

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
No. 1884CR00345

COMMONWEALTH

vs.

CELESTINO VICENTE

**DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS**

Celestino Vicente (Vicente)<sup>1</sup> is charged with carrying a firearm without a license, second offense, in violation of G.L. c. 269 §10(a) and (d); possession of ammunition without an FID card in violation of G.L. c. 269, § 10(h); carrying a loaded firearm without a license in violation of G.L. c. 269, § 10(n); assault with a dangerous weapon in violation of G.L. c. 265, § 15B(b); and two counts of assault and battery on a police officer in violation of G.L. c. 265, § 13D. He moves to suppress all evidence and statements obtained as a result of a warrantless seizure and search on January 29, 2018. An evidentiary hearing on defendant's motion was conducted on February 28, 2019.

In light of the arguments made by counsel and the facts presented, and for the reasons stated below, the defendant's motion is **ALLOWED**.

**FINDINGS OF FACT**

Officers Timothy Callahan (Callahan) and Jonathan O'Brien (O'Brien), both five-year veterans of the Boston Police Department (BPD), and David Malcolm (Malcolm), a thirteen-year

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<sup>1</sup> Although the docket sheet reflects the defendant's name as "Vicente," the indictment uses the name "Vicente," and the defendant signed an affidavit in support of his Motion to Suppress as "Celestino Vicente." Accordingly, the court will refer to the defendant as "Vicente."

BPD veteran testified. Three photographs and Vicente's Arrest Booking Form were admitted into evidence. Based on the credible evidence, and all reasonable inferences drawn therefrom, I find the following facts.

On January 29, 2018, Callahan and O'Brien were working as part of an anti-crime unit and were patrolling in Charlestown near the Bunker Hill housing development in civilian clothes and an unmarked Ford Explorer. They had been directed to patrol that area because there had been several crimes committed in the area, including breaking and entering and armed robbery. In particular, the officers were aware that an individual had entered a number of apartments through a window at night, and when the occupants awoke, the perpetrator was seen engaging in lewd conduct. Callahan and O'Brien had been given a description of the suspect and had seen a written flyer at the station prior to beginning their patrol. They also knew that the police had identified a person of interest.

At approximately 8:00 p.m., Callahan and O'Brien saw an Acura lawfully parked on Polk Street, which is a one-way street, with its engine running. There was one occupant in the driver's seat with the seat reclined. They ran the license plate number through Criminal Justice Information System (CJIS), a police database in their vehicle, and they learned that the Acura had either failed its inspection or had an expired inspection sticker, which is a citable civil infraction.<sup>2</sup> They also learned that the Acura was registered to a woman at a Charlestown address close to where the car was parked.

Callahan and O'Brien turned their vehicle around, drove the wrong way back down the one-way street, and pulled next to the Acura facing the opposite direction. Callahan walked to

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<sup>2</sup> Both Callahan and O'Brien testified that it is their practice to run the license plate of nearly every car they see through CJIS and that, on a normal shift, they might run between 200 and 300 license plates.

the passenger-side window, and O'Brien walked to the driver's side window. When they approached the car, neither officer had any reason to believe the Acura nor its occupant had been or was engaged in any criminal conduct, and the Acura was not blocking traffic.

The occupant, later identified as Vicente, rolled down both windows and, upon request, produced his driver's license and the car's registration. Vicente was compliant, calm, and casual and spoke to the officers for between 30 and 45 seconds. He told them he worked for Town Fair Tire, and he was wearing a zip-up jacket with "Town Fair Tire" written on it. He also said he was waiting for his girlfriend. Both officers credibly testified and candidly admitted that Vicente did not do anything suspicious that caused either officer concern. Further, Vicente did not match the description of the person of interest in connection with the recent spate of break-ins in the area.

Callahan went back to the Explorer intending to write Vicente a ticket for the expired inspection sticker. He ran Vicente's license and registration through the CJIS system, and both were valid. Callahan learned, however, that Vicente had a criminal record that included two arrests for unlawful possession of firearms. The most recent arrest was in 2004 – more than fourteen years prior to the motor vehicle stop. Callahan then signaled to O'Brien that Vicente had a firearms charge on his record.<sup>3</sup> Callahan stopped writing the ticket and went back to the Acura.

Callahan and O'Brien then told Vicente that they were investigating recent crimes in the area, including a series of break-ins. However, neither officer believed that Vicente was a

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<sup>3</sup> Callahan and O'Brien use a secret hand signal to inform each other when a person's criminal history report indicates that the person has been charged with a firearms offense; however, it does not inform the other officer about any details regarding the charge. The evidence does not support a conclusion that Vicente saw the hand signal.

suspect in the break-ins or the armed robberies. In fact, the police had a person of interest, and it was not Vicente. Therefore, solely based on Vicente's prior firearms charges, the officers decided to "investigate" Vicente by telling him why they were in the area to "see where it went." They testified that they "just wanted to see [Vicente's] reaction" to what they were telling him and to learn "[i]f there was something further to go down."<sup>4</sup>

After Callahan and O'Brien told Vicente that they were in the area investigating a series of recent break-ins and armed robberies, Vicente's demeanor changed. Vicente became nervous, began breathing heavily, and touched the waist band area of his pants two or three times. Callahan and O'Brien had been trained that touching that area is one indication of an armed gunman. O'Brien then opened the driver's door and told Vicente to get out of the car. Vicente said, "No," and asked the officers to call a supervisor. Neither Callahan nor O'Brien responded to that request. Vicente tried to shut his door. At that point, Callahan and O'Brien forcibly removed Vicente from the car. Vicente resisted and tried to push the police away. A violent struggle ensued. Callahan was unable to pin Vicente's hands or call for assistance, and when Vicente hit Callahan's arm or elbow, Callahan dropped his radio. Vicente's girlfriend arrived, and Callahan yelled at her to give him the radio. She did, and Callahan called for back-up. After about a minute, Vicente broke free and began to run.

Callahan chased Vicente, who had run into a nearby parking lot. Vicente jumped over a short black fence, stopped, turned toward Callahan, and raised his arm. Callahan believed

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<sup>4</sup> Callahan and O'Brien testified that it is their practice to "go out and conduct traffic stops and tell [drivers] why we are out there, and if it engaged in a different reaction, we build our probable cause off of that." Based on this testimony and the reasonable inferences drawn therefrom, the court finds that Callahan and O'Brien intended to investigate Vicente and not just casually chat about the recent crimes. Specifically, they intended to look for a reaction from him, on which they could "build their probable cause."

Vicente was holding a gun; therefore, Callahan took cover, un-holstered his weapon, and yelled at Vicente to drop the gun or he would shoot. Vicente said, "Fucking shoot me," turned and continued running. Callahan pursued, and when Vicente was near a playground, Callahan saw him make a throwing motion and heard a click.

At some point, Malcolm and his partner arrived on scene and saw the foot chase. Malcolm got out of his car to assist. Malcolm saw Vicente walking towards him and said, "Boston Police, put your hand ups." Vicente put his hands in the air and said, "You got me." Callahan caught up and gave Malcolm a set of handcuffs. Vicente was handcuffed and arrested. Malcolm asked Vicente whether he had a firearm and said that it would "go a long way in court" if he told him if he had a gun. Vicente answered, "I don't have the firearm on me." In light of his answer, one of the officers called for a canine unit to search for weapons. However, before the canine unit arrived, Callahan returned to the area where he had seen Vicente throw something, and he or another officer found a firearm in a leather holster on the ground.

O'Brien then took Vicente through the booking process, which included inventorying Vicente's belongings, taking his fingerprints and photograph, reading Vicente his Miranda rights, and obtaining other biographical information. O'Brien read Vicente the Miranda warnings from a print out on the station's wall. Vicente said that he understood his rights. O'Brien then demanded Vicente's license to carry a firearm, and Vicente answered, "I don't have one." Vicente then said, "You guys did your job," and "No hard feelings."

#### **RULINGS OF LAW**

Vicente's initial detention was permissible because the police had observed a civil motor vehicle infraction – the invalid inspection sticker. See Commonwealth v. Buckley, 478 Mass. 861, 865-866 (2018) (where police have observed a traffic violation, they are warranted in

stopping a vehicle). However, as with any detention of a motor vehicle, “[t]he nature of the stop . . . defines the scope of the initial inquiry by a police officer.” Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 470 (1996). “Citizens do not expect that police officers handling a routine traffic violation will engage . . . in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime.” Commonwealth v. Gonsalves, 429 Mass. 658, 663 (1999). Put another way, the police may not seize individuals during a traffic stop for any longer than is necessary, and “[p]olice authority to seize an individual ends ‘when tasks tied to the traffic infraction are—or reasonably should have been—completed’” (citations omitted). Commonwealth v. Cordero, 477 Mass. 237, 242 (2017).

Notwithstanding, the police may permissibly extend a routine traffic stop if they have “grounds for inferring that ‘either the operator or his passengers were involved in the commission of a crime . . . or engaged in other suspicious conduct’” (alterations in original). Id., quoting Commonwealth v. Torres, 424 Mass. 153, 158 (1997). “[T]o expand a threshold inquiry of a motorist and prolong his detention, an officer must reasonably believe that there is *further criminal conduct afoot*, and that belief must be based on ‘specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer’s experience’” (emphasis added). Commonwealth v. Feyenord, 445 Mass. 72, 77 (2005), quoting Commonwealth v. King, 389 Mass. 233, 243 (1983). See Torres, 424 Mass. at 154-155, 158-159 (that passenger left vehicle, without being asked to do so, on routine traffic stop provides no basis to further detain driver and passenger after issuing speeding ticket).

Here, the court must decide whether the officers – who had seized Vicente for the purpose of issuing a civil citation for lack of a valid inspection sticker – properly extended that

stop by asking Vicente about wholly unrelated crimes, for which he was not a suspect, simply to see how Vicente would react. The question is not close. The officers improperly extended the stop. See Commonwealth v. Borges, 395 Mass. 788, 793 (1985), quoting Terry v. Ohio, 392 U.S. 1, 20 (1968) (“Courts must inquire ‘whether the officer's action . . . was reasonably related in scope to the circumstances which justified the interference in the first place.’”).

Here, Vicente had done nothing to give rise to any suspicion that he had committed a crime. When told that the officers were going to issue him a ticket, Vicente was calm and respectful, produced a valid driver’s license and registration, gave a valid reason for being in the car and in the area, and did not make any furtive or other movements that gave either Callahan or O’Brien any cause for concern. See King, 389 Mass. at 244 (once driver’s and passenger’s licenses and vehicle registration verified, no grounds existed for further investigation or precautions). See also Commonwealth v. Loughlin, 385 Mass. 60, 61-63 & n.3 (1982) (where driver produced valid license and registration, subsequent search was impermissible); Commonwealth v. Ferrara, 376 Mass. 502, 504-505 (1978) (no basis to interrogate passengers after driver produced valid license and registration); Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554, 556-557 (1996) (after officer determined that there was no traffic violation and driver had produced valid license and registration, officer had no reason to issue exit orders in spite of one passenger’s earlier furtive movements); Commonwealth v. Kimball, 37 Mass. App. Ct. 604, 607 (1994) (driver stopped on suspicion that car was stolen should have been allowed to leave once he produced a valid license). It was only when Callahan learned that Vicente had been arrested for firearms offenses that he and O’Brien decided to investigate Vicente. However, the fact that Vicente had been arrested several years prior for possession of firearms is not, by itself, evidence that criminal conduct was “afoot.” Feyenord, 445 Mass. at 77. Furthermore, although

the officers mentioned the recent crimes in the area to Vicente, the officers testified that they were *not* investigating him for those crimes because Vicente was not the person of interest and the officers had no reason to believe he had anything to do with those crimes. Nevertheless, the officers extended the stop to see how Vicente would react. That conduct, however, is exactly what the Supreme Judicial Court has condemned, see Ferrara, 376 Mass. at 505, and thus, it was not constitutionally permissible to extend the stop.<sup>5</sup>

The Commonwealth, nevertheless, argues that the officers were justified in issuing the exit order when Vicente became nervous and touched the area near his waistband because those actions gave rise to a reasonable fear for the officers' safety. See Gonsalves, 429 Mass. at 664 (“[I]t does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns, and, if the basis is there, a court will uphold the order.”). That argument upends the law. Callahan and O’Brien became concerned only after and because they improperly began to investigate Vicente without a basis to do so. While the police may take steps to insure their safety, they cannot “turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion.” Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981). Put simply, the officers' suspicion arose because they impermissibly converted a straightforward motor vehicle stop into an interrogation with no reasonable suspicion to do so. Once Vicente produced a valid license and registration, the officers were obligated to issue a

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<sup>5</sup> The Commonwealth argues that the detention was not impermissibly “extended” because it would have taken only up to five minutes to write the ticket and it was Vicente’s observed nervousness that gave rise to the exit order. This argument is meritless. The constitutional prohibition against unreasonable searches and seizures does not depend on a stopwatch, and the police may neither extend *nor convert* a motor vehicle stop into an interrogation without at least reasonable suspicion of criminality, which did not exist here.



citation and depart. Cordero, 477 Mass. at 238. Thus, the exit order was the result of the wrongful extension of the stop.

The Commonwealth also argues that the firearm should not be suppressed because Vicente abandoned it during the chase. However, given the above conclusion, everything that occurred after the officers unlawfully prolonged Vicente's detention and ordered him from the vehicle must be suppressed as fruit of the poisonous tree. See Borges, 395 Mass. at 796 (defendant's attempt to dispose of evidence not "an independent, intervening act sufficient to justify a subsequent arrest where the disposal is in direct and immediate response" to illegal stop).

The court is concerned, of course, because a violent struggle and dangerous chase ensued. Although the Commonwealth did not argue that Vicente's intervening conduct purges the taint of the officers' misconduct, the court will consider that issue.<sup>6</sup> The attenuation doctrine provides that, when the connection between the underlying misconduct and the evidence has become so attenuated as to dissipate the taint of the illegal seizure, the evidence may still be admissible. Commonwealth v. Damiano, 444 Mass. 444, 452-453 (2005). Had it argued this point, the Commonwealth would bear the "burden to establish that the evidence it has obtained and intends to use is sufficiently attenuated from the underlying illegality so as to be purged from its taint."

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<sup>6</sup> The Commonwealth first raised attenuation in its post hearing brief. The defendant, not surprisingly, argues that the Commonwealth waived the issue by not raising it prior to the hearing. See Commonwealth v. Silva, 440 Mass. 772, 781-782 (2004) ("[T]he doctrine of waiver precludes the defendant from raising a fresh issue after the close of the evidence."). See also Commonwealth v. Bettencourt, 447 Mass. 631, 633 (2006) (waiver doctrine applies to the Commonwealth). The waiver doctrine, however, is most typically applied to arguments raised for the first time on appeal. Even then, both the Appeals Court and the Supreme Judicial Court retain the "discretion" to consider an issue first raised on appeal "where the questions presented are of some public importance and the outcome of the case is not changed by [the] consideration of them." Bettencourt, 447 Mass. at 633. Here, the court exercises its discretion to consider the issue of attenuation because the issue is important.

Commonwealth v. Suters, 90 Mass. App. Ct. 449, 458 (2016), quoting Damiano, 444 Mass. at 454. The Commonwealth cannot satisfy its burden.

“The attenuation doctrine does not apply merely because the defendant commits some voluntary act in response to an unlawful search or seizure.” Suters, 90 Mass. App. Ct. at 458. Rather, “[i]n determining whether the connection between the evidence and the improper conduct has become so attenuated as to dissipate the taint, the facts of each case must be examined in light of three factors: the temporal proximity of the arrest to the obtaining of the evidence; the presence of intervening circumstances; and the purpose and flagrancy of the misconduct.” Commonwealth v. Fredette, 396 Mass. 455, 460 (1985), citing Brown v. Illinois, 422 U.S. 590, 603-604 (1975). Here, all three factors weigh against the Commonwealth.

First, the events that occurred after the officers impermissibly extended the scope of the stop and forcibly removed Vicente from the car took place immediately. The third factor also weighs against the Commonwealth because it is well settled that the police may not extend or convert a straightforward motor vehicle stop except in limited circumstances. See Cordero, 477 Mass. at 238. The second factor, however, requires more discussion.

Courts have held that the intervening criminal conduct of a suspect can attenuate the taint of an illegal seizure. However, in those cases the criminal conduct at issue was unprovoked. See King, 389 Mass. at 238, 245 (driver “jumped out” of vehicle, drew a gun and fired three times at the officers). See also Suters, 90 Mass. App. Ct. at 451 (defendant pushed door into officer who was improperly entering room and scuffle ensued); Commonwealth v. Gomes, 59 Mass. App. Ct. 332, 334-338 (2003) (defendant shoved police officer who improperly entered premises by sticking his foot in the door to prevent its closure and a melee ensued); Commonwealth v.

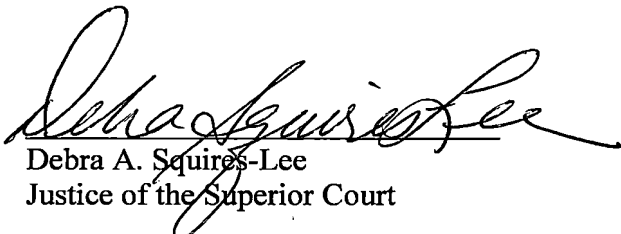
Holmes, 34 Mass. App. Ct. 916, 917-918 (1993) (defendant suddenly opened car door, slammed it against officer and fled).

Here, however, Vicente did not attack the officers. He did not assault them in response to the exit order. See Commonwealth v. Mock, 54 Mass. App. Ct. 276, 284 (2002) (unprovoked physical assault will break causal chain). Instead, he refused to exit, tried to shut the door, and asked for a supervisor. In contrast with the officers' behavior, Vicente acted calmly and rationally in the circumstances presented to him. The officers, however, forcibly removed Vicente from the car, which was, itself, an unlawful extension of the unlawful seizure, and which led to the subsequent struggle and the chase. In those circumstances, the court concludes that Vicente's conduct during the struggle and in fleeing from the police did not purge the taint of the prior illegality.<sup>7</sup>

### ORDER

For the foregoing reasons, defendant's motion to suppress is ALLOWED and all evidence and statements obtained after the police improperly extended the motor vehicle stop and issued the exit order are suppressed.

March <sup>27</sup> 2019

  
Debra A. Squires-Lee  
Justice of the Superior Court

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<sup>7</sup> There is also an issue as to whether Vicente's alleged conduct in aiming the gun at Callahan attenuates the taint of the illegal seizure. The court finds that it does not. Although Callahan believed he saw a weapon in Vicente's hand, when the firearm was located later on, the firearm was found firmly holstered. Even though the officers acted appropriately in effecting Vicente's arrest, the court finds it highly unlikely that Vicente was able to threaten Callahan with the gun and re-holster it in the very short period of time before he dropped it.