SJC-13168

COMMONWEALTH vs. ERIC J. MOREAU.

Worcester. January 5, 2022. - July 29, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Motor Vehicle, Operating under the influence. Evidence, Blood alcohol test. Practice, Criminal, Motion to suppress. Consent. Statute, Construction.

Complaint received and sworn to in the Gardner Division of the District Court Department on October 15, 2020.

A pretrial motion to suppress evidence was heard by Mark A. Goldstein, J.

An application for leave to prosecute an interlocutory appeal was allowed by Wendlandt, J., in the Supreme Judicial Court for the county of Suffolk, and the matter was reported by her.

Ann Grant, Committee for Public Counsel Services, for the defendant.

Donna-Marie Haran, Assistant District Attorney, for the Commonwealth.

Anthony D. Gulluni, District Attorney, & David L. Sheppard-Brick, Assistant District Attorney, for district attorney for the Hampden district & others, amici curiae, submitted a brief.

CYPHER, J. The defendant, Eric J. Moreau, has been charged with operation of a motor vehicle while under the influence of alcohol (OUI) or with a blood alcohol content (BAC) of .08 percent or greater, in violation of G. L. c. 90, § 24 (1) (a) (1) (§ 24 [1] [a] [1]), and negligent operation of a motor vehicle, in violation of G. L. c. 90, § 24 (2) (a) (§ 24 [2] [a]). The defendant filed this interlocutory appeal to challenge the denial of a motion to suppress the results of the test of the defendant's blood for BAC conducted by the State police crime laboratory (crime lab) without the defendant's consent. For the reasons discussed infra, we reverse the denial of the motion to suppress.[1]

Background. We summarize the relevant facts found by the judge, supplemented where appropriate with uncontroverted testimony from the suppression hearing. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015). The relevant facts are undisputed for the purposes of the present appeal. On September 29, 2020, a police officer responded to a report of a motor vehicle accident. On arrival at the scene, the officer observed a pickup truck that had collided with a tree off the side of the road, suffering extensive front-end damage. No

[1] We acknowledge the amicus brief submitted by the district attorneys for the Hampden, Bristol, eastern, Norfolk, northern, northwestern, and Plymouth districts.

other vehicle was involved in the collision. The officer spoke with the defendant, who was seated in the driver's seat and admitted that he was the operator of the vehicle. The officer observed the defendant to be unsteady on his feet, slurring his speech, and glassy-eyed; a strong odor of alcohol emanated from the defendant's person. The defendant was transported to a nearby hospital. Police gave to hospital personnel a "preservation of evidence letter," seeking the preservation of any blood that might be drawn during medical treatment.

Police then obtained and executed a search warrant for the defendant's blood. The blood was transported to and analyzed by the crime lab for BAC. Police never requested or obtained the defendant's consent to test his blood for BAC.

The defendant was charged with OUI in violation of § 24 (1) (a) (1) and negligent operation of a motor vehicle in violation of § 24 (2) (a). The defendant moved to suppress the results of the BAC analysis conducted by the crime lab, arguing that he did not consent to having his blood tested. The judge denied the motion after an evidentiary hearing. The defendant filed an application for leave to file an interlocutory appeal pursuant to Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017), to which the Commonwealth assented. A single justice of this court allowed the application and ordered that the appeal proceed in the Supreme Judicial Court.

Discussion. The sole issue on appeal is whether, pursuant to G. L. c. 90, § 24 (1) (e) (§ 24 [1] [e]), a BAC test done by or at the direction of the police without the defendant's consent is inadmissible in a prosecution for OUI pursuant to G. L. c. 90, § 24 (1) (a) (§ 24 [1] [a]), where the blood was first drawn independently by a third party. As a matter of statutory interpretation, we review the issue de novo. Commonwealth v. Wimer, 480 Mass. 1, 4 (2018). "The meaning of a statute must, in the first instance, be sought in [the] language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Commonwealth v. Bohigian, 486 Mass. 209, 213 (2020), quoting Commonwealth v. Dalton, 467 Mass. 555, 557 (2014). Additionally, "[a] basic tenet of statutory construction requires that a statute be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous" (quotations omitted). Wolfe v. Gormally, 440 Mass. 699, 704 (2004), quoting Bankers Life & Cas. Co. v. Commissioner of Ins., 427 Mass. 136, 140 (1998).

Section 24 (1) (e) provides the conditions under which "evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood . . . shall be admissible" in prosecutions for operating a motor vehicle while

under the influence of alcohol pursuant § 24 (1) (a).[2,3] The statute sets forth three distinct prerequisites to the

---

[2] Section 24 (1) (e) provides, in relevant part:

> "In any prosecution for a violation of [§ 24 (1) (a),] evidence of the percentage, by weight, of alcohol in the defendant's blood at the time of the alleged offense, as shown by chemical test or analysis of his blood or as indicated by a chemical test or analysis of his breath, shall be admissible and deemed relevant to the determination of the question of whether such defendant was at such time under the influence of intoxicating liquor; provided, however, that if such test or analysis was made by or at the direction of a police officer, it was made with the consent of the defendant, the results thereof were made available to him upon his request and the defendant was afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him; and provided, further, that blood shall not be withdrawn from any party for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician. Evidence that the defendant failed or refused to consent to such test or analysis shall not be admissible against him in a civil or criminal proceeding." (Emphases added.)

[3] Although not implicated in a case such as this where the statutory requirements are unmet, we note that where the conditions of § 24 (1) (e) are met, BAC evidence is only presumptively admissible in a prosecution under § 24 (1) (a). Although there is nothing presumptive in the language "shall be admissible," of course BAC evidence must meet general requirements for admissibility that exist separate and apart from § 24 (1) (e), such as laying a proper foundation and complying with constitutional requirements. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (evidence meeting statutory requirements for admissibility may not be admitted in violation of Sixth Amendment to United States Constitution); Commonwealth v. Colturi, 448 Mass. 809, 818 (2007) (where Commonwealth proceeds only on theory of impaired operation, it must present expert testimony establishing relationship between test results and intoxication as foundational requirement of

admissibility of BAC evidence in a prosecution for OUI under § 24 (1) (a), the first of which is that a defendant must consent to a "chemical test or analysis" of his blood when "such test or analysis [is] made by or at the direction of a police officer."[4] G. L. c. 90, § 24 (1) (e). Our interpretation of this provision is controlled by our decision in Bohigian.

In Bohigian, 486 Mass. at 211, the court stated that "[§] 24 (1) (e) requires that where a test of a defendant's breath or blood to determine alcohol content is made by or at the direction of a police officer, it must be done with the defendant's consent in order for the results to be admissible in a prosecution for OUI under . . . § 24 (1) (a)" (emphases added). The court also concluded that "the testing of [BAC]

---

admissibility of such results); Commonwealth v. LaCorte, 373 Mass. 700, 704 (1977) (to be admissible, evidence must be shown to be what its proponent represents it to be). This is because constitutional limitations trump any contrary statutory prescription, see, e.g., Callan v. Winters, 404 Mass. 198, 202 (1989), and because background evidentiary rules continue to govern absent a clear indication of the Legislature's intent to override them, see Chelsea Hous. Auth. v. McLaughlin, 482 Mass. 579, 590 (2019); Commonwealth v. Harris, 443 Mass. 714, 725 (2005), which § 24 (1) (e) lacks.

[4] Second, the statute requires, on the defendant's request, that the results of a chemical test or analysis of the defendant's blood be made available to the defendant and that the defendant be afforded a reasonable opportunity to have his own test or analysis conducted "by a person or physician selected by him." G. L. c. 90, § 24 (1) (e). Third, the statute requires that the defendant's blood only be withdrawn for chemical test or analysis "by a physician, registered nurse, or certified medical technician." Id.

. . . includ[es] the drawing of blood." Id. Of course, a blood draw is a prerequisite to a chemical test or analysis of blood where such test or analysis requires a blood sample to be tested or analyzed. Therefore, separate from the discussion of safety concerns surrounding blood draws in Bohigian, the Bohigian court's conclusion that a test or analysis of blood includes the preceding blood draw such that police must obtain a defendant's consent to such draw is correct for this reason. See id. at 211, 216-217.

Relying on Bohigian, the defendant argues that § 24 (1) (e) provides that a BAC "test or analysis" done "by or at the direction of" the police is inadmissible in an OUI prosecution under § 24 (1) (a), unless the defendant has consented to such test or analysis. The Commonwealth contends that Bohigian stands for the proposition that, under § 24 (1) (e), a defendant's consent is required only when his blood is drawn "by or at the direction of" the police, and that a defendant's consent is not required when a defendant's blood is tested or analyzed "by or at the direction of" police, so long as the blood first was drawn independently by a third party. For the following reasons we agree with the defendant and do not read the statute to apply only where both a blood draw and subsequent chemical test or analysis is done by or at the direction of police.

First, such an interpretation would contradict the plain language of the statute, rendering the consent provision of § 24 (1) (e) inoperative in certain situations where, according to the plain language of the statute, the consent provision applies. We will not read an exception to the consent provision into the statute that the Legislature "did not see fit to put there." Chin v. Merriot, 470 Mass. 527, 537 (2015), quoting Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006). Second, such a reading of the statute makes sense only if the Legislature's sole intent in drafting § 24 (1) (e) was to mitigate safety concerns related to nonconsensual blood draws. Although such concerns likely were part of the Legislature's motivation in drafting § 24 (1) (e), we have no direct evidence of such intent, and the plain language of the statute indicates that the Legislature was motivated by other concerns as well.

Regarding a plain language interpretation of § 24 (1) (e), the statute provides in part that BAC evidence, "as shown by chemical test or analysis of [the defendant's] blood . . . shall be admissible . . . provided, however, that if such test or analysis was made by or at the direction of a police officer, it

was made with the consent of the defendant" (emphases added).[5] G. L. c. 90, § 24 (1) (e). Thus, by its plain language, where a "chemical test or analysis . . . was made by or at the direction of a police officer," the defendant's consent is required for the resulting BAC evidence to be admissible, regardless of whether the preceding blood draw was done by or at the direction of a police officer. To hold that the consent provision is only triggered where the defendant's blood is first drawn by or at the direction of police would contradict the plain language of the statute.

Notably, both § 24 (1) (e) and G. L. c. 90, § 24 (1) (f) (1) (§ 24 [1] [f] [1]), which were intended to work in tandem, Bohigian, 486 Mass. at 211, discuss a defendant's consent "to a chemical test or analysis of his . . . blood," rather than consent to a blood draw. Section 24 (1) (e) "further" requires that "blood shall not be withdrawn . . . for the purpose of such test or analysis except by a physician, registered nurse or certified medical technician" (emphasis added). Section 24 (1) (f) (1) "further" provides that "no person who is afflicted with hemophilia, diabetes or any other condition requiring the use of anticoagulants shall be deemed to

[5] We understand the phrase "such test or analysis" to refer to the preceding phrase, "chemical test or analysis of [the defendant's] blood." G. L. c. 90, § 24 (1) (e).

have consented to a withdrawal of blood" (emphasis added). Thus, in separately discussing "a chemical test or analysis of . . . blood" and "withdrawal of blood" or "blood . . . be[ing] withdrawn," the Legislature appears to have conceived of "a chemical test or analysis" of a defendant's blood as distinct from a blood draw.

This interpretation is supported by the second statutory prerequisite to the admissibility of BAC evidence -- that the results of any chemical test or analysis of the defendant's blood be "made available to him upon his request and [that] the defendant [be] afforded a reasonable opportunity, at his request and at his expense, to have another such test or analysis made by a person or physician selected by him." G. L. c. 90, § 24 (1) (e). This requirement appears to be solely related to concerns about the result of chemical testing or analysis of blood and entirely unrelated to concerns about a preceding blood draw, and such concerns reasonably cannot be said to arise only where both a blood draw and subsequent test or analysis is done by or at the direction of police.

Thus, by its plain language, the statute requires that in a prosecution under § 24 (1) (a), where the Commonwealth wishes to have admitted BAC evidence arising from testing or analysis of a defendant's blood done "by or at the direction of" police, police must first obtain the defendant's consent to the

"chemical test or analysis" of his blood which may result in such evidence, regardless of whether the blood was first drawn by or at the direction of police or independently by a third party. The statute contains no exception to the consent requirement where the blood was first drawn without police involvement. We may not rewrite the statute to create judicially an exception to the consent provision not presented by the statute's plain language. Chin, 470 Mass. at 537, quoting Commissioner of Correction, 446 Mass. at 126.

As to the Legislature's intent in enacting § 24 (1) (e), the Bohigian court noted that "[t]here are valid reasons for [providing additional privacy protections in this context, above those granted by the Federal Constitution and the Massachusetts Declaration of Rights], including avoiding the confrontation that occurred during the blood draw conducted in this case." Bohigian, 486 Mass. at 216. The court went on to discuss those "valid reasons," citing to United States Supreme Court cases and a book chapter on phlebotomy published by the World Health Organization.[6] Id. at 216-217. Thus, the Bohigian court discussed the objective reasonability of the consent provision, but did not purport to conclude that it was the Legislature's

[6] The court's discussion of other States that have enacted statutory schemes similar to § 24 (1) (e) did not include a discussion of the intent of any other State Legislatures in enacting such statutes. See Bohigian, 486 Mass. at 217-218.

intent in enacting the statute to avoid confrontations during nonconsensual blood draws.

Further, § 24 (1) (e) also predicates the admissibility of BAC evidence in prosecutions under § 24 (1) (a) on the results having been made available to the defendant on request and the defendant having been afforded a reasonable opportunity to have his own chemical test or analysis completed. G. L. c. 90, § 24 (1) (e). This requirement, which, as noted supra, facially is concerned solely with the results of the chemical test or analysis of blood and not with the prior blood draw, reasonably cannot be construed to have been drafted out of safety concerns related to the nonconsensual drawing of blood.

If the Legislature's sole concern had been ensuring the safety of those involved in blood draws, it could have conditioned the admissibility of BAC evidence solely on the defendant's consent to having his blood drawn by or at the direction of the police. As such language sufficiently would address that concern, the Legislature would have no discernible reason also to require (1) the defendant's consent to testing or analysis done by or at the direction of police or (2) that the results be made available to the defendant on request and that the defendant be allowed independently to have another test or analysis done.

The plain language of the statute, the absence of any record of legislative intent to contradict that plain language, and our decision in Bohigian control here. Where a "chemical test or analysis" of the defendant's blood is "made by or at the direction of a police officer," including where the blood is first withdrawn independently by a third party, the defendant's consent is required for the resulting BAC evidence to be admissible in a prosecution under § 24 (1) (a).[7]

However, while § 24 (1) (e) discusses conditions for admissibility of BAC evidence, we observe that it does not expressly state what happens when these conditions are not met. The Commonwealth argues that even if a defendant's consent were required for a chemical test or analysis of a defendant's blood made by or at the direction of police after being withdrawn by a third party, suppression nevertheless is not required where the exclusionary rule is not triggered. We agree only to the extent that the constitutional exclusionary rule is inapplicable. Bohigian, 486 Mass. at 211, citing Missouri v. McNeely, 569 U.S. 141, 148 (2013), and Commonwealth v. Angivoni, 383 Mass. 30, 32

[7] We previously have stated that there is no warrant exception to the consent provision in § 24 (1) (e). Bohigian, 486 Mass. at 213. Thus, where, as here, the police do not obtain the defendant's consent to conduct a chemical test or analysis of his blood but do obtain a warrant for the defendant's blood sample, the resulting blood alcohol content (BAC) evidence remains inadmissible in a prosecution for OUI pursuant to § 24 (1) (a).

(1981). However, here we have a statutory exclusionary rule that applies.

As noted supra, the statute provides that BAC evidence resulting from a chemical test or analysis of a defendant's blood done by or at the direction of the police is admissible in a prosecution for OUI under § 24 (1) (a) "provided that" such test or analysis complied with, among other things, the consent provision of § 24 (1) (e). We previously have concluded that the consent provision of § 24 (1) (e) "places several conditions on the admissibility of" BAC evidence. Commonwealth v. Zeininger, 459 Mass. 775, 778, cert. denied, 565 U.S. 967 (2011). We also specifically have concluded that "nonconsensual testing done at the direction of the police is inadmissible." Bohigian, 486 Mass. at 218.

It may be true that providing for the admissibility of evidence if certain conditions are met is not linguistically equivalent to providing for the inadmissibility of evidence if those conditions are not met. However, conditions on the admissibility of certain evidence would be rendered inoperative if noncompliance with those conditions did not result in the inadmissibility -- or required suppression -- of the evidence.[8]

[8] Because it would be "inconsistent with the manifest intent" of the Legislature to read § 24 (1) (e) in a way that leaves its admissibility conditions illusory, we interpret the

Thus, suppression is the appropriate remedy where, as here, the Commonwealth cannot prove compliance with the consent provision of § 24 (1) (e). See Bohigian, 486 Mass. at 218-220 (concluding BAC test results improperly were admitted where defendant did not consent to blood draw and remanding for new trial); Zeininger, 459 Mass. at 778 ("prosecution must prove compliance with [consent provision and other] conditions as a foundational matter before the judge may admit the results in evidence"); Commonwealth v. Lopes, 459 Mass. 165, 173 (2011), quoting § 24 (1) (e) (BAC evidence "'shall be admissible and deemed relevant' only if the defendant actually consented to the test"); Commonwealth v. Dennis, 96 Mass. App. Ct. 528, 538-539 (2019) (denial of motion to suppress BAC evidence reversed where Commonwealth failed to prove defendant consented to blood test). Compare Commonwealth v. Irene, 462 Mass. 600, 612 n.20, cert. denied, 568 U.S. 968 (2012) (G. L. c. 233, § 79G, which provides that hospital medical records "shall be admissible . . . provided . . . that" certain conditions are met, sets forth "requirements for admissibility" of such evidence).

---

provision to provide for the exclusion of BAC evidence that does not comply with those conditions. See Commonwealth v. Rossetti, 489 Mass. 589, 605 n.27 (2022); Tallage Lincoln, LLC v. Williams, 485 Mass. 449, 456 (2020); Commonwealth v. Scott, 464 Mass. 355, 358 (2013), quoting Opinion of the Justices, 313 Mass. 779, 781-782 (1943). This is not to suggest that every statutory violation results in exclusion of otherwise admissible, relevant evidence.

In criminalizing OUI, § 24 (1) (a), the Legislature's apparent aim was to protect the residents of the Commonwealth from motorists impaired by alcohol or other substance consumption. In so doing, "the Legislature has created a statutory scheme specifically to address the testing of [BAC] in connection with prosecutions for OUI." Bohigian, 486 Mass. at 211. Under § 24 (1) (f) (1), "[i]f the arrestee does not consent, . . . the arrestee's license is suspended for at least six months." Id. at 212. See G. L. c. 90, § 24 (1) (f) (1). While it is true that certain provisions of § 24 may make it more challenging for the Commonwealth to present BAC evidence in OUI prosecutions pursuant to § 24 (1) (a), it is for the Legislature to weigh the benefits and drawbacks of the statutory scheme, as it appears to have done by providing that a refusal to consent results in an automatic license suspension. See Opinion of the Justices, 412 Mass. 1201, 1208 n.6 (1992) ("The statutory provision requiring actual consent reflects a legislative intent to avoid forced testing"). It is beyond the power of this court to undermine that balancing by rewriting the statute as the Commonwealth proposes. See art. 30 of the Massachusetts Declaration of Rights; Commonwealth v. Biagiotti, 451 Mass. 599, 602-603 (2008).

We take this opportunity to point out that by enacting § 24 (1) (f) (1), in addition to § 24 (1) (e), the Legislature

has provided law enforcement with a mechanism to ensure that residents of the Commonwealth are protected from motorists impaired by alcohol or other substance consumption, including in situations where a driver suspected of OUI refuses to permit BAC testing. Where a police officer arrests a driver suspected of OUI, and that driver then refuses to consent to a breathalyzer or blood test for BAC, the driver's license is automatically suspended for at least six months and, in certain circumstances, permanently. G. L. c. 90, § 24 (1) (f) (1). That mechanism presumably could have been used in this case regardless of our decision today.

The police officer who responded to the accident scene observed that the defendant, who conceded he was the operator of a pickup truck that had collided with a tree, was unsteady on his feet, slurring his speech, and glassy-eyed, and that a strong odor of alcohol emanated from the defendant's person. Where these observations coupled with the defendant's concession presumably provided probable cause that the defendant had violated § 24 (1) (a), the police officer likely could have placed the defendant under arrest. That the officer chose to have the defendant transported to a hospital did not preclude such action. See Dennis, 96 Mass. App. Ct. at 529 (officer had defendant suspected of OUI sent to hospital and placed defendant under arrest in ambulance). Had the officer placed the

defendant under arrest, § 24 (1) (f) (1) would have been triggered such that, if the defendant refused to consent to a BAC test or analysis, his license would have been automatically "suspended for a period of at least 180 days and up to a lifetime loss" (emphasis added). G. L. c. 90, § 24 (1) (f) (1). Bohigian, 486 Mass. at 212. While it is not our role to pass judgment on the Legislature's policy decisions, it appears that the statutory scheme provides for the protection of the public from dangerous offenders. All that is required is that the police follow the procedures set forth by the Legislature.

Conclusion. For the foregoing reasons, we reverse the denial of the defendant's motion to suppress.

So ordered.