19-P-1200 Appeals Court

COMMONWEALTH vs. JEFFREY J. VELLUCCI.

No. 19-P-1200.

Middlesex. June 3, 2020. - August 17, 2020.

Present: Kinder, Neyman, & McDonough, JJ.[1]

Motor Vehicle, Operating under the influence. Alcoholic Liquors, Motor vehicle. Evidence, Intoxication, Field sobriety test, Result of illegal interrogation. Constitutional Law, Result of illegal interrogation, Arrest. Arrest. Practice, Criminal, Motion to suppress.

Complaint received and sworn to in the Woburn Division of the District Court Department on April 20, 2016.

A pretrial motion to suppress evidence was heard by Marianne C. Hinkle, J.; and the case was heard by Shelley M. Joseph, J.

Nelson P. Lovins for the defendant.
Timothy Ferriter, Assistant District Attorney, for the Commonwealth.

[1] Justice McDonough participated in the deliberation on this case while an Associate Justice of this court, prior to his reappointment as an Associate Justice of the Superior Court.

KINDER, J. Following a jury-waived trial in the District Court, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor, G. L. c. 90, § 24 (1) (a) (1).[2] On appeal, he claims error in the order denying his motion to suppress his statements. We affirm.

Background. The following facts are drawn from the motion judge's findings and from undisputed facts in the record that were implicitly credited by her. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 436 (2015). On April 19, 2016, at 11:20 P.M., Wilmington Police Officer Dillon Halliday observed a black Cadillac stopped on the side of Lowell Street. Lowell Street has two marked lanes and the speed limit at that location is thirty-five miles per hour. Officer Halliday observed that the Cadillac was stopped on the fog line, that the engine was running, that one of the headlights was out, and that the driver's side front tire "was completely blown away." A man, later identified as the defendant, was sitting in the driver's seat. Officer Halliday stopped his cruiser behind the Cadillac, activated his emergency lights, and reported his location to the police dispatcher.[3]

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[2] Following the conviction, the defendant admitted that he had previously been convicted of a like offense in New Hampshire. He pleaded guilty to so much of the complaint as alleged that he was a second and subsequent offender.

Officer Halliday observed the defendant grab the door frame of the Cadillac, pull himself up and out of the Cadillac, and start to walk toward the cruiser. Officer Halliday directed the defendant to get back in his car. The defendant continued walking toward the cruiser. The defendant appeared to be "frustrated and aggressive." "[H]e was waving his arms around" and yelling something that Officer Halliday could not understand. The defendant stumbled as he did so. Officer Halliday again told the defendant to get back in his car. The defendant continued walking toward Officer Halliday, "and it appeared to Officer Halliday that the defendant was becoming more aggravated." At that time, Officer Halliday told the defendant that he was going to place him in handcuffs "for his own safety and for the defendant's safety based upon the way that the defendant was behaving." The defendant cooperated by placing his hands behind his back as Officer Halliday handcuffed him.

Officer Halliday pat frisked the defendant, confirmed that he was not armed, and then asked the defendant, "[W]hat happened, what was going on?" The defendant stated "that he was

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[3] At about the same time, the dispatcher broadcast that officers should be on the lookout for a black sedan that had reportedly been involved in a hit and run accident. When other officers later arrived on the scene to support Officer Halliday, they informed Officer Halliday that the defendant's Cadillac was the vehicle referred to in the dispatcher's broadcast.

a CPA and that he went out with colleagues to celebrate the end of the tax season." The defendant also said "that he had a couple of beers and that he made a mistake." Officer Halliday observed that the defendant was unsteady on his feet, his eyes were bloodshot, his speech was slurred, and his breath smelled of alcohol.

The defendant agreed to perform field sobriety tests and Officer Halliday removed the handcuffs. After Officer Halliday administered the horizontal gaze nystagmus test, "the defendant stated that he was a good guy and he just had made a mistake." As Officer Halliday explained the nine-step walk and turn test, "the defendant stated that the officers were out to get him and that they were just out to have a good time." When the defendant refused to perform further field sobriety tests, Officer Halliday placed him under arrest for operating a motor vehicle while under the influence of intoxicating liquor.

Discussion. We accept the judge's factual findings unless they are clearly erroneous, see Commonwealth v. Welch, 420 Mass. 646, 651 (1995), but we "make an independent determination of the correctness of the judge's application of constitutional principles to the facts." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

The defendant claims that his motion to suppress should have been allowed because he was effectively under arrest at the

moment he was handcuffed, that the arrest was without probable cause, and that all the evidence gathered after that point was the product of his unlawful arrest. In determining whether the defendant was under arrest, we consider "whether the intrusiveness of the seizure was proportional to the degree of suspicion that prompted the intrusion." Commonwealth v. Borges, 395 Mass. 788, 793 (1985). More specifically, we consider "the length of the encounter, the nature of the inquiry, the possibility of flight, and, most important, the danger to the safety of the officers or the public or both" (citations omitted).[4] Commonwealth v. Willis, 415 Mass. 814, 820 (1993). "The use of handcuffs is not dispositive on the question whether and when a stop has been transformed into an arrest." Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 744 (2018).

Here, Officer Halliday was alone at night when he observed the defendant's damaged car parked on the fog line on the side of the road with the engine running. The defendant ignored Officer Halliday's repeated commands to get back in his car and stumbled as he approached Officer Halliday, waving his arms in an apparently aggressive state. As Officer Halliday engaged the defendant, the defendant became "more aggravated." In light of

[4] The defendant does not dispute that Officer Halliday had reasonable suspicion to approach the defendant's car and conduct a threshold inquiry.

these factual findings, which have support in the record, we discern no error in the judge's conclusion that Officer Halliday's safety concerns justified temporarily handcuffing the defendant to facilitate further investigation. See Commonwealth v. Feyenord, 445 Mass. 72, 77 (2005), cert. denied, 546 U.S. 1187 (2006) (limited restraint of motorist justified if commensurate with purpose of stop); Galarza, 93 Mass. App. Ct. at 744. See also Commonwealth v. Santiago, 93 Mass. App. Ct. 792, 795 (2018) (officers not required to gamble with their personal safety [quotation omitted]). Where the use of handcuffs was "limited in duration and necessary to complete the inquiry," Officer Halliday's conduct was reasonable and did not convert the investigatory detention into an arrest. Commonwealth v. Williams, 422 Mass. 111, 119 (1996).

The defendant also argues that his statements should have been suppressed because he was subjected to custodial interrogation before being advised of his rights under Miranda v. Arizona, 384 U.S. 436, 467-468 (1966). It is well settled that Miranda warnings are necessary only when a defendant is subject to custodial interrogation, Commonwealth v. Jung, 420 Mass. 675, 688 (1995), and that it is the defendant's burden to prove custody. Commonwealth v. Larkin, 429 Mass. 426, 432 (1999). "Justifiable safety precautions, such as handcuffing a suspect . . . , may create a level of coercion equivalent to

formal custody without transforming the Terry [v. Ohio, 392 U.S. 1 (1968),] stop itself into an arrest." Commonwealth v. Haskell, 438 Mass. 790, 795 n.1 (2003). "The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody. . . . [I]f the defendant reasonably believed that he was not free to leave, the interrogation occurred while the defendant was in custody, and Miranda warnings were required." Commonwealth v. Groome, 435 Mass. 201, 211 (2001), quoting Commonwealth v. Damiano, 422 Mass. 10, 13 (1996).

As a general rule, persons temporarily detained during an ordinary traffic stop are not in custody for purposes of Miranda, even though they may not feel free to leave. See Berkemer v. McCarty, 468 U.S. 420, 435-440 (1984); Commonwealth v. Ayre, 31 Mass. App. Ct. 17, 20 (1991). The question we confront is whether Officer Halliday's decision to temporarily restrain the defendant with handcuffs transformed an ordinary traffic stop into one that was custodial in nature such that Miranda warnings were required. We conclude that under the circumstances here, it did not.

In determining whether the defendant was in custody for Miranda purposes, we consider "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person

is a suspect; (3) the nature of the interrogation . . . ; and (4) whether . . . the person was free to end the interview . . . as evidenced by whether the interview terminated with an arrest." Groome, 435 Mass. at 211-212. The fourth factor was recently revised by the Supreme Judicial Court in Commonwealth v. Matta, 483 Mass. 357, 363 (2019). We now consider "whether, in the circumstances, a reasonable person would believe that an officer would compel him or her to stay." Id. "Rarely is any single factor conclusive." Commonwealth v. Cawthron, 479 Mass. 612, 618 (2018), quoting Commonwealth v. Bryant, 390 Mass. 729, 737 (1984).

We recently applied these factors in a case where the defendant was questioned while handcuffed during a traffic stop. In Commonwealth v. Spring, 96 Mass. App. Ct. 648, 651-652 (2019), we concluded that a motion to suppress statements should have been allowed where the defendant was removed from his car, handcuffed, placed in the back of a police cruiser, and questioned regarding documentation for a firearm and ammunition found in his car during an inventory search. There, we held that the defendant was subject to custodial interrogation because all of the Groome factors favored the defendant. Id. The back seat of the police cruiser was a coercive location in which to question the defendant. Id. at 651. The questions regarding firearms licensure conveyed the officer's suspicion

that the defendant had committed a crime,[5] and the defendant was arrested after he admitted that he had no license or firearms identification card. Id. at 651-652.

Application of the Groome factors in this case compels a different result. Here, the location was not coercive because the questioning occurred on a public street where the defendant had stopped his vehicle and approached Officer Halliday. There was no evidence that Officer Halliday communicated to the defendant that he was suspected of any criminal activity. Even as he restrained the defendant with handcuffs, Officer Halliday explained that he was doing so only for safety reasons. The questions that followed -- "[W]hat happened, what was going on?" -- were brief and investigatory rather than accusatory in nature. See Commonwealth v. Kirwan, 448 Mass. 304, 311 (2007) (questioning of general fact-finding nature is investigatory rather than accusatory and does not require Miranda warnings). Moreover, the defendant's arrest did not immediately follow his statements. Rather, the handcuffs were removed to facilitate the defendant's performance of field sobriety tests. The defendant was advised that he was under arrest only after he performed one test and refused to complete the rest.

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[5] The interrogating officer already knew that the defendant had no license for the firearm and ammunition. Spring, 96 Mass. App. Ct. at 652.

Considering all of these factors, we discern no error in the judge's conclusion that the defendant was not in custody when he responded to Officer Halliday's questions. Accordingly, Miranda warnings were not required.

Finally, we agree with the judge that "[t]he defendant's later statements, that he was a good guy," that he just "made a mistake," "and that he was just out to have a good time, were" not prompted by questions from the police. Statements that are volunteered by the defendant are not the subject of custodial interrogation. See Commonwealth v. Diaz, 422 Mass. 269, 271 (1996). For all of these reasons, we conclude that there was no error in the denial of the defendant's motion to suppress his statements.

Judgment affirmed.