19-P-1707 Appeals Court

COMMONWEALTH vs. SERGEY A. SARGSYAN.

No. 19-P-1707.

Middlesex. September 17, 2020. - January 27, 2021.

Present: Henry, Lemire, & Shin, JJ.

Controlled Substances. Motor Vehicle. Constitutional Law, Search and seizure. Search and Seizure, Emergency, Automobile, Threshold police inquiry. Practice, Criminal, Motion to suppress.

Complaint received and sworn to in the Newton Division of the District Court Department on January 20, 2015.

A pretrial motion to suppress evidence was heard by Mary Elizabeth Heffernan, J., and the case was tried before Dennis J. Curran, J.

Adriana Contartese for the defendant.
Timothy Ferriter, Assistant District Attorney, for the Commonwealth.

LEMIRE, J. A District Court jury convicted the defendant of possession of a class A substance.[1] On appeal, his sole argument is that the motion judge[2] erred in denying his motion to suppress because the police officer exceeded the scope of the community caretaking function. We affirm the judgment.

Suppression hearing. We summarize the officer's testimony, which was credited by the judge.[3] On January 16, 2015, at approximately 8 P.M., Newton Police Officer John Bergdorf[4] was dispatched to a small dead-end road to check on the well-being of the occupant of a car that had been parked with its motor running "for quite some time." It was a cold and dark night. When the officer arrived at the scene, the car's engine was running and its headlights were on. He walked up to the car and saw one person, who appeared to be asleep, in the driver's seat. This person later was identified as the defendant. The officer

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[1] The defendant also was charged with operating a motor vehicle while under the influence of a narcotic drug. The jury found him not guilty of that offense.

[2] The motion judge was not the trial judge.

[3] The judge denied the motion in a margin endorsement that stated: "After hearing, and crediting the testimony of Officer Bergdorf . . . , the motion is DENIED." As the judge did not make findings of fact, we take the facts from the officer's testimony.

[4] Officer Bergdorf was accompanied by another officer, who did not testify at the hearing.

knocked on the window "many times" to wake the defendant. When that did not get the defendant's attention, he knocked harder on the door. After one or two minutes, the defendant "[p]ut up his hand and waved [the officer] away." The officer then knocked on the door again and asked the defendant to lower the window.

After the defendant lowered the window, the officer asked the defendant for his license to verify who he was and to "make sure the car was valid in his name."[5] The defendant was slow to get his license and attempted to give credit cards to the officer. The defendant seemed very confused and his speech was slurred and slow. The officer asked the defendant where he was, where he was going, and where he was coming from. The defendant was unable to answer the questions; any statements the defendant did provide were not appropriate to the questions. The defendant's eyes were bloodshot, but the officer did not smell alcohol on the defendant.

After the defendant gave his license to the officer, the officer asked the defendant for his registration. When the defendant bent over to get his registration from the glove compartment, the officer noticed the handle of a knife tucked inside the waistband of the defendant's jeans. The officer, for

[5] The officer testified that his request for the defendant's license and registration was for "officer safety."

"officer safety," then asked the defendant to step out of the car. After the defendant got out of the car, the officer asked him if he had weapons on him; the defendant responded, "No." For safety reasons, the officer placed the defendant in handcuffs and conducted a patfrisk, which yielded a knife. Earlier, while the defendant was getting out of the car, the officer saw a syringe on the seat underneath where the defendant had been sitting and the corner of a baggie, or "corner baggie," containing a brown powdery substance in the car's center console. The officer knew from his training that the corners of baggies are used to hold and distribute drugs. After the officer saw the baggie, the defendant was placed under arrest, read his rights, and searched. A small ball of steel wool used to smoke drugs was found on the defendant and a small glass pipe was found in the car.

Discussion. When reviewing a decision on a motion to suppress, we "conduct an independent review of [the] ultimate findings and conclusions of law." Commonwealth v. Medina, 485 Mass. 296, 300 (2020), quoting Commonwealth v. Cawthron, 479 Mass. 612, 616 (2018). The defendant argues that the community caretaking function[6] ended before the officer requested that the

[6] On appeal, the defendant does not contest that the encounter began as an appropriate community caretaking inquiry.

defendant lower his window and show his driver's license and registration. Thus, according to the defendant, the officer's requests resulted in the defendant's seizure and all evidence subsequently obtained should have been suppressed. We disagree.

Community caretaking function. "Local police officers are charged with 'community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" Commonwealth v. Evans, 436 Mass. 369, 372 (2002), quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973). When performing this function, an officer may "stop individuals and inquire about their well-being, even if there are no grounds to suspect . . . criminal activity." Commonwealth v. Knowles, 451 Mass. 91, 94-95 (2008). The function applies "to a range of police activities involving motor vehicles . . . in which there are objective facts indicating that a person may be [in] need of medical assistance or some other circumstance exists apart from the investigation of criminal activity that supports police intervention to protect an individual or the public." Commonwealth v. Fisher, 86 Mass. App. Ct. 48, 51 (2014). Under the community caretaking function, an officer may, without reasonable suspicion of criminal activity, approach and detain citizens for community caretaking purposes. See Commonwealth v. Lubiejewski, 49 Mass. App. Ct. 212, 216 (2000). In addition, "[a]n officer may take

steps that are reasonable and consistent with the purpose of his inquiry, . . . even if those steps include actions that might otherwise be constitutionally intrusive." Knowles, supra at 95.

Here, the defendant first contends that the community caretaking function ended when the defendant indicated by waving his hand that he did not need help. First, we do not agree that, viewed objectively, the defendant's gesture indicated that he did not need help. See Fisher, 86 Mass. App. Ct. at 51 (objective facts must support community caretaking inquiry). On direct examination, the officer testified that the defendant "[p]ut up his hand and waved us away." On cross-examination, the officer testified that the wave "[c]ould be" an indication that the defendant was okay. Compare Evans, 436 Mass. at 374 (rejecting defendant's argument that trooper's request for license and registration was seizure because defendant had effectively denied need for assistance when answering trooper's question, "What are you doing?," by responding, "Nothing").

However, even if we assume that the defendant's gesture signaled that he was okay, we are not persuaded by his argument that his case is governed by Commonwealth v. Quezada, 67 Mass. App. Ct. 693 (2006), S.C. 450 Mass. 1030 (2008). In Quezada, the defendant, who was on foot and appeared to be impaired and possibly injured, was being assisted by another person known to the officer, who was in plain clothes and driving an unmarked

vehicle. Id. at 694. When the officer, without identifying himself as a police officer, gestured to the two and asked if he could speak with them, the defendant ran. Id. The court concluded that although the officer would have been warranted in offering aid, in those circumstances the officer exceeded the scope of the community caretaking function by chasing the defendant and ordering him to stop. Id. at 695. The court also noted that the defendant was not operating a motor vehicle, which could have posed a potential danger to the public. Id.

Here, in contrast, the defendant was found alone, on a cold, dark January evening, and he appeared to be sleeping while seated in the driver's seat of a car that was running. It took one or two minutes of the officer tapping on the window and then knocking harder on the door before he got the defendant's attention. Given the disparate facts, Quezada does not support the defendant's argument. Rather, the facts in the defendant's case are more like those in Commonwealth v. Murdough, 428 Mass. 760 (1999). In Murdough, the court concluded that the officers, as part of their community caretaking functions, acted reasonably in requesting that the defendant get out of his vehicle where it was a cold January morning, the defendant was found sleeping in the vehicle, and the officers had difficulty rousing the defendant. Id. at 761-762.

We also reject the defendant's arguments that the community caretaking function ended because the officer, as characterized by the defendant, thought the defendant was in "good shape," and because the car was not disabled since its engine was running. Although the officer testified that up until he asked the defendant to get out of the car, he had no concerns about the defendant's ability to operate the car, when the officer was asked to clarify his response, he testified that, while he did not smell alcohol, he did notice the defendant's bloodshot eyes and slow speech, and that he "did not know at that point" whether the defendant was unable to drive. There are conditions other than intoxication due to alcohol or drugs, however, that could have affected the defendant's ability to drive, e.g., medical related conditions. Neither the defendant's apparent sobriety, nor the car's running engine, extinguished the need for the community caretaking inquiry to continue.

Further, the officer's requests were appropriate to the community caretaking inquiry -- they did not result in the defendant's seizure. The request that the defendant lower the window did not constitute a seizure. Compare Murdough, 428 Mass. at 764-765 (officers' request that defendant step outside vehicle so they could observe his physical condition did not go beyond community caretaking function). Nor did the officer's subsequent requests to view the defendant's license and

registration constitute a seizure.[7] "When performing community caretaking functions involving a . . . vehicle, a police officer [may be] justified in asking for a driver's license and registration. . . . Such a request is a minimal intrusion on the defendant's rights and does not involve an improper seizure." Commonwealth v. Mateo-German, 453 Mass. 838, 843 (2009). See and compare Evans, 436 Mass. at 374-376 (ruling that seizure did not occur when officer performing community caretaking function requested license and registration of motorist). Although a community caretaking inquiry "may ripen into a seizure," it did not do so here. Mateo-German, supra at 842.

Conclusion. In the circumstances of this case, we conclude that the officer's requests that the defendant lower the window and show his license and registration fell within the scope of the community caretaking function and did not result in an

[7] The officer did not testify that he retained the defendant's license and returned to his cruiser to check its status or run the defendant's name for warrants. Contrast Commonwealth v. Lyles, 453 Mass. 811, 815-816 (2009) (where officer requested defendant's identification and took it from him, not just to view information and verify defendant's identity, but to check for warrants without defendant's consent, retention of identification to perform check was implicit command that defendant remain, resulting in transformation of what began as consensual encounter into seizure).

unlawful seizure. We see no error in the order denying the motion to suppress.

Judgment affirmed.

HENRY, J. (dissenting). I agree that in the circumstances here, the police officer properly exercised his community caretaking function when he approached the defendant's vehicle. I also assume that although the defendant waved the officer off, the officer could ask the defendant to lower his window so they could speak. When the officer asked no questions about the defendant's well-being and instead immediately asked the defendant for his driver's license and registration, however, the encounter became an unjustified stop. Therefore, I respectfully dissent.

Background. When Newton Police Officer John Bergdorf roused the defendant, the defendant "attempted to wave [the officer] off." The officer unequivocally testified that he understood the defendant "was indicating that he was able to drive" and that "he was awake." The officer asked the defendant to roll down his window, which he did. The officer testified that at that point, the defendant was not violating any criminal law. The first thing the officer asked of the defendant was to produce his driver's license and registration. The officer wanted to verify who the defendant was and "make sure the car was valid in his name."

At the time the officer asked the defendant for his license and registration, the officer did not have any concerns about the defendant's ability to operate the car. The record contains

no indication that the car was parked or stopped illegally. The Commonwealth does not argue on appeal that the license request was made because of a civil motor vehicle violation. The Commonwealth limits its argument to the officer's community caretaking function.

Events unfolded from there, as recited by the majority. Those events are not relevant to the information the officer possessed at the time he requested the defendant's license and registration, and whether, in light of all of the surrounding circumstances, the request was an unjustified stop under Terry v. Ohio, 392 U.S. 1 (1968).

Discussion. Police "officers may make inquiry of anyone they wish and knock on any door, so long as they do not implicitly or explicitly assert that the person inquired of is not free to ignore their inquiries." Commonwealth v. Murdough, 428 Mass. 760, 763 (1999). This includes knocking on any car door or window. Id. at 763-764. Thus, the officer's initial approach to the defendant's car, including knocking on the window, was permissible. The "question is whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." Commonwealth v. Matta, 483 Mass. 357, 362 (2019).

The defendant first "waved [the officer] away," which the officer testified that he took to mean the defendant was awake

and able to drive. Given that the defendant was literally asleep at the wheel of a running motor vehicle on a cold January evening and had been for some time, albeit legally parked, I also agree for purposes of this case that it was permissible for the officer to disregard the defendant's wave and ask the defendant to lower his window. See Murdough, 428 Mass. at 764 ("If the community caretaking function . . . means anything, surely it allows a police officer to determine whether a driver is in such a condition that if he resumes operation of the vehicle, in which he is seated at a highway rest stop, he will pose such an extreme danger to himself and others").

Significantly, the community caretaking function is bounded by an important constraint:

> "A check by a police officer on the status of a vehicle and its occupants falls within the scope of the community caretaking function when its purpose is to protect the well-being of the vehicle's occupants and the public -- and not when the purpose is the detection or investigation of possible criminal activity."

Commonwealth v. Mateo-German, 453 Mass. 838, 842 (2009). "The Commonwealth has the burden of demonstrating, by objective evidence, that the officer's actions were 'divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" Commonwealth v. Knowles, 451 Mass. 91, 95 (2008), quoting Cady v. Dombrowski, 413 U.S.

433, 441 (1973). Based on what happened next, the Commonwealth failed to meet its burden to proof.[1]

Once the defendant lowered his window, the officer did not ask if the defendant was in need of assistance or engage the defendant in conversation to assess whether he could be a threat to the public. Rather, the officer immediately asked him to produce his driver's license and registration. An officer's request for a driver's license and registration carries with it the force of G. L. c. 90, §§ 21 and 25, which together require motorists to "produce [their] license[s]" upon such a request or be fined or arrested.[2]

Where a uniformed police officer approaches a legally parked car, accosts a person sleeping in the driver's seat,

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[1] Though the officer testified that this "was a stop," I am not relying on that testimony because whether a person is seized is an objective inquiry. See Commonwealth v. Evelyn, 485 Mass. 691, 698-699 (2020). Thus, we have said that it is of no consequence if an officer referred to his inquiry as a "stop." Commonwealth v. Gaylardo, 68 Mass. App. Ct. 906, 907 (2007). See Murdough, 428 Mass. at 762 (officer's motive does not invalidate objectively justifiable behavior). That said, the officer's state of mind informs whether he was caretaking or investigating.

[2] For pedestrians, the Supreme Judicial Court has held that where officers displayed their badges and went beyond asking a pedestrian their name to request and retain the pedestrian's identification to check it, the officers were "implicitly commanding the defendant to remain on the scene" and thus the defendant was seized. Commonwealth v. Lyles, 453 Mass. 811, 815 (2009).

disregards what the officer understands to be the driver's attempt to wave him away, asks the driver to lower the window to speak, and then immediately asks for a license and registration, no reasonable person would feel that they were free to leave. The officer's persistent conduct and words objectively communicated that the defendant was not free to ignore the officer's inquiry and the officer would use his police power to coerce the defendant to stay. See Matta, 483 Mass. at 362; Murdough, 428 Mass. at 763. This is the very definition of a seizure. See Commonwealth v. Stoute, 422 Mass. 782, 786 (1996) ("a person is 'seized' by a police officer 'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave'" [citation omitted]). See also Commonwealth v. Evelyn, 485 Mass. 691, 696-697 (2020) ("Under art. 14, a seizure occurs when an officer, 'through words or conduct, objectively communicate[s] that the officer would use his or her police power to coerce [an individual] to stay'" [citation omitted]).

The burden of proof was on the Commonwealth to justify this warrantless stop. Yet the officer offered no testimony that, before requesting the defendant's license and registration, the defendant had committed or was committing a crime or that the officer had concerns about the defendant's ability to drive. We cannot assume that every person sleeping in a car is a threat to

the public, particularly when the officer who interacted with that person did not perceive such a danger.[3] Objectively, therefore, the officer did not check on the defendant's well-being. Compare Murdough, 428 Mass. at 763 ("officer testified that [he and another officer] first had asked the defendant 'if he was on any type of medication or narcotics'"); Commonwealth v. Fisher, 86 Mass. App. Ct. 48, 49 (2014) (officer engaged in conversation with defendant and "asked if he had consumed any drugs or alcohol that evening and if he needed medical attention"). Rather, this officer acted to "make sure the car was valid in [the defendant's] name." That was an investigation and the officer therefore exceeded the scope of the community caretaking function.

This case is much closer to cases that the Supreme Judicial Court has found constituted an impermissible seizure. For example, in Commonwealth v. Knowles, 451 Mass. 91 (2008), an officer was dispatched to a particular location because of a report of a man swinging a baseball bat. Id. at 92. When the

[3] Although I will not go as far as to say the car has become "a home away from home" (citation omitted), New Jersey v. T.L.O., 469 U.S. 325, 337 n.5 (1985), our citizens spend considerable time in their cars, especially parents chauffeuring and then waiting, sometimes with eyes closed, for children. During the pandemic arising from COVID-19 the car can also provide an accessory home office for privacy a home may not give.

officer arrived, a man fitting the description was leaning into the open trunk of an automobile with a baseball bat leaning against a nearby telephone pole. Id. When the man noticed the officer, he reached into his pocket and threw "something" into the trunk. Id. The officer ordered the man to "stop," "step away from the car," and to "come towards" the officer with his hands out of his pockets. Id. Once backup arrived, the officer approached the open trunk and saw what he believed to be narcotics. Id. The court concluded that the community caretaking function did not apply in these circumstances because any objective view of the officer's actions lead to the conclusion that he was in fact conducting a criminal investigation. Id. at 95. "After arriving at the scene, [the officer] quickly seized Knowles, made no inquiry about his well-being, and as soon as other officers arrived and took charge of [the defendant], [the officer] proceeded to examine the contents of the open trunk for evidence of criminal activity" (emphasis added). Id. at 95-96. See Commonwealth v. Lubiejewski, 49 Mass. App. Ct. 212, 216 (2000) ("[B]ecause a reasonable inference may be drawn that [the trooper] was engaged in 'the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,' the community caretaking function cannot be used in these circumstances to justify the stop" [citation omitted]).

Neither Commonwealth v. Evans, 436 Mass. 369 (2002), nor Commonwealth v. Mateo-German, 453 Mass. 838 (2009), justify this stop. In Mateo-German, the Supreme Judicial Court stated that "[w]hen performing community caretaking functions involving a disabled vehicle, a police officer is justified in asking for a driver's license and registration." Mateo-German, supra at 843, citing Evans, supra at 374-375. Unlike Mateo-German, supra at 839, where the officer knew the defendant's vehicle had run out of gasoline, the car here was not disabled. Further, the officer in Mateo-German waited over twenty minutes with the defendant before asking for his license and registration. Mateo-German, supra at 840. Here, the officer asked for the documents immediately.

In Evans, the Supreme Judicial Court acknowledged that the split in authority "on the issue of whether a seizure has occurred when an officer, checking on the well-being of an already stopped motorist, requests the motorist's license and registration despite a lack of evidence that the driver has committed a motor vehicle violation or criminal act." Evans, 436 Mass. at 374. The Evans court was persuaded by a Wisconsin case, State v. Ellenbecker, 159 Wis. 2d 91 (App. 1990), to hold that "a seizure does not occur when an officer requests the license and registration of a motorist stopped in the circumstances of this case." Evans, supra at 375. The

circumstances in Evans are distinguishable from this case. Unlike this defendant's legally parked car, the defendant in Evans was stopped in the breakdown lane of a rural stretch of Route 20 with his car's right-turn signal flashing. Id. at 370. As here, the car's sole occupant was asleep in the driver's seat and the officer knocked to rouse him, however, in Evans, the driver opened his eyes, looked around for about ten seconds, and lowered his window without being asked. Id. at 371. The trooper asked the defendant what he was doing, and the defendant replied, "Nothing." Id. Only then did the trooper ask for the defendant's license and registration. Id. The Evans court specifically acknowledged that the trooper's request was in part justified due to "the defendant's response to the trooper's question." Id. at 376. Moreover, the Wisconsin case on which Evans relied acknowledged Wisconsin's analog to G. L. c. 90, §§ 21 and 25, and expressly stated that the license request did not intrude on that defendant's freedom to leave because the car was disabled. Ellenbecker, 159 Wis. 2d at 98. Here, the defendant's car was not disabled. Nor did the court in Evans address the fact that the refusal to produce a driver's license and registration is an arrestable offense. See G. L. c. 90, §§ 21, 25.

Since Evans, State courts have continued to be divided on this question with the more persuasive authority, from

Connecticut, Maryland, and New Mexico, concluding that where State law requires a motorist to provide a driver's license and registration upon request by a police officer, that motorist is seized. See State v. Jones, 113 Conn.App. 250, 259 (2009) ("In the present case, we conclude that once [the officer] approached the defendant's vehicle and requested that the defendant produce his documents, thereby exercising police authority, the defendant was not free to leave and was under seizure. . . . [T]he defendant was required to produce those documents under penalty of law. . . . [N]o reasonable person in the defendant's position would have felt free to leave"); Pyon v. State, 222 Md. App. 412, 450-452 (2015) (seizure occurred when officer requested driver's license without justification, without making any prior inquiries of defendant, and without informing defendant he may leave); State v. Williams, 139 N.M. 578, 584 (2006) ("To hold that a driver of a nonmoving vehicle, who must produce a driver's license and registration upon request and await the officer's completion of a check to ensure those documents are valid, is in a consensual encounter would be to take the concept of consensual encounters into the realm of a legal fiction").[4]

[4] See Conn. Gen. Stat. § 14-217; Md. Code Ann., Transp. § 16-112; N.M. Stat. Ann. § 66-5-16.

These authorities are more relevant and persuasive than cases in which other State courts have found that no seizure occurred, particularly as many of those States do not have a law requiring the motorist to provide license and registration upon request by a police officer. For instance, although Commonwealth v. Garrett, 585 S.W.3d 780 (Ky. Ct. App. 2019), held that no seizure occurred where the officer asked a motorist stopped in a high crime area for license and registration, the Court of Appeals of Kentucky noted that the defendant "could have refused to provide his driver's license." Id. at 792 n.12. The defendant in Garrett was not at pain of criminal sanctions if he refused to provide his license. See Kavanaugh v. Commonwealth, 427 S.W.3d 178, 181 (Ky. 2014) (noting Kentucky does not have stop and identify statute). Similarly, although Coffia v. State, 191 P.3d 594, 598 (Okla. Crim. App. 2008), found that no seizure occurred where a police officer asked a driver and passenger for their licenses when stopped on a highway shoulder, Oklahoma does not have a stop and identify statute. Commonwealth v. Au, 615 Pa. 330 (2012), is likewise distinguishable because Pennsylvania does not have a stop and identify statute. See Commonwealth v. Campbell, 862 A.2d 659, 665 n.5 (Pa. Super. Ct. 2004). In addition, the officer in Au asked for identification only after he was told that the six individuals in the five person car were "hanging out" and the

officer determined that some of the six were minors. Au, supra at 332. In State v. Dixon, 218 S.W.3d 14 (Mo. App. W.D. 2007), the Missouri Court of Appeals, in a jurisdiction that has a stop and identify statute,[5] explicitly stated that a seizure did not occur because " an officer may request identification and examine that identification as long as the officer does not convey a message that compliance with his request is required" (emphasis added). Dixon, supra at 19. These cases make clear that where State law criminalizes the refusal of an officer's request for identification, no reasonable person would feel free to refuse to comply.

Having determined that a seizure occurred upon the officer's request for license and registration, I further conclude that the seizure was not justified by specific, articulable facts sufficient to give rise to reasonable suspicion. The only basis presented at the suppression hearing for the officer's request for identification was to learn the defendant's name and to determine whether he owned the car. That reasonable suspicion subsequently developed is of no significance to this initial impermissible seizure. Thus, the motion to suppress should have been allowed.

[5] Mo. Rev. Stat. § 302.181(3).