COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

SUFFOLK, ss. No. 2019-P-0499

COMMONWEALTH OF MASSACHUSETTS

v.

TYKORIE EVELYN

REPLY BRIEF FOR THE DEFENDANT ON INTERLOCUTORY APPEAL FROM THE SUFFOLK SUPERIOR COURT

K. HAYNE BARNWELL
B.B.O. 667952
ATTORNEY AT LAW
401 ANDOVER STREET
SUITE 201-B
NORTH ANDOVER, MA 01845
TEL (978) 655-5011
FAX (978) 824-7553
attorney.barnwell@gmail.com

AUG. 23, 2019

ATTORNEY FOR DEFENDANT
TYKORIE EVELYN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL/RULE AUTHORITY

OTHER AUTHORITY

ARGUMENT

I. The Commonwealth and the Superior Court fail to reckon with significant studies (including the Boston Police Department's own report showing racially discriminatory stops) and expert testimony which demonstrate that black men display behaviors indicative of stereotype threat when interacting with police officers and that officers, due to implicit and investigative bias, interpret such behaviors as suspicious.

Although the Supreme Judicial Court (SJC) did not use the words "stereotype threat" in Commonwealth v. Warren, 475 Mass. 530 (2016), it described the same dilemma faced by young, black men who want to avoid contact with police but who also worry the police will view them as criminals if they rebuff their approach. The SJC exposed what had long been buried in Article 14 jurisprudence – race matters when characterizing a black man's behavior like flight from the Boston police. "[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department (department) report documenting a pattern of racial profiling of black males in the city of Boston." Warren, 475 Mass. at 539. This report documents that "[sixty-three per cent] of Boston police-civilian encounters from 2007-2010 targeted blacks, even though blacks made up less than [twenty-five per cent] of the city's population." Id. at 539 n.13, citing American Civil Liberties Union, Stop and Frisk Report Summary, available at:

https://www.aclum.org/sites/all/files/images/education/stopandfrisk/stop_and_frisk_summary.pdf [https://perma.cc/7APK-8MG9].

As a result, a black man "might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity. Given this reality for black males in the city of Boston, a judge should, in appropriate cases, consider the report's findings in weighing flight as a factor in the reasonable suspicion calculus." Warren, 475 Mass. at 540. The Superior Court offered no reason why it did not consider the BPD report's findings in weighing Mr. Evelyn's flight or his other behaviors. In Warren, the SJC did not find explicit bias on the part of the particular officers, but did find a general pattern of racial profiling by BPD officers, meriting heightened scrutiny of using the black defendant's flight from BPD police as a factor weighing in favor of reasonable suspicion. The BPD's pattern of racial profiling, which has not since improved with exposure (see Def. Br. pp. 66-74 (Addendum)), merits the same, if not more, scrutiny when applied to Mr. Evelyn's behaviors such as his flight. The SJC also directed the lower courts to consider the BPD report's findings in "appropriate cases", not cases that are exact replicas of the factual scenario in Warren. This is just such an "appropriate" case where it shares factual similarities with Warren and where the defense directly challenged any reasonable suspicion finding due, in part, to the BPD's history of racial profiling causing young, black men in Boston to

behave in ways consistent with stereotype threat.

The defense presented studies and reports as well as Dr. Sweet's expert testimony, which exposed another facet of stereotype threat beyond flight. When interacting with police, black people – far more often than white people - fear that the officer(s) will stereotype him/her because of his/her race. (RA I:211-214; T I:43). As a result of that fear, black people are far more likely to exhibit behaviors like hyper-vigilance and aversion of gaze. (RA I:212-214,231-233; T I:45-47,61). Yet the BPD trains its officers to consider such behavioral cues as characteristics of an armed gunman. (RA I:175-177; T I:42-63). Like the Superior Court, the Commonwealth entirely ignores this evidence about stereotype threat as well as police officers' tendencies towards implicit and investigative bias rather than objective criteria when gauging a black person's behavior. (See Comm. Br. pp. 31-32). It is one thing not to "weigh the evidence to the satisfaction of a particular party," Commonwealth v. O'Brien, 432 Mass. 578, 587 (2000). It is quite another not to weigh reliable evidence, admitted without objection, at all. Furthermore, Dr. Sweet's reliance upon these and other studies, which she did not author, when addressing the issues of implicit bias and stereotype threat, was proper expert testimony. An expert's "reliance on treatises and literature not in evidence [is] proper opinion testimony[.]" Commonwealth v. Durand, 475 Mass. 657, 670 (2016). See also Commonwealth v. McNickles, 434 Mass. 839, 855-856 (2001).

Dr. Sweet testified that the BPD's training about so-called armed gunmen characteristics rests upon no objective or reliable criteria. (T I:50-52,71). The Commonwealth counters by misconstruing Dr. Sweet's testimony: "She did not testify that armed individuals do not display certain characteristics. Indeed, to the contrary, Dr. Sweet testified that there is a study from the Naval Research Lab which supported the opposite[.]" (Comm. Br. p. 33). It omits Dr. Sweet's further testimony: "There was a report published by the Naval Research Laboratory but that was completely anecdotal. It's not based on any kind of science. It's not evidence based. What they did was convene law enforcement officers who told anecdotally, hey, here's what it looks like when somebody is concealing a weapon. And they introduced this language of bladed stance." (T I:51). Officer Garney thus received wholly inadequate training, in the form of a PowerPoint presentation at least partly derived from an anecdotal Naval Research Laboratory study, to support a reliable association between certain behaviors and the illegal concealment of a firearm. Officer Abasciano's training in this area was even more deficient as it involved no formal presentation, but a police captain showing him still photographs of "groups of gentlemen" who displayed unspecified "body language" and "body behavior." (T II:53).

The Commonwealth also misconstrues Mr. Evelyn's brief as "arguing…that reasonable suspicion can only be established via a method that social science has

established as reliable under [Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993)/Commonwealth v. Lanigan, 419 Mass. 15 (1994)]." (Comm. Br. p. 33). Mr. Evelyn's argument is actually that before the Superior Court, as here, relies upon the officers' training and experience and accepts their opinions about otherwise ambiguous behaviors (like a black man looking away from, turning away from, or fleeing from police in Boston), the officers' qualifications and expert opinions must meet a reliability standard before they are either admissible or considered competent evidence. "[A] prosecutor who elicits from a police officer his or her special training or expertise in ascertaining [a conclusion] risks transforming the police officer from a lay witness to an expert witness on this issue, and the admissibility of any opinion proffered on this issue may then be subject to the different standard applied to expert witnesses." Commonwealth v. Canty, 466 Mass. 535, 542 n.5 (2013). Mr. Evelyn is also not arguing that social science provides the *only* reliable method by which to opine that certain behaviors indicate concealment of a weapon. Instead, he argues that the Commonwealth, which bears the burden to justify this warrantless seizure and is a proponent of this expert opinion evidence, must demonstrate, by some means, a reliable method by which an officer may opine that certain behaviors are associated with the illegal concealment of a firearm.

The Commonwealth still proffers no method, much less a reliable one. An evidence-free PowerPoint presentation, an ad-hoc training about "body behavior" in still photographs and Officer Abasciano's gun arrests (of dubious number and without context) do not fill the reliability gap. None of the cases, upon which the Commonwealth relies to argue that officers may testify to the "significance" of their observations, involve a challenge to the adequacy of the officers' training and experience or to the reliability of their opinions or methods. (See Comm. Br. pp. 34-35). "Observation informed by experience is but one scientific technique that is no less susceptible to Lanigan analysis than other types of scientific methodology." Canavan's Case, 432 Mass. 304, 313 (2000).

The Threat Study, other studies and Warren itself dismantle long-held police assumptions about behavior particularly by young, black men. By contrast, the "Characteristics of Armed Gunmen Overview" PowerPoint, presenting random and evidence-free factors by which to suspect a person is armed, resembles a "'drug courier profile,' a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics." Reid v. Georgia, 448 U.S. 438, 440 (1980). In Reid, the U.S. Supreme Court held that such characteristics, like only carrying shoulder bags after arriving to an airport and concealing from an agent with whom one is traveling, were insufficient to establish reasonable suspicion under the Fourth Amendment because they would "describe a very large

category of presumably innocent travelers[.]" Reid, 448 U.S. at 440-441. The BPD's creation of an "armed gunman" profile, which could describe a "very large category" of innocent black men, combined with the BPD's long history of racial profiling, likewise undermine a reasonable suspicion finding in this case.

Finally, the Commonwealth argues that the Daubert/Lanigan analysis only applies to expert opinion testimony offered at trial. (Comm. Br. p. 34). This is a curious argument since the Commonwealth challenged Dr. Sweet's qualifications on Daubert/Lanigan grounds for purposes of the suppression hearing. The Superior Court fully assessed her qualifications and the methodology of the Threat Study per Daubert/Lanigan and found her expert testimony admissible. (Def. Br. pp. 101-102 (Addendum)). The Court took a similar path to the Sixth and Seventh Circuit Courts of Appeal where they applied Daubert to the suppression context. "Even at a suppression hearing, the district court must always consider any proffered expert's qualifications and determine, in its discretion, what weight to afford that expert's testimony…This determination, however, will typically follow the presentation of an expert's testimony, rather than precede it." United States v. Stepp, 680 F.3d 651, 669-670 (6th Cir. 2012) (holding that defendant's proffered expert "lacked the necessary qualifications to offer even minimally credible or reliable testimony on the subject of dogs sniffing for narcotics"). See also United States v. Ozuna, 561 F.3d 728, 736-737 (7th Cir. 2009) (after hearing expert

testimony at suppression hearing, judge properly weighed credibility and reliability of expert's opinions, choosing to reject some but not all of his handwriting analyses) and United States v. Posado, 57 F.3d 428, 432-434 (5th Cir. 1995) (applying Daubert to the admissibility of polygraph evidence in suppression hearings).

In Massachusetts, although the law of evidence does not apply with full force at a motion to suppress, the evidence presented at the suppression hearing must be reliable. See Commonwealth v. Monteiro, 93 Mass. App. Ct. 478, 485 (2018) (determining whether confidential informant provided sufficiently reliable information to support the magistrate judge's probable cause determination) and Mass. Guide Evidence § 1101(d) (2018). The Reporter's Note to Section 1101(d) states: "While out-of-court statements are admissible as to the determination of probable cause or the justification of government action, other evidence that would be incompetent under the rules of evidence is not admissible at suppression hearings or other proceedings in which probable cause is challenged."

Here, the Superior Court weighed the expert and reliability issues and determined the admissibility of such evidence after first hearing the testimony. The Court's error was not in the procedure by which it considered opinion testimony, but in the substance of its conclusions that Dr. Sweet's testimony was "unhelpful" and that Officer Abasciano and Officer Garney were simply relaying lay opinions.

(See Def. Br. pp. 50-54). As to the latter finding, where the two officers relied upon their specialized training and experience to inform their opinions and beliefs, "[t]he Daubert inquiry…'applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.'" Commonwealth v. Camblin, 471 Mass. 639, 643 n.9 (2015), quoting Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). Compare Commonwealth v. Cintron, 435 Mass. 509, 521 (2001) (prosecution lay sufficient foundation for lay testimony that defendant was a gang member since the witness had earlier learned of his gang membership while in jail with him and had seen the defendant with gang members). The officers' speculative leaps about human behavior, such as their testimony that a person turning away from police indicates "blading" or concealing something from police, which a layperson could not rationally perceive, constituted unreliable and incompetent evidence.

II. The Commonwealth ignores the fact that the BPD's history of racial profiling affects a black boy's behavior when responding to a BPD officer's advances. It also downplays the level of intimidation that a reasonable black boy feels when BPD officers continue to shadow, surveil and question him despite his efforts to avoid them.

Young black men avoiding BPD officers is normal behavior given the BPD's long history of racially profiling them in Boston. The Commonwealth's casting of factors like Mr. Evelyn's nervousness, his refusal to speak with the police, his "clutching an object" while he "bladed his body to the left side", and his

"evasive refusing to make eye contact" with police (see Comm. Br. pp. 39-44) comprises its attempt to negatively spin a black boy's natural desire to avoid contact with white, BPD officers. Compare Commonwealth v. Martin, 457 Mass. 14, 20 (2010) ("Because it was within the defendant's right to ignore questions posed by the officers, his refusal to answer Officer Henriquez's question concerning whether he had a weapon cannot provide reasonable suspicion for his seizure.") with Commonwealth v. Alvarado, 420 Mass. 542, 551 (1995) (defendant continuously lied about putting something in his pants where the officer had seen him put a glassine bag in his pants and then gave the officer a falsified license and false social security number).

Mr. Evelyn's ultimate flight when Officer Garney signaled a further encroachment upon his liberty was not only an innocent behavior but one that exercised his right to be left alone. In Warren, the SJC noted the "factual irony" in the prior case law which acknowledged the right of individuals to avoid contact with police but then also held their exercise of that right against them in the reasonable suspicion analysis. Warren, 475 Mass. at 538. It resolved this internal conflict as follows: "Where a suspect is under no obligation to respond to a police officer's inquiry, we are of the view that flight to avoid that contact should be given little, if any, weight as a factor probative of reasonable suspicion. Otherwise, our long-standing jurisprudence establishing the boundary between consensual and

obligatory police encounters will be seriously undermined." Id. at 539. As in Warren, this Court should give no weight to Mr. Evelyn's avoidance of BPD officers, including his flight from them.

When determining the moment of seizure, the Commonwealth does not recognize the intimidating nature of this police surveillance and shadowing especially as imposed upon a young, black man walking alone at night on a Roxbury street. (See Comm. Br. p. 37). The Commonwealth argues that "[t]here was never a request from the officers that the defendant do anything." (Comm. Br. p. 41). However, Officer Garney's exiting his cruiser would signal to any reasonable person who has been rebuffing officer questioning and walking away from them that the police are now pursuing him/her until they get answers. As in Meneus, an officer can show his authority by words *or* actions. See Commonwealth v. Meneus, 476 Mass. 231, 235 (2017). The Commonwealth never addresses whether the "reasonable person" or "free-to-leave" test for purposes of seizure should account for that person's age and race. (See Def. Br. pp. 41-44). Thus, it has waived argument on this issue. See Mass. R. App. 16(a)(4); Commonwealth v. Clemente, 452 Mass. 295, 308 n.20 (2008). "To the extent that the application of the free-to-leave test avoids this racial difference, masks it, or both, it legitimizes racial asymmetries in people's vulnerability to and perceptions of police authority. In other words, eliding the ways in which race structures how

people interact with and respond to the police leaves people of color in a worse constitutional position than whites." Carbado, Eracing the Fourth Amendment, 100 Mich. L. Rev. 946, 1002-1003 (March 2002).

Finally, despite the defense presenting an ample record on same, the Commonwealth asserts that "without any factual basis for asserting that race played a part in the case, the defendant argues that the Court must consider the 'reality of being black in Boston,' (D.Br.44)[.]" (Comm. Br. p. 44). Even setting aside the defense record, the Commonwealth need only turn to the BPD's own report which relays the statistics confirming their racially discriminatory policing. Or it could simply read the SJC's own serious consideration of race in Warren and its reasoning that "the finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt." Warren, 475 Mass. at 540. The Commonwealth may, for purposes of Article 14's protections, continue to ignore the reality of BPD officers disproportionately (by wide margins) stopping and frisking young, black men. It may ignore the effects of racially discriminatory (and at times fatal) policing upon young, black men. It may ignore studies confirming investigative bias and implicit racial bias on the part of police generally. But this reality will not disappear. In Warren, the SJC took the first step in weighing "this

reality for black males in the city of Boston," Warren, supra at 540, as part of the reasonable suspicion analysis. It should not be the last step.

CONCLUSION

For the above reasons and those presented in his principal brief, this Court should reverse the Superior Court's order denying his motion to suppress and enter an order allowing it. Alternatively, it should remand the matter to the Superior Court for further findings and/or hearing.

Date: August 23, 2019

Respectfully Submitted,

TYKORIE EVELYN

By His Attorney:

/s/ K. Hayne Barnwell
K. Hayne Barnwell
BBO # 667952
401 Andover Street, Ste. 201-B
North Andover, MA 01845
TEL: 978-655-5011
FAX: 978-824-7553
attorney.barnwell@gmail.com

SUPPLEMENTAL ADDENDUM

Massachusetts Guide to Evidence (2018 Edition)

ARTICLE XI. MISCELLANEOUS SECTIONS

Section 1101. Applicability of Evidentiary Sections

(a) Proceedings to Which Applicable. Except as provided in Subsection (c), these sections apply to all actions and proceedings in the courts of the Commonwealth.

(b) Privileges. The provisions of Article V apply at all stages of all actions, cases, and proceedings.

(c) Where Inapplicable. These sections (other than those concerning privileges) do not apply in the following situations:

(1) Preliminary Determinations of Fact. The determination of questions of fact preliminary to the admissibility of evidence when the determination is to be made by the judge under Section 104(a).

(2) Grand Jury Proceedings. Proceedings before grand juries.

(3) Certain Other Proceedings. Most administrative proceedings; bail proceedings; bar discipline proceedings; civil motor vehicle infraction hearings; issuance of process (warrant, complaint, capias, summons); precomplaint, show cause hearings; civil commitment pro-ceedings for alcohol and substance abuse; pretrial dangerousness hearings; prison discipli-nary hearings; probation violation hearings; restitution hearings; sentencing; sexual offender registry board hearings; small claims sessions; and summary contempt proceedings.

(d) Motions to Suppress. The law of evidence does not apply with full force at motion to suppress hearings. As to the determination of probable cause or the justification of government action, out-of-court statements are admissible.

NOTE

[…]

Subsection (d). This subsection is derived from United States v. Matlock, 415 U.S. 164, 172-175 (1974), and Commonwealth v. Young, 349 Mass. 175, 179 (1965). While out-of-court statements are admissible as to the determination of probable cause or the justification of government action, other evidence that would be incompetent under the rules of evidence is not admissible at suppression hearings or other proceedings in which probable cause is challenged. If a defendant testifies at a motion to suppress hearing and subsequently testifies at trial, his or her testimony from the motion to suppress hearing may be used to impeach his or her credibility at the later trial. Commonwealth v. Rivera, 425 Mass. 633, 637-638 (1997).

CERTIFICATE OF SERVICE

I, Kathryn Hayne Barnwell, certify that on August 23, 2019, I served by e-mail, one copy of the foregoing Brief, to:

ADA Cailin Campbell
Suffolk District Attorney's Office
One Bulfinch Place
Boston, MA 02114

/s/ Kathryn Hayne Barnwell
Kathryn Hayne Barnwell

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief and appendix in this matter comply with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs and word limitations in briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers). The Brief was produced, using Microsoft Word for Mac Version 16.16.8, in proportional font and the non-excluded sections consist of 2,934 words (or less than the maximum of 4,500 words).

/s/ Kathryn Hayne Barnwell
Kathryn Hayne Barnwell