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SJC-12743

COMMONWEALTH vs. WILSON GONCALVES-MENDEZ.

Suffolk. November 7, 2019. - February 3, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Firearms. Constitutional Law, Search and seizure. Search and Seizure, Motor vehicle, Impoundment of vehicle, Inventory, Fruits of illegal search. Practice, Criminal, Motion to suppress.

Complaint received and sworn to in the Roxbury Division of the Boston Municipal Court Department on August 4, 2016.

After transfer to the Central Division of the Boston Municipal Court Department, pretrial motions to suppress evidence were heard by Catherine K. Byrne, J.

An application for leave to prosecute an interlocutory appeal was allowed by Gants, C.J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court. The Supreme Judicial Court granted an application for direct appellate review.

Julianne Campbell, Assistant District Attorney, for the Commonwealth.

Patrick Levin, Committee for Public Counsel Services, for the defendant.

Chauncey B. Wood, Matthew R. Segal, Jessica Lewis, & Jessie Rossman, for American Civil Liberties Union of Massachusetts & another, amici curiae, submitted a brief.

LENK, J. The police properly stopped the defendant driver for a motor vehicle violation and arrested him on an outstanding warrant. The officers ascertained that the sole passenger was a duly licensed and otherwise qualified driver. Rather than inquire of the defendant as to whether he preferred to have the passenger take custody of and later move the vehicle from its location on a busy residential road to a safe spot, police arranged for it to be impounded, and then conducted an inventory search that yielded a gun. The defendant acknowledged that the gun was his.

The defendant's gun and his statements thereafter were suppressed in part because the impoundment was found by the motion judge to be unreasonable in the face of the passenger's availability to drive and the failure by police to ask the defendant whether the passenger taking custody of the vehicle would be a preferred alternative. Citing the defendant's failure to ask police whether the passenger could take over for him, and the absence of any duty expressly recognized in extant case law for police to take affirmative steps in this regard,

the Commonwealth maintains on appeal that the suppression was error. We affirm.¹

1. Facts. We recite the facts as found by the motion judge, supplemented occasionally with uncontested facts that are not inconsistent with the judge's findings, see Commonwealth v. Jessup, 471 Mass. 121, 127-128 (2015).

At approximately 11 P.M. on August 4, 2016, two Boston police officers on patrol in a marked police cruiser observed a Honda Accord with what appeared to be a defective brake light being driven on Columbia Road.² From the vehicle's registration number, the officers discovered that its registered owner, the defendant, had an outstanding misdemeanor default warrant for possession of marijuana with intent to distribute. The officers then stopped the vehicle in the left-hand travel lane on Columbia Road in the Dorchester section of Boston.

The defendant was the driver of the vehicle, and he was accompanied by one front seat passenger. The officers asked both the defendant and his passenger for identification. Upon conducting computer checks on the information provided, the

¹ We acknowledge the amicus brief of the American Civil Liberties Union of Massachusetts and the Massachusetts Association of Criminal Defense Lawyers.

² As the officers learned after stopping the vehicle, the brake light was not actually defective but, rather, had been accidentally obscured by a piece of cardboard that had slipped in front of the light.

officers learned that the passenger's driver's license was valid, he had no outstanding warrants, and he was not a suspect in any other crimes; further, he did not appear to be under the influence of any intoxicating substances. The passenger was polite and cooperative with police.

One of the officers informed the defendant that, due to the default warrant, he was under arrest, and his vehicle would be towed. The officers ordered both men out of the vehicle. The defendant did not request that his passenger assume custody of the vehicle, and the officer did not offer this alternative. As required by Boston police department policy, in preparation for impoundment, one of the officers searched the vehicle. The officer found a firearm under the driver's seat; when the officer implied that both the defendant and the passenger would be arrested, the defendant said that the firearm was his. The defendant was taken to the police station in a police cruiser and then questioned at the station. The passenger ultimately was allowed to leave the scene.

The defendant was charged with multiple firearms violations;³ he moved to suppress the evidence seized during the

³ The charges included carrying a loaded firearm without a license, G. L. c. 269, § 10 (n); carrying a firearm without a license, G. L. c. 269, § 10 (a); and possession of ammunition

inventory search of his vehicle and his subsequent statements to police, on the ground that both were fruits of an unlawful search. A Boston Municipal Court judge concluded that the search was unlawful, and allowed the defendant's motions.⁴ The Commonwealth filed a petition to pursue an interlocutory appeal in the county court, challenging the suppressions.⁵ That appeal was allowed to proceed in the Appeals Court, and this court then allowed the defendant's petition for direct appellate review.

2. Discussion. a. Whether the inventory search was lawful. In reviewing a decision on a motion to suppress, "we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his [or her]

without a firearm identification card, G. L. c. 269, § 10 (h) (1).

⁴ The defendant separately argued that his statements should be suppressed as custodial statements made without adequate Miranda warnings, in violation of his rights under Miranda v. Arizona, 304 U.S. 436 (1966). The judge ordered the statements be suppressed on this ground as well. As we affirm the judge's order on the ground that the seizure of the vehicle was improper, we need not address the adequacy of the Miranda warnings.

⁵ The Commonwealth, as mentioned in its brief, did not separately file a notice of appeal from the allowance of the defendant's motion to suppress statements within the requisite thirty-day period. See Mass. R. Crim. P. 15, as amended, 476 Mass. 1501 (2017). In this instance, however, the single notice of appeal was sufficient to address both motions, because the motion judge consolidated her rulings on the defendant's separate motions into a single order.

ultimate findings and conclusions of law'" (citation omitted).
Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

The Commonwealth bears the burden of proving that a warrantless inventory search is lawful. Commonwealth v. Oliveira, 474 Mass. 10, 13 (2016). "A lawful inventory search is contingent on the propriety of the impoundment of the [vehicle]." Id., quoting Commonwealth v. Brinson, 440 Mass. 609, 612 (2003). Impoundment must be undertaken for a legitimate, noninvestigative purpose, and must be "reasonably necessary based on the totality of the evidence." See Oliveira, supra at 13-14.

Because the defendant does not challenge the propriety of the stop, at issue here is whether impoundment was "reasonably necessary."⁶ Oliveira, 474 Mass. at 14. The propriety of an impoundment turns on whether police reasonably could have concluded they had no lawful, practical alternative. In our previous decisions, where impoundment was deemed reasonable

⁶ The impoundment was undertaken for a legitimate, noninvestigative purpose. Police stopped the defendant's vehicle for a minor traffic violation. See Commonwealth v. Buckley, 478 Mass. 861, 865-869 (2018); Commonwealth v. Bacon, 381 Mass. 642, 644 (1980). Immediately before executing the stop, police ran a check of the license plate and learned that the registered owner had an outstanding default warrant. This led to the defendant's arrest. The arrest, in turn, created the need to move the defendant's vehicle from the left-hand travel lane where it had been stopped. See Commonwealth v. Brinson, 440 Mass. 609, 615-616 (2003).

notwithstanding the presence of a passenger, the passenger was unable lawfully to assume custody of the vehicle. See Commonwealth v. Eddington, 459 Mass. 102, 109-110 (2011) (passenger had been observed drinking); Commonwealth v. Ellerbe, 430 Mass. 769, 775-776 (2000) (passenger did not have valid driver's license available); Commonwealth v. Caceres, 413 Mass. 749, 751-752 (1992) (passenger was not authorized to drive in Massachusetts); Commonwealth v. Garcia, 409 Mass. 675, 676-677 (1991) (passenger had outstanding warrants).

Consistent with the established standard that impoundment be reasonable, we have held that police officers were required to honor an owner's or authorized driver's requested alternative to impoundment where doing so was "lawful and practical." See Oliveira, 474 Mass. at 15. We also have concluded that an inventory search of a defendant's personal belongings was unreasonable where police were independently aware of an alternative to seizing them. See Commonwealth v. Abdallah, 475 Mass. 47, 51-52 (2016) (inventory search of backpack was unreasonable where police were aware that hotel where defendant was arrested was willing to retain custody of his other belongings).⁷

⁷ Although Commonwealth v. Abdallah, 475 Mass. 47, 51-52 (2016), involved the seizure and inventory search of a backpack rather than a vehicle, the underlying question -- whether the

In the present case, we discern no error in the judge's finding that the officers were aware that the defendant's passenger lawfully could have assumed custody of the vehicle, yet nonetheless told the defendant that his vehicle "would be towed." The judge also found that police did not consider the alternatives to impoundment available under the motor vehicle inventory policy. One option enumerated in the policy when officers arrest a driver is to "leave [the vehicle] with a person having apparent authority to assume control of it." Boston Police Department Rules and Procedures, Rule 103 § 31 (1984). Unlike when a vehicle is impounded, no inventory search is conducted in those circumstances, because there is no risk of false claims against the police or the towing company. See *id.* The arresting officer here evidently believed that the Boston police impoundment policy was to tow a vehicle when it was not lawfully parked, and that the policy required an arrested driver affirmatively to request that custody be given to another individual before police were required to release the vehicle to that person.

seizure and warrantless search were reasonable -- is the same. Indeed, our analysis of that issue relied on our impoundment jurisprudence to support the conclusion that the seizure and inventory search of the backpack was unreasonable. See *id.* at 51-53, citing *Commonwealth v. Oliveira*, 474 Mass. 10, 13-14 (2016). See also *Commonwealth v. Eddington*, 459 Mass. 102, 108-109 (2011); *Commonwealth v. Ellerbe*, 430 Mass. 769, 774-776 (2000); *Commonwealth v. Caceres*, 413 Mass. 749, 751 (1992).

The Commonwealth concedes that transferring custody to the passenger was a reasonable alternative, one which the officers would have been required to honor had the defendant requested it. Nonetheless, the Commonwealth argues that our jurisprudence has placed the burden on the defendant to propose an alternative.

As the Commonwealth points out, to date we have not explicitly stated that police should inquire about alternatives to impoundment, at least where a passenger is present who lawfully could assume custody of the vehicle, absent a defendant's request. In our prior cases where impoundment was deemed reasonable notwithstanding the presence of a passenger, however, the passenger was unable lawfully to assume custody of the vehicle. See Eddington, 459 Mass. at 109-110; Ellerbe, 430 Mass. at 775-776; Commonwealth v. Daley, 423 Mass. 747, 750 n.4 (1996); Caceres, 413 Mass. at 751-752; Garcia, 409 Mass. at 675-677. We have never held that police may disregard a readily apparent alternative to impoundment simply because a defendant does not request that a passenger be allowed to leave with the vehicle.

We conclude that, where officers are aware that a passenger lawfully could assume custody of a vehicle, it is improper to impound the vehicle without first offering this option to the

driver.⁸ Absent such an inquiry, the police cannot conclude that impoundment is "reasonably necessary." Because no such inquiry was made here, the impoundment of the defendant's vehicle was improper. Moreover, because the validity of an inventory search turns on the propriety of the underlying impoundment, the search was unlawful. See Oliveira, 474 Mass. at 13.

Although our holding in the present case in no way alters the established requirement that impoundment be reasonable, we nonetheless acknowledge that we have never before had occasion to articulate what is reasonable under the circumstances presented here. Because the duty we articulate is not, strictly speaking, "dictated by precedent," it shall apply prospectively (citation omitted). See Commonwealth v. Sylvain, 466 Mass. 422, 433-434 (2013), S.C., 473 Mass. 832 (2016).

b. Whether the exclusionary rule should apply. The Commonwealth argues that, even if the search was unlawful, the evidence should not be suppressed, because the police have never

⁸ Our holding applies only where police are aware that a passenger lawfully could assume custody. Whenever police arrest the owner or an authorized driver of a vehicle, the better practice is to "inform the driver that the vehicle will be taken to a police facility or private storage facility for safekeeping unless the driver directs the officer to dispose of it in some lawful manner." See Eddington, 459 Mass. at 112 (Gants, J., concurring). We discern no burden merely in asking the question; indeed, this practice would appear to further the goal of minimizing the inconvenience and risks to law enforcement officers that are associated with impoundment.

had an affirmative duty to inquire whether a driver wishes a passenger to assume custody of a vehicle. We do not agree.

"The general rule is that evidence is to be excluded if it is found to be the 'fruit' of a police officer's unlawful actions" (citation omitted). See Commonwealth v. Balicki, 436 Mass. 1, 15 (2002). The exclusionary rule serves to preserve "the integrity of the law" and to deter future constitutional violations. See Commonwealth v. Gomes, 408 Mass. 43, 46 (1990). Although we have acknowledged exceptions to the rule where suppression would not further these ends, see Commonwealth v. Sbordone, 424 Mass. 802, 809-810 (1997), we discern no cause to do so here.

The officers in the present case overlooked a readily apparent alternative to impoundment. As a result, their decision to impound the defendant's vehicle fell short of the established requirement that impoundment be "reasonably necessary." Moreover, the officers' apparent misunderstanding of the Boston police department's inventory policy does not justify unreasonable conduct. The policy clearly allows for transfer of a vehicle to a third party, and does not condition this alternative on a driver requesting it.

Based on this, we conclude that suppression is appropriate here, and that evidence directly obtained from the search of the vehicle properly was suppressed. See Balicki, 436 Mass. at 15.

As to the defendant's subsequent statements, "[t]he exclusionary prohibition extends as well to the indirect as the direct products" of an unlawful search. See id. at 16, quoting Wong Sun v. United States, 371 U.S. 471, 484 (1963). Accordingly, they, too, were "fruits" of the search, and properly were suppressed. See Wong Sun, supra at 485-488.

Order allowing motions
to suppress affirmed.