18-P-1741 Appeals Court

COMMONWEALTH vs. JOHN G. COSTA.

No. 18-P-1741.

Plymouth. February 12, 2020. - May 14, 2020.

Present: Massing, Neyman, & Singh, JJ.

Reckless Endangerment of a Child. Wanton or Reckless Conduct. Probable Cause.

Complaint received and sworn to in the Wareham Division of the District Court Department on October 3, 2017.

A motion to dismiss was heard by Robert S. Ovoian, J., and a motion to reconsider was considered by him.

Mary Nguyen, Assistant District Attorney, for the Commonwealth.
Katherine C. Riley for the defendant.

NEYMAN, J. The Commonwealth appeals from a District Court judge's dismissal of a count of reckless endangerment of a child against the defendant, John G. Costa. We conclude that the information contained in the criminal complaint application did not establish probable cause to believe that the defendant

"wantonly or recklessly engage[d] in conduct that create[d] a substantial risk of serious bodily injury . . . to a child," as required by the reckless endangerment statute, G. L. c. 265, § 13L. Accordingly, we affirm.

Background. 1. Facts. We recite the facts delineated in the police report filed in support of the criminal complaint application. The defendant and his daughter's mother entered a local fire department in Lakeville with their two year old daughter on September 1, 2017. Sergeant Ryan Maltais of the Lakeville Police Department responded to the fire department and observed medical personnel assessing the defendant's daughter. In response to Sergeant Maltais's questions, the defendant explained that he and the daughter's mother were in their yard while their daughter "was playing in [the defendant's] motor vehicle that was parked at the residence." The defendant stated that both parents "observed [their daughter] spitting something from her mouth onto the driver[']s seat." The parents determined that their daughter had placed an eight milligram Suboxone tablet in her mouth, ingested half, and spit out the remaining half. The defendant called 911, and the parents went to the fire department.

The defendant told Sergeant Maltais that he "was unaware of the tablet[']s location within the vehicle, or where [the daughter] had located the substance." He stated that "he does

have Suboxone in the vehicle at times. However, they are kept in a pill bottle." He further told Sergeant Maltais that the Suboxone pill bottle was not in the motor vehicle at the time of the incident. Asked if he had a prescription for the Suboxone, the defendant responded, "I do, but it's at home." The defendant provided the remaining half of the tablet to Sergeant Maltais.

2. Procedural history. The Lakeville Police Department initially sought the issuance of a complaint for one count of reckless endangerment of a child and one count of possession of a class B substance. However, a complaint ultimately issued for the reckless endangerment count only.[1]

Following his arraignment, the defendant filed a motion to dismiss the complaint. After a nonevidentiary hearing, the judge issued a memorandum of decision allowing the motion.[2] The

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[1] Defense counsel represented at the motion to dismiss hearing that the defendant had a prescription for Suboxone, and had "turned that in to the Commonwealth." The record reflects neither the date on which the Commonwealth received the prescription, nor whether evidence of the prescription was presented to the clerk-magistrate who issued the complaint. That notwithstanding, neither party contends that the outcome of this case hinges on whether the defendant legally or illegally possessed the tablet.

[2] In his memorandum of decision, the judge summarized the information before the clerk-magistrate, and concluded, in relevant part:

> "While these circumstances certainly are regrettable, they do not constitute sufficient evidence to support a finding

Commonwealth filed a motion to reconsider, which the judge denied without a hearing.

Discussion. 1. Legal standards. a. Probable cause. Probable cause "exists where the facts and circumstances . . . [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been . . . committed" (quotation omitted). Commonwealth v. Coggeshall, 473 Mass. 665, 667 (2016). "Probable cause requires more than mere suspicion, but it is considerably less demanding than proof beyond a reasonable doubt" (quotation omitted). Id. "When applying this standard we are guided by the factual and practical considerations of everyday life on which reasonably prudent [people], not legal technicians, act" (quotation omitted). Id.

b. Motion to dismiss. Where a clerk-magistrate has issued a criminal complaint, "a motion to dismiss[] is the appropriate and only way to challenge a finding of probable cause." Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002). "A motion to dismiss for lack of probable cause 'is decided from the four corners of the complaint application, without

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of probable cause as to the element of the offense charged that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk of serious bodily injury to the child. The defendant's motion to dismiss is, therefore, ALLOWED."

evidentiary hearing.'" Commonwealth v. Leonard, 90 Mass. App. Ct. 187, 190 (2016), quoting Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013). "The complaint application must include information to support probable cause as to each essential element of the offense." Humberto H., supra at 565-566. Our review of a judge's probable cause determination is a question of law, which we review de novo. Id. at 566. We view the information set forth in the complaint application "in the light most favorable to the Commonwealth." Leonard, supra.

c. Reckless endangerment. General Laws c. 265, § 13L, provides in relevant part:

> "Whoever wantonly or recklessly engages in conduct that creates a substantial risk of serious bodily injury or sexual abuse to a child or wantonly or recklessly fails to take reasonable steps to alleviate such risk where there is a duty to act shall be punished . . . .
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> "For the purposes of this section, such wanton or reckless behavior occurs when a person is aware of and consciously disregards a substantial and unjustifiable risk that his acts, or omissions where there is a duty to act, would result in serious bodily injury or sexual abuse to a child. The risk must be of such nature and degree that disregard of the risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

In the context of § 13L, a "substantial and unjustifiable risk" requires "a good deal more than a possibility." Commonwealth v. Hendricks, 452 Mass. 97, 103 (2008). In addition, "[d]isregard of this risk requires a showing that is 'substantially more than negligence.'" Coggeshall, 473 Mass. at 668, quoting Hendricks,

supra. Further, "wanton and reckless" conduct under § 13L is limited "to circumstances where an accused 'is aware of and consciously disregards' the risk." Coggeshall, supra at 670, quoting G. L. c. 265, § 13L. Thus, "§ 13L requires proof of the defendant's subjective state of mind with respect to the risk involved. That is, he must be shown to have been actually aware of the risk." Coggeshall, supra.

We conduct a fact-specific analysis in these cases, considering the totality of the circumstances. See Commonwealth v. Santos, 94 Mass. App. Ct. 558, 561 (2018). In the context of a reckless endangerment case alleging inadequate supervision:

> "[r]elevant circumstances may include 'the gravity and character of the possible risks of harm; the degree of accessibility of the [defendant]; the length of time of the abandonment; the age and maturity of the children; the protective measures, if any, taken by the [defendant]; and any other circumstance that would inform the factfinder on the question whether the defendant's conduct was [wanton or reckless].'"

Id., quoting Barnes v. Commonwealth, 47 Va. App. 105, 113 (2005).

2. Analysis. The Commonwealth argues that the complaint established probable cause for the elements of reckless endangerment because "the defendant allowed his two year old daughter to play in his motor vehicle unsupervised, a motor vehicle in which he routinely stored narcotics." Considering the allegations within the four corners of the complaint

application in their totality, we conclude that the Commonwealth's claim is unavailing.

The Commonwealth's argument relies upon speculation rather than reasonable inferences. Contrary to the Commonwealth's position, the police report did not show, and we cannot infer, that the daughter was unsupervised. Rather, the information contained in the police report revealed only that the defendant was in his yard while his daughter was in his motor vehicle parked at the same residence. He and the daughter's mother contemporaneously observed their daughter spit something out of her mouth, and reacted by retrieving the item, calling 911, and taking her to the fire station. There was no information to the effect that the defendant was anywhere but adjacent to the motor vehicle where he and the daughter's mother could, and did, observe their daughter. Cf. Santos, 94 Mass. App. Ct. at 561 (defendant's act of leaving child in front of television while defendant used bathroom did not rise to level of wanton or reckless conduct creating substantial risk of bodily injury to child even though child had previously wandered from home).

The Commonwealth further contends, as it did in its motion to reconsider, "that the act of leaving a two year old alone in a vehicle is in itself reckless" because a child "could have potentially put a car into gear and rolled the vehicle," and "leaving a child alone in a vehicle where narcotics are

routinely stored is even more egregious." The Commonwealth reasons that the daughter "could have injured herself in any number of ways . . . . She could have manipulated a device inside the vehicle, such as putting the car into gear. She could have wandered out into vehicular traffic." These statements are unpersuasive, and amount to nothing more than speculation. The police report states only that the daughter was inside the vehicle; that at some unidentified "times" the defendant's prescription medication, in a bottle, had been in the vehicle; and that her parents were close enough to observe her "spitting something from her mouth," retrieved the object, called 911, and sought immediate emergency care. The police report does not reflect, and does not permit an inference, that the defendant lacked "accessibility" to his daughter at any time, or "abandon[ed]" his daughter for any length of time, if at all. Santos, 94 Mass. App. Ct. at 561. Furthermore, the police report does not offer any other facts relevant to the question whether the defendant consciously disregarded a substantial and unjustifiable risk, such as whether the daughter was in any sort of car seat; whether she wore a seatbelt or restraint; whether any windows or doors to the vehicle were open or closed; whether the motor was running; or whether the keys were in the ignition. Thus, stripped of speculative assertions, the application for complaint permits, at most, an inference

that the defendant might have unknowingly exposed his daughter to the theoretical possibility of an injury.[3] See Coggeshall, 473 Mass. at 670 ("wanton or reckless" conduct under § 13L limited "to circumstances where an accused 'is aware of and consciously disregards' the risk" [citation omitted]); Hendricks, 452 Mass. at 103 ("the risk must be a good deal more than a possibility"). This is not enough to establish probable cause for reckless endangerment.

Finally, the police report likewise does not support the Commonwealth's claim that the defendant "routinely stored narcotics" in his vehicle. In response to Sergeant Maltais's question, the defendant stated that he has had Suboxone in the vehicle "at times," and that the Suboxone was kept in a bottle. He denied that the bottle was in the vehicle at the time of the incident, and was unaware as to how or where the tablet was located in the vehicle. The police report offers no further information to support an inference that the defendant "stored"

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[3] We recognize that "[p]robable cause does not require a showing that the police resolved all their doubts," and that the government is not charged with excluding hypotheses of innocence. Commonwealth v. Hason, 387 Mass. 169, 175 (1982). See Commonwealth v. Merola, 405 Mass. 529, 533-534 (1989). Rather, "[w]hat had to be shown was more than a suspicion of criminal involvement, something definite and substantial, but not a prima facie case of the commission of a crime, let alone a case beyond a reasonable doubt." Commonwealth v. Bond, 375 Mass. 201, 210 (1978). Here, however, the information in the police report falls well short of the required standard.

his prescription medication in the vehicle, much less that he did so "routinely."

Conclusion. Although we agree with the Commonwealth's assertion that the probable cause requirement is not onerous, see note 3, supra, the defendant's conduct here, viewed in the light most favorable to the Commonwealth, amounted to negligence at the most. See Coggeshall, 473 Mass. at 668. The conduct was not wanton and reckless within the meaning of § 13L because there is no information in the police report from which one could reasonably infer that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that would result in serious bodily injury to his daughter. See id. at 670. Contrast Santos, 94 Mass. App. Ct. at 562-563 (probable cause for reckless endangerment charge existed where mother discovered that three year old child who had previously wandered from home was missing, mother "just assumed" daughter was playing with neighbor's child, and mother left "child unsupervised outside for an indeterminate amount of time, without calling the police," and, by inference, "with no apparent plan to continue searching . . . anytime soon"). Accordingly, we affirm the order dismissing the complaint and the order denying the motion to reconsider.

So ordered.