt what he recognized to be a pill bottle in the spot where he saw the defendant reach his hands, namely, his front waist area. Contrast Commonwealth v. Amado, 474 Mass. 147, 153 (2016) (search not justified by "plain feel" doctrine, where identity of object behind defendant's testicles, and its contraband nature, not immediately known by touch). "It is eminently reasonable to infer that a prescription [pill] bottle carried in

this manner would contain contraband." See Commonwealth v. Clermy, 421 Mass. 325, 330 (1995) (probable cause to believe that plastic container for prescription drugs contained contraband, where container concealed between defendant's legs). Moreover, the fact that the defendant was attempting to either hide the bottle in his pants or remove it from that location when he was observed by Alldredge further supported the belief that the bottle contained contraband. Compare Commonwealth v. Wooden, 13 Mass. App. Ct. 417, 422 (1982) ("gesture of stuffing something into one's pocket" during police interaction properly considered in probable cause analysis). Under these circumstances, the troopers had probable cause to believe that the pill bottle in the defendant's pants contained contraband, and they were thus authorized to seize it. The motion to suppress was properly denied.

Judgment affirmed.

By the Court (Meade,
Desmond & Ditkoff, JJ.¹),



Clerk

Entered: November 24, 2021.

¹ The panelists are listed in order of seniority.