COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

DISTRICT COURT DEPARTMENT
LOWELL DIVISION
DOCKET NUMBER 1711CR1388

COMMONWEALTH

v.

JANE DOE

DEFENDANT'S MOTION TO DISMISS

Now Comes the Defendant and respectfully moves this Honorable Court to dismiss counts 1 and 3 of the complaint. The police reports submitted to the clerk magistrate in support of the complaint fail to establish probable cause that the defendant received a stolen motor vehicle or resisted arrest, and the issuance of counts 1 and 3 of the complaint was therefore an error of law.

I. JURISDICTION

The Supreme Judicial Court has ruled that a district court has jurisdiction to review a clerk's decision to issue a criminal complaint. Commonwealth v. DiBennadetto, 436 Mass. 310 (2002). "'If the person complained of believes that there was not probable cause to charge him with a crime, he may move to dismiss the complaint.'" Id. at 313, quoting, Bradford v. Knights, 427 Mass. 748, 753 (1998). The Court said, "…the issuance of a complaint by a clerk-magistrate is not to be revisited by a further show cause hearing; the defendant's remedy is a motion to dismiss the complaint… After the issuance of a complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate." Id.

II. CHARGES

Lowell District Court complaint number 1711CR1388 issued on March 13, 2017, and charged the defendant with: (1) receiving a stolen motor vehicle; (2) disorderly conduct; and (3) resisting arrest.

III. COMMONWEALTH'S EVIDENCE

The Commonwealth has provided three Lowell Police Department reports (case number 2017-0004522A, supplement numbers 000, 001, and 002) to the defendant. These reports are presumably the same reports provided to the clerk magistrate in support of the complaint, and copies are attached hereto.

On March 10, 2017, Officer Christopher Kelly spotted a brown Lexis containing four occupants and being driven by Esli Diaz in the area of Broadway and Suffolk Streets. Diaz looked extremely nervous. Officer Kelly reported the license plate number to dispatch and learned the vehicle had been reported stolen. Officer Kelly briefly lost sight of the car but quickly located it at the intersection of Suffolk and Merrimack Streets. When officers attempted to stop the car, the driver sped away at a high rate of speed, narrowly avoiding collisions along the way. The vehicle finally came to a stop after the driver pulled into the parking lot at 41 Father Morissette Boulevard, but not before crashing into three parked cars, a picket fence, and a metal barrier. All of the occupants of the vehicle fled, and Officer Kelly chased the driver, ultimately taking him into custody. A second officer, Bryan Toupin, arrived on the scene and saw the defendant and a male, later identified as Darnell Cruz, exit the passenger side of the car and run away. Office Toupin chased the defendant and Cruz as they ran across Father Morissette Boulevard (causing multiple vehicles to come to an immediate stop). Officer Toupin

caught up with the defendant, who stated, "I give up." Officer Toupin handcuffed and arrested her. Meanwhile, Officer Ryan Coyle arrived and chased down Cruz, placing him into custody. The fourth occupant of the car escaped.

IV. THE COMMONWEALTH HAS FAILED TO ESTABLISH PROBABLE CAUSE THAT THE DEFENDANT RECEIVED A STOLEN MOTOR VEHICLE

"To sustain a conviction for receiving a stolen motor vehicle, the Commonwealth is required to prove [the defendant] (1) had possession of the motor vehicle; (2) knew or had reason to know that the motor vehicle was stolen; and (3) intended to deprive the owner of rightful use of the vehicle." Commonwealth v. Darnell D., 445 Mass. 670, 672-673 (2005). The Court further held, "[a] person's presence in a vehicle as a passenger, without more, is insufficient to prove that he possessed the vehicle." Id. at 673.

The evidence contained in the police reports establishes the defendant was a passenger in the stolen car. There is no evidence that she ever drove the vehicle or otherwise controlled it. Additionally, there is no evidence whatsoever to establish the defendant knew the vehicle was stolen, and there is no circumstantial evidence (such as a damaged ignition) that would lead a reasonable person to conclude the vehicle was stolen. See Commonwealth v. Aponte, 71 Mass. App. Ct. 758 (2008). Finally, evidence that the defendant ran away from the vehicle as the police were approaching does not warrant the inference that she knew the SUV was stolen, as "a conviction may not be based on consciousness of guilt alone." Darnell D., supra, at 674.

V. THE COMMONWEALTH HAS FAILED TO ESTABLISH PROBABLE CAUSE THAT THE DEFENDANT RESISTED ARREST

The Supreme Judicial Court has said, "the resisting arrest statute states that the crime is committed, if at all, at the time of the 'effecting' of an arrest…. An arrest occurs

where there is (1) 'an actual or constructive seizure or detention of the person, [2] performed with the intention to effect an arrest and [3] so understood by the person detained.'" Commonwealth v. Grandison, 433 Mass. 135, 145 (2001), quoting Commonwealth v. Cook, 419 Mass. 192, 198 (1994), quoting Massachusetts Gen. Hosp. v. Revere, 385 Mass. 772, 778 (1982), rev'd on other grounds, 463 U.S. 239 (1983). The police reports in this case fail to establish the defendant would have understood that she was being arrested.

"The standard for determining whether a defendant understood that he was being arrested is objective – whether a reasonable person in the defendant's circumstances would have so understood." Commonwealth v. Grant, 71 Mass. App. Ct. 205, 208 (2008). In Grant, the Appeals Court noted that while an officer need not use the word "arrest" when taking a defendant into custody, "'in most instances there is some form of communication between the police officer and the person.'" Id. at 209, quoting Smith, Criminal Practice and Procedure § 3.13 (3d ed. 2007). For example, a reasonable person would understand an arrest was being effected when a police officer told an individual to turn around and place his hands behind his back. Commonwealth v. Soun, 82 Mass. App. Ct. 32 (2012). However, a police officer pursuing a (juvenile) defendant on foot and yelling "Stop, police. Stop, police," was insufficient to place a reasonable person on notice that an arrest was being effected. Commonwealth v. Quintos, 73 Mass. App. Ct. 828 (2009).

In Grant, the defendant was running from police officers who initially intended to arrest him on an outstanding warrant. The defendant ran through a residential neighborhood, jumping over multiple fences, racing through backyards of houses, and

attempting to hide a gun he had been carrying. One of the pursuing officers drew his gun and yelled "get on the ground," but the defendant continued to run. He stopped only when he was cornered by two officers, both of whom had their guns drawn. The Appeals Court ruled that the defendant had not resisted arrest.

> Fleeing from, or even resisting, a stop or patfrisk does not constitute the crime of resisting arrest…. Although the officers here were intending to effect an arrest, and not just a stop or patfrisk, neither their words nor their actions had objectively communicated that intention to the defendant prior to, or during, the pursuit. We believe such communication is required to satisfy the requirement that a defendant understand he is being arrested.

71 Mass. App. Ct. at 209-210.

In this case, there is nothing in the police reports establishing any officer said anything at all to the defendant prior to the moment she was taken into custody. She would not have appreciated the officer was attempting to "effect" an arrest.

VI. CONCLUSION

For the foregoing reasons, this Court should dismiss counts 1 and 3 of the complaint against the defendant.

Respectfully Submitted,

JANE DOE,

By her Attorney,

Christopher W. Spring
BBO # 650734
Spring & Spring
7 Post Office Square, # 3031
Acton, Massachusetts 01720
(617) 513-9444