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19-P-1299

Appeals Court

COMMONWEALTH vs. LANG LEK.

No. 19-P-1299.

Middlesex. October 7, 2020. - February 11, 2021.

Present: Rubin, Desmond, & Englander, JJ.

Firearms. Motor Vehicle, Firearms. Constitutional Law, Search and seizure, Investigatory stop, Reasonable suspicion, Probable cause. Search and Seizure, Motor vehicle, Impoundment of vehicle, Inventory, Reasonable suspicion, Probable cause. Probable Cause. Practice, Criminal, Motion to suppress.

Indictment found and returned in the Superior Court Department on February 23, 2016.

A pretrial motion to suppress evidence was heard by Kenneth J. Fishman, J., and the case was tried before John T. Lu, J.

Erin R. Opperman for the defendant.
Chia Chi Lee, Assistant District Attorney, for the Commonwealth.

RUBIN, J. This case presents a question about the use of an inventory search following a pretextual traffic stop. The defendant, who was operating an automobile that was targeted for

a traffic stop that was a pretext for police investigation of gang activity of which there was neither reasonable suspicion nor probable cause, and later subjected to an inventory search, sought to suppress the fruits of that search, but his motion was denied. The defendant was subsequently found guilty of possession of a firearm. G. L. c. 269, § 10 (a). We conclude that on all the facts and circumstances of this case, the Commonwealth has not met its burden of showing that the inventory search was made for a legitimate, noninvestigative purpose, where the traffic stop admittedly was animated by an investigative purpose and there was no showing that the purpose had changed. Consequently, we conclude that the purported inventory search was unlawful, and the motion to suppress should have been allowed.

Background. At the hearing on the motion to suppress, the Commonwealth called a single witness, Lowell Detective Juan Sandoval. Following the hearing, the motion judge made findings and conclusions of law on the record. The following recitation of facts is taken from his findings, supplemented where appropriate, and as indicated, by the testimony of Detective Sandoval, whom the judge found "generally . . . was a credible witness."

The judge found that on the night in question, Detective Sandoval was patrolling the "Back Central" area of Lowell. As

Detective Sandoval had candidly testified, the judge found that Sandoval was "looking for motor vehicle violations in order to pursue gang suppression in the area." Detective Sandoval had testified that "my main responsibility is gang suppression through motor vehicle stops, field interviews or observations, and encounters with known gang members or associates." His training with respect to that assignment, he testified, was that he had "attended various trainings on how to recognize and observe gangs specific to our city, as well as other larger national gangs."

Detective Sandoval had been in the gang unit for less than two months at the time of the events at issue. On the night in question, the detective and his partner were in plain clothes in an unmarked police car. Detective Sandoval explained that at the time of the stop of the defendant's motor vehicle, "we were looking for motor vehicle violations to focus on gang suppression through motor vehicle stops." Detective Sandoval testified that he was not required to do any traffic enforcement that night.

When Detective Sandoval first saw the vehicle that the defendant was driving, it was stopped behind another vehicle that was itself stopped at a stop sign. There was no testimony about what characteristic of the vehicle or the driver led

Sandoval to choose to target it, but Detective Sandoval did not see what the driver was wearing.

The defendant's vehicle proceeded down the street, and Detective Sandoval observed it fail to make a complete stop before crossing the stop line at the stop sign. The defendant then turned right onto a rotary.

Detective Sandoval in his unmarked cruiser followed the defendant's vehicle as it turned right onto Central Street, then later left onto Elm Street. Central Street and the streets they passed that intersected Elm Street all had legal parking spaces available.

The judge credited Detective Sandoval's testimony that he was looking for a safer and better-lit area to effectuate the stop, and that Elm Street was a narrow street without lawful parking. The judge also found that it was reasonable to wait to make the stop while the detectives made an inquiry based on the license plate number and determined that the vehicle was owned by a woman later identified as the defendant's girlfriend. Detective Sandoval followed the defendant for a total of five and one-half blocks.

Detective Sandoval pulled his unmarked car up behind the defendant's vehicle while it was stopped at a red light. When the light turned green, Detective Sandoval pulled the defendant over on a block where parking was illegal. The detective

approached the driver's side window of the vehicle. He observed that the defendant was dressed in all red, which he recognized as the color of the Bloods gang.

The detective asked the defendant to produce a driver's license and registration. The defendant produced a driver's license, but Detective Sandoval reasonably believed, after comparing the photograph on the license to the appearance of the defendant, that it was not the defendant's license. The defendant insisted it was. The detective reasonably did not believe him, and ordered the defendant out of the vehicle, pat frisked him, and ordered him to sit on the curb. The defendant commented that he had had a fight with his girlfriend and that she might have reported the vehicle stolen, although she had not.

Without securing the defendant in handcuffs, telling him he was under arrest, or that the vehicle would be towed, Detective Sandoval began searching the vehicle. He opened the glove compartment, where a firearm was readily observable. The detective said in a loud voice, "Gun," and the defendant was handcuffed.

The Commonwealth defends the search as a lawful inventory search undertaken pursuant to the Lowell Police Department's written impoundment and inventory search policy. Under that policy, a vehicle may be towed only for certain enumerated

reasons, including "[a]rrest." Under the policy, "[i]f the owner of a vehicle is arrested, the officer must advise him/her that the vehicle will be taken to a police facility or private storage facility for safekeeping, and that an inventory search of its contents shall be conducted. . . . If the arrested owner asks an officer to dispose of the vehicle in a manner that does not involve police custody, and the request is reasonable, lawful, and can be accomplished within a reasonably short period of time[,] the officer must comply with this request."

As described, before searching the vehicle, the police did not advise the defendant that the vehicle would be impounded or its contents searched. The Commonwealth argues that this was permissible under the written policy because the defendant operator was not the "owner" of the vehicle. Detective Sandoval acknowledged that if an operator asked that a vehicle be turned over to its owner, he could comply with that request if it were "reasonable and feasible." He testified that the registered owner of a vehicle could be contacted "[a]t the request of the defendant. But we're not obligated to give him that opportunity. . . . I am not obligated to afford someone [the] opportunity [to contact the registered owner]. It is at my discretion." Detective Sandoval acknowledged that he never asked the defendant whether he wanted to contact the registered

owner to pick up the vehicle, and added, "I was not under any obligation to ask him for her to come pick up the vehicle."

The judge found that there was no dispute that the failure to provide the license and effort to provide a false identification were arrestable offenses, that the exit order and patfrisk therefore were justified, and that there was probable cause to make an arrest at that point. The defendant has not appealed from any of these conclusions, and we need not and do not address them.

The judge found that the search was a lawful inventory search, done pursuant to the written inventory policy, after a decision had been made to arrest the defendant and to tow the vehicle. The judge concluded that the police were not required to ask the defendant whether he wanted his girlfriend, the vehicle's owner, contacted, and found there was no request by the defendant to contact the girlfriend.

Discussion. 1. Inventory searches. An inventory search may be conducted without any suspicion of wrongdoing, but because it is a suspicionless search, the use of inventory searches by police has been strictly cabined by our courts. Its purpose must be "safeguarding the car or its contents, protecting the police against unfounded charges of misappropriation, protecting the public against the possibility that the car might contain weapons or other dangerous

instrumentalities that might fall into the hands of vandals, or a combination of such reasons" (citation omitted). Commonwealth v. Baptiste, 65 Mass. App. Ct. 511, 516 (2006).

The current, well-known rule with respect to traffic stops is that under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution, they may be undertaken whenever a police officer has either probable cause or reasonable suspicion to believe that a motor vehicle violation was committed, regardless of the officer's subjective reasons for engaging in the stop. See Commonwealth v. Long, 485 Mass. 711, 726-730 (2020). This test explicitly permits police to perform pretextual motor vehicle stops, i.e., stops ostensibly made on the basis of a motor vehicle violation, but actually made for the purpose of investigation in order to uncover unrelated criminal activity.¹

¹ Under the relevant case law, only where a defendant meets the burden of raising an inference the Commonwealth cannot rebut, that a traffic violation is a pretext for a stop motivated by an impermissible classification such as race, do the equal protection principles articulated in arts. 1 and 10 of the Declaration of Rights require its suppression. See Long, 485 Mass. at 726. This case was decided in the trial court and briefing was completed in our court before Long lightened the burden that must be met in order to raise a reasonable inference of racial discrimination that requires rebuttal by the Commonwealth. See id. at 724-725 (explaining reduced burden). We need not and do not address whether the facts and circumstances here suffice to meet that newly lowered burden.

Inventory searches of motor vehicles, however, may not be undertaken as a pretext for investigation. "[A]n inventory search [will] not be upheld if . . . 'this standard procedure' [is] a pretext concealing an investigatory police motive" (citation omitted). Commonwealth v. Tisserand, 5 Mass. App. Ct. 383, 386 (1977). "Impoundment must be undertaken for a legitimate noninvestigative purpose, and must be 'reasonably necessary based on the totality of the evidence'" (citation omitted). Commonwealth v. Goncalves-Mendez, 484 Mass. 80, 83 (2020).

With respect to inventory searches, courts have also recognized that limiting police discretion is essential to ensuring that such searches are undertaken only for purposes that are not investigative. See Commonwealth v. Davis, 481 Mass. 210, 219 (2019) ("the decision to conduct an inventory search must not be for investigatory purposes; the decision must be objectively reasonable"). An inventory search may be undertaken only when a vehicle is to be impounded. See Goncalves-Mendez, 484 Mass. at 83 (inventory search of vehicle is allowed only when there is "no lawful, practical alternative" to impoundment). And it must be undertaken pursuant to a written policy that defines the manner in which the search is undertaken, in order to eliminate officer discretion with respect to the manner of the search. See Commonwealth v.

Bishop, 402 Mass. 449, 451 (1988) ("art. 14 of the Declaration of Rights requires the exclusion of evidence seized during an inventory search not conducted pursuant to standard police procedures, which procedures, from now on, must be in writing").

At least to date, our courts have not held that the decision when to impound a vehicle must be made pursuant to a standardized written policy, although in this case it was. See Commonwealth v. Daley, 423 Mass. 747, 749-750 (1996) ("we have not determined whether the police must have written guidelines delineating the circumstances in which an inventory search may be undertaken"). See also Commonwealth v. Eddington, 459 Mass. 102, 112 (2011) (Gants, J., concurring) ("With respect to motor vehicles, the standard written procedures we have required for inventory searches focus solely on the conduct of the search of the motor vehicle, not on whether the motor vehicle itself should be impounded and made the subject of an inventory search"). The Supreme Judicial Court has, however, held that "[w]henver 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'" (emphasis added; citation omitted). Goncalves-Mendez, 484 Mass. at 85 n.8. Our courts, though, have not said that officers must ask a driver

who is being arrested whether he would like to direct the officer to dispose of the vehicle in some lawful manner other than impoundment. See Commonwealth v. Caceres, 413 Mass. 749, 751 & n.1 (1992) (suggesting that there is no general obligation on police to ask defendant if he wishes to propose alternative to seizure of vehicle). See also Eddington, supra at 109 n.12 ("We noted that 'some State courts have . . . placed the burden on the police to initiate consideration of obvious reasonable alternatives.' In our view, adopting any per se rule whether such a rule applies to an owner or a driver contravenes the proper constitutional analysis" [citation omitted]).

The Supreme Judicial Court has also held that if an arrestee operator does request an alternative to impoundment, the police must allow it if it is reasonable and practical. See Commonwealth v. Oliveira, 474 Mass. 10, 15 (2016) ("Violet's request that the police leave the vehicle where he parked it until his girl friend could retrieve it was lawful and practical"). Logically, in order to make meaningful the right to make and have honored such a request, an arrestee must be informed that he is being arrested and that his vehicle will be impounded. But neither the Supreme Judicial Court nor this court has yet held that an operator must be told that he will be arrested and his vehicle impounded before an inventory search may commence.

2. Application of law to facts. At the time Detective Sandoval commenced his search, there was no probable cause to search the vehicle in this case, and the Commonwealth defends the search only on the ground that it was a lawful inventory search. We may assume without deciding that all of Detective Sandoval's actions leading up to his interaction with the defendant were lawful. We may further assume that the detective had probable cause to arrest the defendant after he failed to provide proper identification and gave the detective a false driver's license. See G. L. c. 90, §§ 24B, 25.

At that point, Detective Sandoval ordered the defendant out of the vehicle, but neither arrested the defendant nor informed him that his vehicle was to be impounded. Without saying anything, he simply began searching the defendant's vehicle.

Although requiring the police to tell a driver when his vehicle is going to be impounded would only be logical given his right to request a practical alternative, we need not announce such a broad rule to decide this case. As noted, the written policy of the Lowell Police Department was that if an owner was to be arrested and vehicle impounded, before the search could be undertaken the officer was, in fact, required to advise him that the vehicle would be taken to a police facility for safekeeping. There can thus be no argument that telling the operator of the vehicle, in this case the defendant, would have imposed any

burden on the police; if he had happened to be the owner, he would have been told. Indeed, Detective Sandoval asserted that it was his discretionary decision not to give the defendant the opportunity to request an alternative disposition of the vehicle.

Further, in this case, the Commonwealth concedes that the initial stop of the defendant was pretextual. It was thus motivated by an investigatory purpose, apart from the defendant having failed to stop his vehicle completely before the stop line at the stop sign.

The burden remains on the Commonwealth to demonstrate that Detective Sandoval's investigatory purpose did not, in fact, infect the subsequent inventory search. The motion judge did not make an explicit finding on this question. But on the record before us, the Commonwealth has not met its burden to show that the decision of Detective Sandoval to begin searching the vehicle before informing the defendant it would be impounded was not motivated by an investigatory purpose. Detective Sandoval admitted to an investigatory purpose at the outset, and he took no actions, prior to initiating the search, that objectively indicated that his purpose had changed. Indeed, if the only purpose of the search were the protective ones that are permissible, there would be no reason not to give the defendant

the opportunity to suggest another way to dispose of the vehicle prior to commencing the search.

In this case, where the initial traffic stop was a pretext for investigating certain preselected individuals as part of a police operation to suppress gang activity, where the interaction with the defendant confirmed that the defendant was in fact affiliated with a gang, and Detective Sandoval deliberately failed to inform the defendant that he was under arrest or that his vehicle was being impounded prior to searching it, the Commonwealth cannot meet its burden to show that that search -- even if otherwise permissible -- was not tainted with an investigatory purpose. The motion to suppress should, therefore, have been allowed.

In light of our conclusion, we need not decide whether searching the vehicle prior to the arrest was permissible under the Lowell Police Department's written policy that states that a vehicle may be towed only upon "arrest."² We also need not address further the Lowell Police Department's policy described by Detective Sandoval for using the tool of pretextual traffic stops for unrelated law enforcement purposes. Detective Sandoval was not asked and did not explain on what basis

² The Commonwealth does not assert that impoundment was authorized under any other provision of the Lowell Police Department's policy. Any such argument is waived.

vehicles were chosen for scrutiny, so that they could be stopped when they inevitably engaged in some minor motor vehicle infraction. We echo the concerns, though, of the Supreme Judicial Court in its recent decision in Long, 485 Mass. at 726-730, and note that a policy of unbridled discretion is an obvious invitation to arbitrary action and, particularly when the few things known about a vehicle seen on the street can include the driver's race, it would obviously be a matter of concern were such a policy adopted, at least without strict and explicit criteria for its use.³

It was error to deny the motion to suppress. The judgment is vacated and the verdict is set aside.

So ordered.

³ In light of our conclusion about the search, we need not address the defendant's final contention that the prosecutor shifted the burden of proof to the defendant and commented on the defendant's failure to testify in closing argument.