COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. WOBURN SUPERIOR COURT
INDICTMENT NOS. 2012 MICR 241

COMMONWEALTH

v.

AXXXXX TXXXXX
AXXXXXXXX HXXXXXXXX,
Defendant

DEFENDANTS' JOINT MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO SUPPRESS

FACTS

On October 26, 2011, Officer Jose RXXXXXX pulled over a Nissan Maxima for having a license plate that was not illuminated. The vehicle pulled over without incident at 97 Hildreth Street, Lowell, Massachusetts. Officer RXXXXXX approached the vehicle, calling for back-up after observing two individuals in the car. Officer DXXXXX soon arrived on the scene.

Officer RXXXXXX informed the driver, AXXXXX TXXXXX ("Driver"), of the reason for the motor vehicle stop and asked him for his license and the vehicle's registration. Officer RXXXXXX noticed that the passenger, AXXXX HXXXXXXXX ("Passenger"), had a brown paper bag between his legs. The officer testified at the Probable Cause Hearing in the Lowell District Court in November 2011, however, that he observed

neither occupant manipulate, reach for, or touch the bag with his hands in any way during the stop.

The presence of the bag did not cause Officer RXXXXXX to feel threatened. He nevertheless felt "curious" about what it might contain.

Officer RXXXXXX issued the Driver a citation for his motor vehicle infraction. The Driver then asked if he could exit the vehicle to check the light to the license plate.

Meanwhile, Officer DXXXXX approached the Passenger for his identification. Officers claim that the Passenger was not wearing a seatbelt.

However, police never issued the Passenger a citation for not wearing a seatbelt. They did, however, issue the Driver a citation for the license plate violation.

When Officer DXXXXX approached the Passenger, he claimed that the Passenger was trying to push the brown paper bag underneath the seat with his feet.

Officer DXXXXX asked the Passenger to exit the vehicle allegedly fearing for his safety. The Driver had already exited the vehicle with Officer RXXXXXX's permission to inspect the license plate light. Officers asked both the Driver and the Passenger to put their hands on the trunk of the vehicle.

Officer DXXXXX retrieved the brown paper bag from beneath the seat of the car.

He did not feel the outside of the bag to determine if it contained a weapon. Instead, he immediately removed a white T-shirt that had been stuffed into the top opening of the bag. His search of the bag revealed no weapons but did uncover a large amount of pills. Officer DXXXXX showed the bag of pills to Officer RXXXXXX.

Neither officer recognized the type of pills in the bag.

Neither officer knew if the pills were prescription drugs.

Neither officer was experienced in narcotics investigations at the time of the stop.

Police searched both AXXXX HXXXXXXXX and AXXXXX TXXXXX and found money in their possession. AXXXXX TXXXXX possessed $681, and AXXXX HXXXXXXXX possessed $7,360.

A sergeant arrived on scene.

At the sergeant's suggestion, the officers took the pills to a local CVS pharmacy. A pharmacist inspected the pills. The pharmacist looked up the markings on the pills and learned that they were 30 mg oxycodone hydrochloride tablets.

Officers arrested both the Defendant and his passenger, and charged each with trafficking in a Class B substance.

ARGUMENT

Where police have observed a traffic violation, they are justified in stopping the vehicle for the purposes of issuing a citation. Commonwealth v. Cruz, 459 Mass. 459 (2011).

Officers are not permitted, however, to detain a vehicle for longer than necessary to effectuate the purpose of the stop. Id. Only other suspicious conduct from the driver or passengers can warrant further intrusion. Further, ordering an occupant to exit the vehicle requires reasonable suspicion that the occupant poses a threat to the officers or is involved in criminal activity. Id.

If officers allege a fear that a parcel or container in the suspect's possession contains a weapon, they are permitted to search that container only to the extent "minimally necessary to learn whether the suspect is armed[.]" Commonwealth v. Pagan, 440 Mass. 62, 69 (2003)(internal citations omitted).

In the instant matter, the Driver's arrest arose from a motor vehicle stop pursuant to an equipment violation. At the conclusion of the traffic stop, officers ordered the Driver and the Passenger out of the vehicle after the Passenger allegedly tried to conceal a brown paper bag. Neither officer testified that the Driver or the Passenger at any time reached for the bag with his hands, made any furtive or otherwise threatening movements, or failed to cooperate with officers.

Rather, Officer RXXXXXX testified at a Probable Cause Hearing on November 30, 2011 that he saw neither the Driver nor the Passenger manipulate the bag with hands or feet. Officer RXXXXXX testified only that he saw the passenger with the bag

"in his lap," and that the two occupants appeared nervous. (Probable Cause Hearing Transcript, Page 17, Lines 22-24; Page 18, Lines 1-6).

These facts, coupled with the time of night and the high drug crime character of the neighborhood constitute the only basis of suspicion underlying the exit order.

The officer's actions in this case violated the Defendants' rights under Article 14 of the Massachusetts Declaration of Rights for three reasons.

First, assuming the officers permissibly stopped the Driver for a valid motor vehicle infraction, which the Defendants' challenge, the resulting exit order of the Passenger, the Driver's detention, and the search of the vehicle were unreasonable for want of either reasonable suspicion or probable cause. Commonwealth v. Cruz, 459 Mass. 459 (2011); Cf. Commonwealth v. Elysee, 77 Mass. App. Ct. 833 (2010).

Second, even if reasonable and articulable suspicion supported the exit order, Officer DXXXXX's search of the paper bag lacked constitutional authority. The officers' intrusion went far beyond that necessary to dispel their alleged fears that the bag contained a weapon and should have terminated with a "patfrisk" of the bag. Commonwealth v. Pagan, 440 Mass. 62 (2003); Commonwealth v. Wilson, 441 Mass. 390 (2004).

Third, the Officers here lacked probable cause to believe the bag's contents to be contraband. The warrantless seizure of the bag and its contents thus lacked constitutional justification. Commonwealth v. Ortiz, 376 Mass. 349 (1978), Commonwealth v. Santana, 420 Mass. 205 (1995).

I. OFFICERS LACKED REASONABLE SUSPICION TO BELIEVE THAT THE DRIVER WAS INVOLVED IN CRIMINAL ACTIVITY OR TO FEAR FOR THEIR SAFETY. THE EXIT ORDER AND RESULTING SEARCH OF THE VEHICLE WAS UNREASONABLE AND THUS VIOLATED THE DEFENDANTS' RIGHTS UNDER ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

Where officers seek to prolong a validly executed traffic stop beyond the time necessary to issue a citation, "additional suspicious conduct" on the part of the vehicle's occupants is required. Commonwealth v. Cruz, 459 Mass. 459, 466 (2011). An exit order is justified if "a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger ... [or if] the officers could have developed reasonable suspicion (based on articulable facts) that the defendant was engaged in criminal activity separate from any offense of the driver." Id.

Neither of these circumstances can justify the Passenger's exit order[1] on the facts of the instant matter.

[1] The driver has standing to challenge the passenger's exit order. Possession of the evidence seized as a result of the unlawful exit order and search is an essential element of guilt in this case giving the driver "automatic standing" to contest its seizure. Commonwealth v. Ware, 75 Mass. App. Ct. 220 (2009).

In Cruz, plain clothes officers approached a vehicle illegally parked in front of a fire hydrant. The officers recognized the driver and passenger as having been previously involved in criminal conduct. Id.

The officers questioned the occupants of the vehicle for an explanation as to the illegal parking and noted the smell of burnt marijuana on their approach. That odor, coupled with the nervous demeanor of the occupants and their presence in a high crime area, led the officers to order the occupants out of the vehicle. Subsequent questioning of the defendants yielded admissions to possession of crack cocaine. Id.

The defendants moved to suppress the drugs on the basis that the officers' ordering them from the car violated their rights under the United States Constitution and the Massachusetts Declaration of Rights.

The Supreme Judicial Court held the exit order to be unreasonable for want of reasonable suspicion that the defendants were engaged in criminal activity. The Court held that the odor of burnt marijuana, "the stop's location [in a] high crime neighborhood, the defendant's nervous demeanor, and the occupants' sharing of a cigar" were insufficient basis for ordering the defendants out of the vehicle. Id. at 467.

Here, officers had even less reason to suspect Defendant's involvement in criminal activity than did the officers in Cruz.

In Cruz, officers at least had the odor of burnt marijuana beyond nervous demeanor and high crime neighborhood to support an inference of criminality. Here, Officers RXXXXXX and DXXXXX had only the presence of a non-descript paper bag, which one of the officers allegedly viewed being placed under the seat. Trying to stow a parcel, innocent in outward appearance, however, can hardly support reasonable suspicion where the unquestioned odor of an illicit substance cannot. Id. at 467.

Nor do the facts of the instant matter constitute "'specific and articulable facts,' from which 'a reasonably prudent [person] in the [officer's] position would be warranted' in the suspicion that his or her safety, or the safety of others, is in danger." Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 840 (2010).

To meet this burden, the officer must demonstrate "some fact or facts in the totality of the circumstances that would create in a police officer a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from the car." Id. at 841.

The Commonwealth cannot meet this standard here. Officer RXXXXXX gave as the basis for fear of his safety only the facts that the occupants appeared nervous and that the stop occurred late at night in a high crime area. Officer DXXXXX viewed the

alleged manipulation of the paper bag, claiming that this gave rise to a fear for his safety. These facts taken all together simply would not cause "an objectively reasonable officer" to fear for his safety.

The Supreme Judicial Court's holding in Cruz indicates that neither the high crime nature of the locale in which the stop occurred nor the nervous demeanor of the occupants can serve as a basis of reasonable suspicion. Commonwealth v. Cruz, 459 Mass. 459, 467. This is only rational. That the occupants happened to be passing through a high crime neighborhood at the time the stop occurred cannot serve to impute the character of the neighborhood upon the occupants.[2] And, as the Cruz Court explained, "[i]t is common, and not necessarily indicative of criminality, to appear nervous during even a mundane encounter with police[.]" Id. at 468.

The Appeals Court in Elysee illustrated a clear example of a justified exit order. The vehicle's windows were heavily tinted, the occupants were known gang members, some were known to have prior firearms arrests, officers observed the occupants in an altercation with known members of a rival gang shortly

[2] See also Commonwealth v. Holley, 52 Mass. App. Ct. 659 (2001). The fact that the traffic stop took place in a high crime area is relevant to an objective assessment of the officer's safety but must be "considered with some caution because many honest, law-abiding citizens live and work in high crime areas. Those citizens are entitled to the protections of the Federal and State Constitutions despite the character of the area. Therefore, the fact that a routine traffic violation takes place in a high crime area does not allow the police, without more, to order a driver out of a vehicle or to conduct a patfrisk." Holley at 663. (internal citations omitted).

before the stop, one passenger refused to cooperate with officers, and the vehicle was seen to be rocking as if the back seat passengers were attempting to conceal something as officers approached. Commonwealth v. Elysee, 77 Mass. App. Ct. 833 (2010).

The instant case is distinguishable from that which the Elysee court deemed sufficient to justify an exit order. Here, the vehicle's windows were not tinted. Officer RXXXXXX and Officer DXXXXX could, thus, clearly see into the stopped vehicle. Neither the Driver nor the Passenger was a known or suspected gang member. Neither the Driver nor the Passenger was involved in any prior firearm offenses. Here, the officers were not investigating a rival gang altercation, which had occurred shortly before the stop. Officer RXXXXXX simply pulled the vehicle over for an equipment violation. Further, as officers approached the vehicle in question, neither officer observed the vehicle to be rocking as if one of the vehicle's occupants was trying to conceal something in the vehicle. Both the Driver and the Passenger were completely cooperative with the police as the officers approached the vehicle. They listened to the police commands and followed their instruction.

Arguably the only factual similarity between this case and Elysee is the alleged act of attempted concealment after the stop appeared over. However, even if Officer DXXXXX did observe

the Passenger attempt to conceal the bag, this cannot serve as the only basis for reasonable suspicion to support an exit order.

The act of concealing an item may in certain circumstances give rise to reasonable suspicion to support an exit order, but the cases holding as such differ greatly from the instant matter. Typically, these cases deal with an officer observing a passenger physically bending over or ducking down in an attempt to manipulate an item out of the officers' sight prior to resolution of the encounter. See Commonwealth v. Stampley, 437 Mass. 323 (2002); Commonwealth v. TXXXXX, 433 Mass. 669 (2001); Commonwealth v. Moses, 408 Mass. 136 (1990); Commonwealth v. Prevost, 44 Mass. App. Ct. 398 (1998).

The present matter is different from the facts held sufficient to justify reasonable suspicion in the above-cited cases. In each of those cases, the alleged safety threat grew from an officer's observation that a vehicle occupant physically reached for something out of view prior to resolution of the encounter. The paramount concern of officer safety thus justified a search to uncover what the occupant had hidden. Commonwealth v. Prevost, 44 Mass. App. Ct. 398 (1998) (exit order justified; occupant disappeared from sight briefly after vehicle stopped, same occupant struggled to put on overcoat after stop as officer approached vehicle).

The courts in the above cases held reasonable the officers' search to determine what the defendant's had hidden after observing that they had hidden something. Here the Passenger hid nothing. One of the officers merely observed movements that he assumed to have been an attempt at hiding something. Officers could plainly see (and Officer RXXXXXX testified as such) that the bag lacked any characteristics that might indicate contraband or that they would find a weapon within it.

Moreover, Officer RXXXXXX testified that he never saw either occupant attempt to access the bag. Officer DXXXXX only saw the Passenger attempt to move it using his feet, and only after the tenor of a mundane traffic stop had been established. The occupants' hands were never near the bag and neither occupant ever bent over or attempted to escape the officers' view. If anything, the passenger's act of stowing the bag more accurately shows his intent not to retrieve it during the stop thereby obviating an inference of danger to the officers.

The circumstances described above justifying exit orders are absent from the present case. See e.g. Prevost, 44 Mass. App. Ct. 398. That one of the officers here allegedly viewed the passenger attempt to hide the brown paper bag - at a time when the traffic stop seemed to be resolved uneventfully - simply is not enough to justify the resulting exit order and search.

In a later case, the Appeals Court held that facts more closely resembling those of the instant matter did not give rise to an "articulable risk to officer safety." Commonwealth v. Greenwood, 78 Mass. App. Ct. 611, 617 (2011). In Greenwood, officers stopped the defendant after observing him as he departed from the scene of a reported, though uncertain, crime. The defendant had in his possession at the time a purse, which officers opened and began to search in an attempt to discern its ownership. Eventually determining the bag stolen, officers arrested the defendant. Id.

The defendant in that case challenged the search of the purse. Hearing testimony from the arresting officer established that "throughout the course of the investigative stop, the defendant acted in a cooperative manner." He made no furtive gestures, was not hostile towards the officers, and did not attempt to flee." Id. The Court ultimately held that "[w]hen coupled with the officers' uncertainty regarding the precise nature of the criminal activity afoot, these facts do not give rise to an articulable risk to officer safety." Id.

The current matter could not be further from the facts of Elysee. This case is more appropriately on the same factual footing as Greenwood and justifies the same finding. The officers here, unlike those in Elysee, testified to no familiarity with the criminal records of either occupant. The

occupants, like the defendant in Greenwood, were exceedingly cooperative with officers. The occupants did not attempt to reach for anything as the officers approached, and as in Greenwood, made no furtive gestures and were not hostile towards officers. Further, as in Greenwood, officers had nothing but "uncertainty regarding the precise nature of the criminal activity afoot." Commonwealth v. Greenwood, 78 Mass. App. Ct. 611, 617 (2011); compare with Commonwealth v. Elysee, 77 Mass. App. Ct. 833 (2010).

Perhaps most tellingly, Officer RXXXXXX testified during the Probable Cause Hearing that he did not believe the bag contained a weapon. (Probable Cause Hearing Transcript, Page 18, Lines 15-21). Instead, he was just "curious" as to what it might contain. He felt this "curiosity" prior to any alleged effort to conceal the bag. While Officer RXXXXXX sought back up in an abundance of caution due to the time of night and the locale of the stop, he never testified that the behavior of the passengers gave him any reason to fear for his safety. Similarly, the objective circumstances did not warrant any safety concern.

This testimony more rationally supports an inference that the officers simply felt "curious" about the bag, and curiosity rather than fear prompted the search.

Officer RXXXXXX claimed that he needed Officer DXXXXX to obtain identification from the passenger because the passenger was not wearing his seatbelt.

The Court should reject this testimony because it is not credible.

The entire predicate for Officer DXXXXX approaching the Passenger was to obtain identification in order to give the Passenger a ticket for failing to wear a seatbelt.

However, Officer RXXXXXX never cited the Passenger for failing to wear his seatbelt. Officer DXXXXX also did not cite the Passenger for failing to wear a seatbelt. Any assertion that the purpose of Officer DXXXXX approaching the Passenger was to obtain identification to give the Passenger a citation is therefore without merit. Officer DXXXXX more accurately approached the Passenger for investigative purposes based upon Officer RXXXXXX's curiosity about the contents of the bag. This type of unsupported, unjustified curiosity cannot serve as the basis for a valid exit order for safety concerns.

Officer RXXXXXX offered no explanation as to why neither officer issued the Passenger a citation. Officer RXXXXXX did cite the driver for the plate light violation. His inconsistency in his handling of these two minor civil infractions, therefore, casts suspicion on his claim that the Passenger was not wearing a seatbelt.

Furthermore, if the Passenger truly was not wearing his seatbelt, Officer RXXXXXX had every opportunity to obtain the Passenger's identification for purposes of writing a ticket at the same time as he obtained the Driver's identification – the first moments of the motor vehicle stop. He offered no credible explanation as to why he failed to obtain the Passenger's identification at that time.

Interestingly, Officer DXXXXX's observation of the passenger's alleged movements occurred outside of Officer RXXXXXX's view. Thus, Officer RXXXXXX could not corroborate them.

This highly suspect narrative, coupled with the immediate seizure and search of the bag, and Officer RXXXXXX's admitted "curiosity" about the bag, indicates that any alleged safety concern was not credible. Rather, Lowell Police arguably manufactured these claims as a pretext to cover their simple curiosity driven desire to search the bag.

Considering the mundane circumstances of the stop and utter lack of any indication of criminal activity within the vehicle, "[i]t can be argued with some persuasiveness that the defendant could hardly be viewed as a potential assailant." Commonwealth v. Silva, 366 Mass. 402, 409 (1974). Prior to Officer DXXXXX's invasion of the vehicle and bag, the officers had given no indication that the encounter would result in more than a

traffic citation. The officers were not investigating criminality apart from the defective license plate light. The occupants offered no resistance and were cooperative throughout the motor vehicle stop. The objective circumstances indicated that the stop was over. The notion that the Driver and Passenger would nonetheless suddenly jump to violence simply strains logic.[3]

Because the facts of the instant matter could not support a reasonable inference either of the occupants' criminality or danger to the officers, the exit order and resulting search were unreasonable and in violation of the occupants' rights under Article 14 of the Massachusetts Declaration of Rights.

II. THE OFFICERS' SEARCH OF THE PAPER BAG EXCEEDED THE SCOPE OF INTRUSION PERMISSIBLE UNDER THE CIRCUMSTANCES, THEREFORE VIOLATING THE DRIVER'S AND PASSENGER'S RIGHTS UNDER ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

Even assuming that the passenger's alleged attempt to conceal the bag during the stop justified Officer DXXXXX in ordering him to exit the vehicle, the officers still lacked justification to open the bag and visually inspect its contents. Article 14 of the Massachusetts Declaration of Rights required the officers to first perform a "patfrisk" of the brown paper

[3] The Defendant is mindful of the fact that an officer's subjective intent in conducting a search is not relevant so long as the objective facts justify the search. Commonwealth v. Santana, 420 Mass. 205 (1995). Here, the Defendant avers that the objective facts are not what the police claim them to be. Instead, the Defendant argues here that the Court should disregard any testimony regarding the passenger's failure to wear a seatbelt and act of concealment because that aspect of the Commonwealth's evidence is not credible.

bag. Such an inspection of the container here at issue could not possibly have supported further suspicion that officers might have located a weapon within it. Officer DXXXXX therefore exceeded his constitutional authority in opening and visually inspecting the contents of the bag.

Where the character of a container in a suspect's possession is "such that a patfrisk might suffice to establish that there is no potential weapon within, the container may not be opened as part of a search for weapons unless a patfrisk has first been performed." Commonwealth v. Pagan, 440 Mass. 62, 73 (2003). In situations where the character of the bag is such that the patfrisk would reasonably dispel the officers' fears, officers are required to frisk the container and terminate the encounter if their inspection reveals no weapon. Id. See also Commonwealth v. Bonas, 81 Mass. App. Ct. 1129 (2012)(rescript) (probable cause to open purse and seize firearm only after patfrisk of purse revealed what officer believed from training and experience to be a firearm).

In Pagan, the Supreme Judicial Court held that officers who suspect or fear that a container in a suspect's possession may contain a weapon may inspect the container pursuant to the principles of Terry v. Ohio, 392 U.S. (1986). Id. However, the inspection must be "confined to what is minimally necessary to

learn whether the suspect is armed and to disarm him once the weapon is discovered." Pagan at 69 (internal citations omitted).

The Court in Pagan recognized that the "patfrisk," which Terry sanctioned, may not in all circumstances be "sufficient to detect whether a suspect has a weapon on his or her person[.]" Id. (internal citations omitted). The Court applied this reasoning to containers, holding that where the character of a container is not susceptible to a patfrisk, or where a frisk would not reveal enough information to dispel officers' fears, a frisk is not required. Id. Pat frisking a hard-shell suitcase, for example, would surely be an exercise in futility which officers cannot be expected to perform. Id.

But, "[b]y the same token, a patfrisk of a small, soft-sided container that reveals no hard objects will, by itself, assuage the officer's prior suspicion and avoid the need for any greater intrusion on the suspect's privacy." Id. at 70. Thus, where the character of the container is such that a patfrisk would suffice to establish that there is no potential weapon within, officers may go no further after the patfrisk obviates their concerns. Id. at 72.

In Pagan, officers reported to the scene of an alleged burglary, confronting and questioning the defendant on the scene. The Defendant claimed to be a police officer, and reported his identification to be in a backpack he then possessed. The

suspect gave the backpack to the officers, who then opened the bag to retrieve the identification. The officers discovered numerous bricks of cocaine in the backpack, arresting the defendant soon thereafter. Id.

The defendant unsuccessfully sought to suppress the cocaine discovered in the search of his backpack, claiming that officers failed to patfrisk the backpack before opening it. Id. The Court rejected that argument on the facts of the case. The backpack, though "constructed of pliable material, was full of heavy, hard objects. Simply from looking at it and lifting it (which the officers had done), it was evident that a patfrisk could not possibly suffice to dispel the suspicion that burglarious implements (which could be used as weapons) or other potential weapons were inside." Id. at 71.

The Court concluded that a patfrisk would not have revealed "anything beyond what the officers already knew, namely, that the pack contained hard, heavy objects that could be used as weapons[.]" Id. Because the frisk would not have dispelled their suspicions, officers were justified in opening and inspecting the backpack.

The instant matter is far from the facts of Pagan, and the search justified in that case cannot be justified here. Where in Pagan officers had a large backpack, here the officers had only a small paper bag. Where in Pagan, the backpack contained

"hard, heavy objects," here the paper bag had only smaller bags of tiny round items. Officers in Pagan had the reasonable belief that the large, hard, and heavy objects could have been weapons. The same does not hold true here. No reasonable officer would believe that soft, small bags of tiny round items felt through a thin paper bag could be used as any sort of weapon.

Because a "patfrisk" of the bag would have readily dispelled suspicion that a weapon would be contained therein, Officers DXXXXX and RXXXXXX had the duty to "frisk" the bag before opening it. Had they bothered to perform the frisk, the character of the bag and its contents would not have given rise to any further suspicion justifying its opening. The officers here therefore exceeded their constitutional authority in inspecting the bag beyond "what [was] minimally necessary to learn whether the suspect [was] armed[.]" Pagan at 69.

Nor would seizure of the bag's contents have been permissible under the "plain feel" doctrine. The Supreme Judicial Court recognized this doctrine in Commonwealth v. Wilson, 441 Mass. 390 (2004), holding that officers may seize contraband found during a lawful Terry patfrisk. But the doctrine has limits, and applies only where officers during the frisk "feel[] an object whose contour or mass makes its identity [as contraband] immediately apparent." Commonwealth v. Wilson,

441 Mass. 390, 396 (2004). "If the officer must manipulate or otherwise further physically explore the concealed object in order to discern its identity, then an unconstitutional search has occurred." Id.

Here, the officers could not have satisfied the doctrine. If officers had bothered to patfrisk the bag, they would have felt soft bags containing several tiny items, which are not consistent with any sort of weapon. The frisk would thus have revealed only that the contents could be anything but a weapon. Even if the officers could discern that the bag contained pills,[4] they would have had no basis to believe the pills to be contraband.

Indeed, that officers immediately opened the bag and peered inside, without bothering to frisk it first, reveals that the officers did exactly that which Wilson held unconstitutional. Because officers failed to confine their intrusion to what was "minimally necessary to learn whether the suspect is armed," the search was illegal. Pagan, supra.

Officers RXXXXXX and DXXXXX lacked any basis for believing that the Driver and the Passenger posed any threat. They made no furtive gestures, were fully cooperative, were not known to police, and not clearly engaged in any criminality. The only

[4] Any claim that one could tell the items to be pills by touch would be incredible. The physical properties of the pills would be impossible to distinguish them, by touch, from any other small round item such as hard candy, vitamins, beans, nuts, or peas.

discernible basis for the exit order, which Officer DXXXXX gave, involved the Passenger's alleged attempt to hide a paper bag, which led Officer DXXXXX to immediately invade the vehicle and the bag.

Had officers undertaken to do that which Article 14 required of them, that is "patfrisk" the bag before opening it, they would have assuaged their supposed safety concerns. Had they merely first felt the bag, the officers would have had no reasonable basis to believe they would find a weapon or contraband therein. Rather, and more importantly, any patfrisk of the bag would have revealed the absence of a weapon, at which point officers would have been required to terminate the intrusion and complete the process of issuing whatever citations they felt appropriate. Commonwealth v. TXXXXX, 424 Mass. 153, 159 (1997)("once any potential threat to the officer's safety was dispelled and there was no reasonable suspicion that criminal activity was afoot, any basis for further detention evaporated").

Officers DXXXXX and RXXXXXX instead chose, however, to open the bag and immediately visually inspect it without bothering to "patfrisk" it. This Honorable Court should not sanction their haste. The United States Constitution and the Massachusetts Declaration of Rights has earmarked constitutional protections against police unreasonable searches and seizures. Police

cannot trample upon the rights of a defendant merely in the name of "safety" without justifiable reason or excuse.

Here, the Commonwealth can neither justify nor excuse their actions.

As the Wilson Court made clear, under these circumstances "an unconstitutional search has occurred." Commonwealth v. Wilson, 441 Mass. 390, 396 (2004). This Honorable Court should, therefore, suppress the fruits of the police officers' constitutional violation.

III. THE OFFICERS' LACKED PROBABLE CAUSE TO SEIZE THE PAPER BAG'S CONTENTS AND THEREFORE VIOLATED THE DRIVER'S AND PASSENGER'S RIGHTS UNDER ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS AND THE UNITED STATES CONSTITUTION.

If this Honorable Court were to conclude that Officers DXXXXX and RXXXXXX acted reasonably in opening and inspecting the contents of the brown paper bag, this Honorable Court should still suppress its contents. Officers lacked probable cause to believe that the bag contained illicit contraband and, thus, violated the Driver's and Passenger's rights under Article 14 of the Massachusetts Declaration of Rights and the United States Constitution.

Where police seize property without a warrant, the Commonwealth bears the burden of proving that a recognized exception to the warrant requirement justified the seizure. Commonwealth v. Figueroa, 412 Mass. 745, 750 (1992). Here, the Commonwealth must demonstrate probable cause to believe the bag

contained contraband and exigent circumstances to justify its seizure without a search warrant. Commonwealth v. Ortiz, 376 Mass. 349, 353 (1978).

Alternatively, the Commonwealth must justify its seizure under the "plain view" doctrine. Officers can seize evidence in plain view if lawfully in a position from which they view an object, if its incriminating character is "immediately apparent," and they come across the item inadvertently." Commonwealth v. Santana, 420 Mass. 205, 211 (1995). The "immediately apparent" prong of the plain view doctrine "has come to be understood as requiring that police had probable cause to believe that the items observed were contraband or the instrumentalities of a crime." Commonwealth v. King, 67 Mass. App. Ct. 823, 829, n. 14 (2006).

"Probable cause to believe that the items observed were contraband" is where the Commonwealth must fail in the instant matter. Id.; see also Ortiz, 376 Mass. at 353. Officers in the present matter utterly lacked any facts that "'would warrant a man of reasonable caution in the belief ... that certain items may be contraband[.]" King, 67 Mass. App. Ct. at 829.

The Appeals Court in King illustrated clearly that an observation of a substance presumed to be illicit cannot "be equated to illegal contraband without competent supporting evidence[.]" Id. In King, for example, an officer stopped a car

containing multiple occupants after observing the driver commit a moving violation. The officer learned during the stop that the defendant had an outstanding arrest warrant. The officer radioed for backup, ordered the defendant out of the car, and conducted a patfrisk. Id. at 824.

At this point, another officer allegedly observed and called to the arresting officer's attention "'a piece of green, leafy vegetable matter' on the driver's seat." Id. The officer who viewed this "vegetable matter" never testified to his observations. The officers then conducted a warrantless search of the vehicle, found, and seized other illicit substances. The defendant sought to suppress that evidence which resulted from the illegal, warrantless search. The Commonwealth sought to excuse the intrusion under the plain view doctrine. Id.

The Appeals Court rejected the Commonwealth's assertion that "the police had a lawful right of access to the green, leafy vegetable matter because its incriminating character was immediately apparent." Id. at 828. The Court held that the testimony that the officers "reasonably believed—on the basis of [their] training and experience—that the vegetable matter was marijuana" was not credible. Id.

Simply, the Court held, it cannot be "assumed that an undescribed particle of unknown green vegetable matter—that might have been a remnant of lettuce from a sandwich—can be

equated to illegal contraband without competent supporting evidence[.]" Id. at 829.

The Court in the present matter is similarly presented with officers who utterly lacked any basis to believe the allegedly illicit substance to be illegal contraband. As in King, the officers in the instant matter did not testify as to any basis in training or experience for believing the bag's contents to be illicit. Indeed, that the Officers felt the need to seize the bags' contents and take them to a local pharmacy for identification indicates that they possessed no facts that would warrant a man of reasonable caution in the belief that its contents were illegal. Id.[5]

Nor can the Commonwealth in the instant matter satisfy the "inadvertence" requirement of the plain view doctrine. The Supreme Judicial Court has described this element of the plain view doctrine as requiring that police lack probable cause before the warrantless search or seizure. Commonwealth v. D'Amour, 428 Mass. 725, 732 (1999). "The inadvertence requirement simply lends credibility to the doctrine by ensuring

[5] No Massachusetts case has dealt with a claim of "plain view" in the context of pills where the officer in question lacked training or experience in immediately identifying the same. But see Liichow v. State of Maryland, 288 Md. 502, 514 (1980)("[m]erely seeing dime-sized white tablets among personal belongings does not make it immediately apparent that the viewer has before him evidence of criminal conduct); State v. Meichel, 290 So.2d 878 (1974)(seizure of pill bottle from front seat of automobile did not fall within plain view exception to warrant requirement where officer did not know nature of pills until after he had picked up the bottle and examined it); State v. Elkins, 245 Or. 279 (1966)(officer not authorized to take white pills of which he was suspicious but did not know to be contraband).

that only evidence which the police did not anticipate or know to be at the locus of a search will be seized without a warrant." Id.

The Commonwealth also fails here.

The Commonwealth cannot in good faith suggest that Officers RXXXXXX and DXXXXX "did not anticipate" that the bag might contain contraband. Id. The officers here sought to open the bag precisely because they had a hunch it would contain contraband, but lacked probable cause to search it.

At the outset, Officer RXXXXXX indicated he was curious about what was in the bag. In his testimony, he indicated that the neighborhood was known for drug arrests. By the combination of these factors, Officers RXXXXXX and DXXXXX then set about creating a chain of events that would allow them to get a look inside the bag to satisfy their curiosity. Far from being inadvertent, this is exactly the type of abuse that caused the Commonwealth's Courts to adhere to the inadvertence requirement when the federal courts abandoned it. See Commonwealth v. Balicki, 436 Mass. 1, 10 (2002) (Inadvertence requirement designed to ensure that police who have cause to suspect criminality, instead of obtaining a warrant, wait "until an opportune moment to 'place themselves in a position to gain a plain view of the evidence.'")

The officers' conduct throughout the stop most accurately indicates that they had a hunch and simply sought justification to pursue their suspicions.

This Honorable Court should not excuse the officers' hunch and unconstitutional pursuit of the same simply because their illegal search bore fruit. An illegal search in violation of the Constitution does not become legal simply because it brings to light illegality. Commonwealth v. Garcia, 34 Mass. App. Ct. 645, 652 (1993).

The officers lacked any reasonable basis to extract the occupants from their vehicle and impermissibly accessed a container found therein. Even if this Court excuses this conduct, this Honorable Court must still suppress the evidence in this case.

Officers' seized and searched the occupants' property to determine its nature when they lacked probable cause to believe it was contraband. In so doing, they violated the rights of the Driver and his Passenger under Article 14 of the Massachusetts Declaration of Rights and the United States Constitution.

CONCLUSION

For the above reasons, the Defendants respectfully request that this Honorable Court allow the instant Motions to Suppress.

Respectfully submitted,
AXXXXXXXX HXXXXXXXX,
By and through his Attorney

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