COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1068

COMMONWEALTH

vs.

KASHIF SCOTT.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals his conviction, after a bench trial, of unlawful possession of ammunition without a firearm identification card, G. L. c. 269, § 10 (h).[1] On appeal, he argues that his motion to suppress was erroneously denied. We agree.

[1] The defendant was additionally charged with carrying a firearm without a license, G. L. c. 269, § 10 (a); possession of a large capacity firearm, G. L. c. 269, § 10 (m); receiving stolen property valued in excess of $250, G. L. c. 266, § 60; and furnishing a false name following arrest, G. L. c. 268, § 34A. The large capacity firearm charge was dismissed prior to arraignment. A subsequent charge of carrying a loaded firearm, G. L. c. 269, § 10 (n), was dismissed prior to trial. The defendant's motion for a required finding of not guilty was allowed with respect to the stolen property charge. The judge found the defendant not guilty of furnishing a false name.

In reviewing a ruling on a motion to suppress we "accept the judge's subsidiary findings of fact absent clear error,"[2] but "review independently the application of constitutional principles" (citations omitted). Commonwealth v. Leslie, 477 Mass. 48, 53 (2017). Clear error occurs "where there is no evidence to support [the factual finding] or where the reviewing court is left with the 'definite and firm conviction that a mistake has been committed.'" Commonwealth v. Colon, 449 Mass. 207, 215 (2007), quoting Custody of Eleanor, 414 Mass. 795, 799 (1993).

We recite the well-supported facts found by the motion judge pertinent to our analysis, supplemented by the "uncontroverted testimony of the [testifying] police officer because we infer that the motion judge accepted it in its entirety." Commonwealth v. Alvarado, 423 Mass. 266, 268 n.2 (1996). See Commonwealth v. Fredericq, 482 Mass. 70, 72 (2019) ("Where necessary and appropriate, we supplement these findings with uncontradicted witness testimony that the motion judge[] implicitly credited"). Compare Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015) ("[I]t appears from the judge's

[2] Our review of the facts is based on the evidence developed at the suppression hearing, not at trial. Commonwealth v. Dame, 473 Mass. 524, 536, cert. denied, 137 S. Ct. 132 (2016).

prefatory statement that he intended to credit only those portions of the testimony that were reflected in his findings").

On June 8, 2017, after 10 P.M., Brockton police received a 911 call for assistance from an employee of a liquor store reporting that a customer was carrying a firearm in the back of his waistband area. After providing his name, the caller gave a detailed description of the customer as a black man in his twenties wearing a red and gray hat, red jacket, and white headphones. He described the customer as being about six feet tall, with an average build, and a big black beard. The customer was reported to be in the process of checking out of the store, and standing at the cashier's counter. The caller was asked to attempt to detain the customer in the store long enough to permit officers to arrive.

Two officers responded shortly thereafter and observed the defendant, who matched the caller's description, standing at the counter facing the clerk. Neither officer witnessed the defendant making concerning demands of the clerk, holding or brandishing a firearm, or otherwise engaged in criminal activity. The other customers inside the store did not seem concerned and were "going about their business."

The two officers approached the defendant from either side and grabbed his arms, which had the effect of pulling up his top. At the same time, the officers asked if the defendant was

carrying a firearm and if he had a license to carry. Because the defendant's clothing had been pulled up, a third officer who had arrived on the scene was able to see an unholstered firearm in the defendant's back right pocket and seized it.

The defendant argues that the judge made three clearly erroneous findings. We agree with the defendant with respect to two. First, as the Commonwealth concedes, there was no evidence to support the judge's finding that the defendant freely raised his arms. Second, two -- not one, as the judge found -- officers grabbed the defendant's arms. The defendant also contends that it was clear error to find that the liquor store was located in a high-crime area. Unlike the first two findings, however, there was some evidence to support this third finding. Specifically, the responding officer testified that the store was located in an area "kind of considered [to be] a high-crime area," and mentioned assaults, narcotics violations, and robberies in the area. For our purposes here, we accept that this testimony was sufficient to support the judge's finding, but note that the testimony was brief, conclusory, and without detail.

The defendant and the Commonwealth both agree that the defendant was seized for purposes of the Fourth Amendment to the United States Constitution and article 14 of the Massachusetts Declaration of Rights when the officers grabbed his arms. See

Commonwealth v. Wilson, 441 Mass. 390, 394 (2004) (seizure occurred when trooper grabbed back of defendant's shirt). Thus, the question is whether, at that moment, the officers had reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime. See Commonwealth v. DePeiza, 449 Mass. 367, 371 (2007); Commonwealth v. Barros, 435 Mass. 171, 176-177 (2001). The suspicion must be grounded in "specific, articulable facts and reasonable inferences [drawn] therefrom rather than on a hunch." Commonwealth v. Scott, 440 Mass. 642, 646 (2004), quoting Commonwealth v. Lyons, 409 Mass. 16, 19 (1990). See Terry v. Ohio, 392, U.S. 1, 21 (1968).

Based on Commonwealth v. Couture, 407 Mass. 178 (1990), we conclude that the officers did not have reasonable suspicion at the moment they seized the defendant. In Couture, a convenience store employee called the police to report a man with a handgun in his rear pocket. Id. at 179. The clerk reported that the man left the store in a pickup truck and relayed the registration number. Id. Police stopped the man a short time later in his truck, recovered a firearm, and arrested him. Id. The Supreme Judicial Court upheld the motion to suppress the firearm, because "[t]here [was] no indication that the gun . . . was used in any manner to threaten or intimidate the store clerk," or any "suggestion that the defendant lingered for an unusual period of time at the store or that he was 'casing the

joint' in preparation for a robbery. . . . Rather, the police only knew that a man had been seen in public with a handgun." Id. at 181. That someone is carrying a firearm, without more, does not raise reasonable suspicion that the person has committed or will commit a crime. See Alvarado, 423 Mass. at 269-270. This is because carrying a firearm is not itself a crime; carrying a firearm without a license is. Id. at 269.

The Commonwealth argues that license-holding gun owners, as a result of taking the required firearm safety course, would not engage in the unsafe behavior of carrying an unholstered gun in their waistband into a busy retail establishment. This may well be so. But no evidence was presented along these lines below, and without some evidence on the point, we cannot (as the Commonwealth urges us to do) simply accept it as a matter of common sense and then infer that the defendant did not have a license. Furthermore, the Commonwealth did not make this argument below. "It has long been our rule that we need not consider an argument . . . when that argument is raised for the first time on appeal." Commonwealth v. Bettencourt, 447 Mass. 631, 633 (2006).

It is true that carrying a firearm coupled with other factors may yield reasonable suspicion of past, present, or planned criminal activity. See DePeiza, 449 Mass. at 373. Such factors may include public loading of the firearm, Commonwealth

v. Haskell, 438 Mass. 790, 793-794 (2003), brandishing the firearm, Commonwealth v. Edwards, 476 Mass. 341, 346 (2017), appearing "to be ready to commit violence, either against police officers or bystanders," Commonwealth v. Narcisse, 457 Mass. 1, 9 (2010), active attempts to conceal the firearm from police, DePeiza, 449 Mass. at 371-373, and strange or furtive movements, Commonwealth v. Johnson, 454 Mass. 159, 164 (2009).[3] But none of these additional factors is present here.

What remains is the judge's finding that the liquor store was in a high-crime area. Although we have accepted that this finding is sufficiently supported by the evidence, it adds little, if anything, to the reasonable suspicion calculus in this case given the conclusory, undetailed testimony upon which it was based. See Commonwealth v. Gomes, 453 Mass. 506, 512-513 (2009). "The term 'high crime area' is itself a general and conclusory term that should not be used to justify a stop or a frisk, or both, without requiring the articulation of specific facts demonstrating the reasonableness of the intrusion." Johnson, 454 Mass. at 163, citing Gomes, supra at 513. Thus, while an area being "high crime" may properly factor into reasonable suspicion, "the accuracy of the characterization in a

[3] The time of day may also be pertinent. See Edwards, 476 Mass. at 346 (1:30 A.M.); Haskell, 438 Mass. at 793 (shortly before 2 A.M.); Commonwealth v. Foster, 48 Mass. App. Ct. 671, 672 (2000) (5:30 A.M.).

particular case depends on specific facts found by the judge that underlie such a determination, rather than on any label that is applied." Jones-Pannell, 472 Mass. at 434.

The motion judge, without explanation, concluded that this case could be distinguished from Couture, and relied instead on Commonwealth v. Foster, 48 Mass. App. Ct. 671 (2000). Foster involved notably different facts. In Foster, the defendant had been displaying a firearm while the officers were observing an after-hours party at 5:30 A.M. on the same street where shootings had occurred in the past. See id. at 672-673. Equally importantly, the motion judge failed to recognize that there is a serious question of Foster's continued force. See Commonwealth v. Meneus, 476 Mass. 231, 238-239 (2017), quoting Narcisse, 457 Mass. at 9 ("[The] holding in the Narcisse case casts doubt on the wisdom of the judge's steadfast reliance on the Foster case as support for his ruling that the actions of the police officers were constitutionally permissible because of the nature of the crime under investigation . . . . The rationale underlying Foster, derived principally from Commonwealth v. Fraser, 410 Mass. 541 (1991), was undercut substantially in Narcisse, where the court specifically 'disavow[ed] any suggestion in Fraser that we were establishing a new or lesser standard in our stop and frisk jurisprudence.' . . . The motion judge erred, therefore, in disregarding this

limitation of Fraser, which in turn called into question the continued vitality of Foster").

Based on the information known to the officers from the 911 call, at the time of the seizure they had reason to believe that the defendant was armed and dangerous. That notwithstanding, in order to justify a seizure in these circumstances, Supreme Judicial Court precedent further requires evidence that the defendant has committed, was committing, or was about to commit a crime. See Narcisse, 457 Mass. at 7. As we explained above, the Commonwealth did not proffer such evidence. Accordingly, because the motion to suppress was erroneously denied, we are constrained to vacate the judgment and to set aside the finding.[4]

So ordered.

By the Court (Wolohojian, Neyman & Lemire, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: December 21, 2020.

[4] Deciding as we do, we need not reach the defendant's other arguments as to why the motion to suppress was incorrectly denied.

[5] The panelists are listed in order of seniority.