

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

21-P-685

21-P-686

COMMONWEALTH

vs.

RAFAEL PENA (and a companion case¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendants, Rafael Pena and Antonio Williams, filed motions to suppress a firearm, ammunition, and other physical evidence seized after the police stopped and searched the vehicle they occupied. A Superior Court judge allowed the motions, concluding that the police were justified in conducting the stop and in ordering the defendants out of the car, but not in conducting a protective search of the car's interior after patfrisks revealed that the defendants were unarmed save for a pocketknife. A single justice of the Supreme Judicial Court granted the Commonwealth leave to pursue these interlocutory appeals. We affirm.

¹ Commonwealth vs. Antonio Williams.

Background. We summarize the facts as found by the motion judge, supplemented with the uncontroverted testimony of the only two witnesses at the suppression hearing, Boston Police Officers James Higgins and Zachery Macinnis, whose testimony the judge explicitly credited, and with documentary evidence admitted at the hearing. See Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018).

Higgins and Macinnis began their shift at 4:00 P.M. on March 12, 2019. During roll call, detectives handed out copies of a Boston Regional Intelligence Center (BRIC) flyer requesting identification for an "unknown . . . [four]-door dark colored Acura TL that was seen fleeing the area of Annunciation Road shortly after a person was shot." The flyer described the target vehicle as having "a bumper with fog lights, [a] license plate attached to the right side of the bumper, silver colored rims with a red center and a blue sticker running down the front passenger side windshield," and "a partial plate of 9ES and a possible plate of 9ES987 which comes back to a 2005 Gray Acura TL registered out of 23 Harold Street #3 in Roxbury." Although not identified by name in the flyer, defendant Williams was the registered owner of the Acura.

The flyer was admitted in evidence with no testimony about how it was created or where the information in the flyer came from. It included a photograph of the target vehicle, but the

officers were not "made aware of the exact camera or the exact intersection" where the photograph was taken; they "were just told that it was seen fleeing the area of Annunciation Road." In response to leading questions, Higgins agreed that the photograph was "a still image from surveillance of the area" taken "[d]uring the time of the shooting." When asked whether "a lot of the video that was obtained [was] from Wentworth [University] cameras," Macinnis answered, "I don't know where the video itself was obtained from."

The only other evidence supplying the possible basis for the information in the flyer was a two-page Computer Aided Dispatch (CAD) sheet. A CAD sheet creates a record of, among other details, "information that a 911 caller provides to dispatch." The CAD sheet showed that less than one-half hour before the officers began their shift, the Boston police received four 911 calls regarding a shooting in "the Annunciation Road Development area."

First, at 3:33 P.M., Caller 1 reported that a person had been shot in the chest at 60 Annunciation Road. Seconds later, Caller 2 reported having heard five to six shots outside of 68 Annunciation Road and that a person had been shot in the chest. At 3:35 P.M., Caller 3 reported seven to ten gunshots fired at 86 Annunciation Road. At 3:36 P.M., Caller 4 reported hearing about six to seven shots fired at 70 Annunciation Road but

"didn[']t see anything." One caller provided additional information: Caller 3 "saw H/males jump in blk Acura. Sped off out of small parking lot on Annunciation in unk dir."

The CAD sheet also appears to record police activity. A series of entries suggests that within minutes of the first call, an ambulance was enroute to the hospital and the police had found ballistics evidence at 41 Prentiss Street, more ballistics across from 61 Prentiss Street, and a "window struck" at 60-M Annunciation Road. Presumably based on Caller 3's tip regarding a black Acura leaving the area of the shooting, the police were also tracking the travel route of a car or cars described as a "blue Honda," a "4-dr blu Acura," and a "blue Acura TL" in the vicinity of the shooting. Macinnis described the area of 60 Annunciation Road as "pretty busy" at 3:30 P.M. on a weekday, "heavily trafficked" by pedestrians and vehicles.

Throughout their shift, Higgins and Macinnis and other officers drove by the address where the Acura in the flyer was registered but did not see the vehicle there. Around 9:10 P.M., however, Higgins and Macinnis saw it about three miles from the location of the shooting. They activated their vehicle's lights and sirens, and the Acura pulled over promptly without issue.

Higgins and Macinnis approached the Acura from opposite sides. Because its windows were tinted, the officers could not see inside until the occupants rolled down their windows. When

the officers asked for identification, the driver, Williams, and the passenger, Pena, both complied. Higgins ordered the defendants out of the car. They cooperated and made no furtive movements. Macinnis pat frisked Williams and found nothing. Before pat frisking Pena, Higgins asked him whether he had any weapons on him. Although Pena said he did not, Higgins found a pocketknife while conducting the patfrisk. Pena apologized for forgetting to mention the pocketknife. The defendants were then escorted about fifteen feet behind the Acura, where they were surrounded by approximately fourteen other officers who had arrived on the scene after the stop.

Acting on instructions from a superior, Higgins and Macinnis searched the vehicle. After neither found anything in the front seats, Higgins started feeling around a child's car seat that was directly behind and "within reaching distance" of where Pena had been sitting and "felt something slide." Higgins recovered a firearm from between the cloth covering and plastic body of the car seat.

Discussion. In reviewing a ruling on a motion to suppress evidence, "we accept the motion judge's factual findings unless clearly erroneous, and independently apply the law to those findings to determine whether actions of the police were constitutionally justified." Commonwealth v. Manha, 479 Mass. 44, 45 (2018).

"To perform an investigatory stop of a vehicle, the police require 'reasonable suspicion, based on specific, articulable facts and inferences therefrom, that an occupant . . . had committed, was committing, or was about to commit a crime.'" Manha, 479 Mass. at 46, quoting Commonwealth v. Anderson, 461 Mass. 616, 621, cert. denied, 568 U.S. 946 (2012). An exit order is justified where the "police have reasonable suspicion of criminal activity" or "are warranted in the belief that the safety of the officers or others is threatened." Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020). "A lawful patfrisk, however, requires more; that is, police must have a reasonable suspicion, based on specific articulable facts, that the suspect is armed and dangerous." Id. at 38-39. Finally, if the police reasonably fear that the occupants might reach for a weapon left behind when permitted to return to the vehicle, the police may conduct a limited, protective search of the interior of the car within the occupants' possible reach. See Commonwealth v. Silvelo, 486 Mass. 13, 16-17 (2020); Manha, supra at 49-50; Commonwealth v. Monell, 99 Mass. App. Ct. 487, 491 (2021).

In this case, the only facts suggesting that the defendants were armed and dangerous were the same facts relied upon to justify the stop: the Acura's suspected involvement in the

shooting in the Annunciation Road area almost six hours earlier.² See Manha, 479 Mass. at 49-50; Commonwealth v. Lopes, 455 Mass. 147, 160-161 (2009). See also Commonwealth v. Doocey, 56 Mass. App. Ct. 550, 553 (2002). We, therefore, begin and end our analysis with whether the police had reasonable suspicion to believe that the Acura was implicated in the shooting.³

When police officers stop and search a vehicle based on a directive in a police flyer, bulletin, or radio broadcast, the Commonwealth must establish "both the indicia of reliability of the transmitted information and the particularity of the description of the motor vehicle." Commonwealth v. Pinto, 476 Mass. 361, 364 (2017), quoting Lopes, 455 Mass. at 155. As the BRIC flyer particularly identified the vehicle that the officers stopped, the pertinent question here is whether the police had

² The police did not learn any other information about the shooting before the stop, nor did the defendants' conduct during the stop provide any additional reason to believe that they were involved in the shooting or that they were armed and dangerous. As the motion judge found, "the Acura pulled over promptly. The driver (Williams) and passenger (Pena) properly identified themselves, complied with the exit order, and made no suspicious movements or statements that suggested they were involved in the shooting or posed a danger to the police." The officers did not see any evidence of a weapon in the passenger compartments of the vehicle, contrast Monell, 99 Mass. App. Ct. at 490, and the patfrisks of the defendants confirmed they were unarmed.

³ Although we reach our conclusion on grounds somewhat different from those on which the motion judge relied, we are free to affirm on any grounds supported by the record and the judge's findings. See Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997).

reasonable suspicion, based on reliable sources, that the Acura identified in the flyer, and its unidentified occupants, were involved in the shooting and were, therefore, armed and dangerous.

The identification of Williams's Acura as the target vehicle was based on information supplied by a single 911 caller, Caller 3. To establish that Caller 3's tip carried adequate indicia of reliability, the Commonwealth was required to demonstrate Caller 3's basis of knowledge and veracity. See Pinto, 476 Mass. at 364. Here, however, "even if we were to assume that [Caller 3's information] carried the requisite indicia of reliability, the officers did not possess sufficient specific and articulable facts to establish a reasonable suspicion" that the black Acura Caller 3 reportedly saw speeding out of an unspecified parking lot in an unknown direction was the same vehicle identified in the flyer. Commonwealth v. Cheek, 413 Mass. 492, 495 (1992).

Caller 3 provided few details, and independent police investigation did not sufficiently corroborate the scant information that Caller 3 did provide to establish reasonable suspicion. The officers' testimony did not establish that the surveillance video gathered by BRIC captured any car speeding

out of a parking lot in the Annunciation Road area.⁴ In fact, the record is wholly devoid of evidence as to where the car pictured in the flyer was located in relation to the shooting or in what direction it was traveling.

Nor did the police articulate any other facts to support their conclusion that the vehicle identified in the flyer was the same vehicle described by Caller 3. Caller 3 did not provide distinctive details of the Acura, contrast Lopes, 455 Mass. at 158, its registration number, contrast Manha, 479 Mass. at 48, or its travel direction, contrast Commonwealth v. Depiero, 473 Mass. 450, 457 (2016). Unlike in Commonwealth v. Hilaire, 92 Mass. App. Ct. 784, 791 (2018), no other factors were known to the police to enhance Caller 3's insufficiently particularized description. Rather, Caller 3's tip was "so broad as to fit a large number of motor vehicles in the area," Lopes, supra at 157, and failed to distinguish the black Acura from other cars that might have been traveling through the area in the middle of a weekday afternoon, see Cheek, 413 Mass. at 496. Because Caller 3's description was so general, and the area was heavily trafficked by vehicles, the car the police

⁴ The flyer's statement that the target Acura "was seen fleeing the area" merely repeated, but did not corroborate, the information provided by Caller 3. No evidence was presented that the police had independent information to confirm the Acura's flight. See Pinto, 476 Mass. at 365.

identified in the flyer could have been driven by anyone going to, leaving, or passing through anywhere in the vicinity of the Annunciation Road housing development. Based on the evidence presented at the suppression hearing, the implied conclusion in the BRIC flyer that the Acura identified by an unspecified surveillance camera in an undisclosed location was the same vehicle Caller 3 had described was based on nothing more than guesswork. "[R]easonable suspicion may not be based merely on good faith or a hunch." Commonwealth v. Gomes, 453 Mass. 506, 511 (2009).

In addition, the police lacked any reason to conclude that the defendants were implicated in the shooting and, therefore, armed and dangerous almost six hours later when the car was stopped. As the motion judge noted, "[t]he Acura and its occupants were not specifically identified by the 911 callers as having been involved in the shooting." Caller 3 did not purport to have witnessed the crime and did not provide -- nor did independent police work discover -- any information to establish that the men who "jump[ed]" into the black Acura were armed or had fired the reported shots, as opposed to being witnesses or entirely uninvolved passersby trying to get out of harm's way. See Commonwealth v. Meneus, 476 Mass. 231, 237 (2017); Commonwealth v. Walker, 443 Mass. 867, 873 (2005). Contrast Lopes, 455 Mass. at 157 (reasonable suspicion although

defendants were not seen committing homicide where they were seen in van minutes before homicide, one defendant had head down in driver seat and other defendant was in rear passenger seat, and van was gone immediately after homicide).

Because the Commonwealth failed to articulate any specific facts reasonably linking Williams's Acura to the shooting, the investigatory stop was not justified by reasonable suspicion that the occupants had committed a crime, and the subsequent search of the Acura's interior was not justified by reasonable suspicion that the defendants were armed and dangerous.

Order allowing motions to
suppress affirmed.

By the Court (Sullivan,
Massing & Shin, JJ.⁵),



Clerk

Entered: May 24, 2022.

⁵ The panelists are listed in order of seniority.