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19-P-964

Appeals Court

COMMONWEALTH vs. HANNAH R. KAPLAN.

No. 19-P-964.

Hampshire. February 13, 2020. - June 1, 2020.

Present: Green, C.J., Wolohojian, & Sullivan, JJ.

Motor Vehicle, Operating to endanger. Constitutional Law, Reasonable suspicion. Search and Seizure, Reasonable suspicion. Practice, Criminal, Motion to suppress. Words, "Hang onto."

Complaint received and sworn to in the Eastern Hampshire Division of the District Court Department on October 29, 2018.

A pretrial motion to suppress evidence was heard by Bruce S. Melikian, J.

An application for leave to prosecute an interlocutory appeal was allowed by Scott L. Kafker, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

Alexa Pascucci, Assistant District Attorney (Thomas H. Townsend, Assistant District Attorney, also present) for the Commonwealth.

Daniel M. Sandell for the defendant.

WOLOHOJIAN, J. In this interlocutory appeal from an order allowing the defendant's motion to suppress,¹ the issue is whether the judge correctly concluded that a police officer's observation of the defendant driving her car with her passenger's torso extended out the side window was insufficient to permit him to stop the car. Contrary to the judge below, we conclude that the officer had reasonable suspicion that the defendant was negligently operating her motor vehicle, G. L. c. 90, § 24 (2) (a), and that the defendant had committed a civil traffic violation by driving while a person was hanging onto the outside of her vehicle, G. L. c. 90, § 13. For these reasons, we reverse the order allowing the defendant's motion to suppress.

On October 27, 2018, at approximately 12:18 A.M.,² Officer Matthew Frydryk saw the defendant drive her car through the Amherst town hall public parking lot.³ Notably, the defendant's

¹ A single justice of the Supreme Judicial Court allowed the Commonwealth's application for leave to pursue an interlocutory appeal and reported the case to this court. See G. L. c. 278, § 28E; Commonwealth v. Demirtshyan, 87 Mass. App. Ct. 737, 740 n.7 (2015).

² It was the weekend before Halloween and thus there were many parties and celebrations taking place. As a result, the police had a greater than usual presence on the streets of Amherst.

³ "We recite the facts found or implicitly credited by the motion judge, supplemented by additional undisputed facts where they do not detract from the judge's ultimate findings."

front-seat passenger, who was yelling, had her torso extended out the side window of the car and was holding onto the roof. Officer Frydryk observed this situation for five or ten seconds. He then followed the defendant as she drove out of the parking lot, turned onto Boltwood Avenue, and proceeded to Main Street, where Officer Frydryck pulled her over without incident. The officer's reason for stopping the vehicle was that driving with the passenger outside the vehicle in the manner we have described was unsafe and negligent.⁴

The defendant was charged with operating under the influence of alcohol, G. L. c. 90, § 24 (1) (a) (1); negligent operation of a motor vehicle, G. L. c. 90, § 24 (2) (a); and unsafe operation of a motor vehicle, G. L. c. 90, § 13. She filed a motion to suppress the evidence obtained during the traffic stop on the grounds that the police lacked probable cause or reasonable suspicion to stop her car.⁵ The judge below

Commonwealth v. Jessup, 471 Mass. 121, 127-128 (2015). It bears noting that the pertinent facts are essentially undisputed, and the judge credited the officer's testimony in its entirety.

⁴ Although it may be presumed that the passenger did not have her seat belt fastened in violation of G. L. c. 90, § 13A, that alone could not justify stopping the vehicle. See G. L. c. 90, § 13A ("The provisions of this section shall be enforced by law enforcement agencies only when an operator of a motor vehicle has been stopped for a violation of the motor vehicle laws or some other offense").

⁵ The defendant's motion to suppress also asserted that the police exceeded the scope of any lawful stop, and that she was

agreed, rejecting the Commonwealth's arguments that the officer had reasonable suspicion that the defendant had driven in a negligent or unsafe manner. This appeal followed.

Discussion. In reviewing a ruling on a motion to suppress we "review independently the application of constitutional principles to the facts found," but "we accept the judge's subsidiary findings of fact absent clear error" (citation omitted). Commonwealth v. Leslie, 477 Mass. 48, 53 (2017). For purposes here, the Commonwealth accepts the judge's findings. But it argues that the stop was justified either because there was reasonable suspicion of negligent operation or unsafe operation or, in the alternative, because of the officer's community caretaking function.⁶ We turn first to reasonable suspicion.

Where, as here, "a seizure occurs, we ask whether the stop was based on an officer's reasonable suspicion that the person was committing, had committed, or was about to commit a crime. That suspicion must be grounded in specific, articulable facts and reasonable inferences [drawn] therefrom rather than on a hunch" (quotations and citations omitted). Commonwealth v.

searched without consent. Neither of these arguments is at issue in this appeal.

⁶ Deciding the case as we do, we do not reach the Commonwealth's community caretaking argument.

Warren, 475 Mass. 530, 534 (2016). The crime at issue here is G. L. c. 90, § 24 (2) (a), which provides that "[w]hoever . . . operates a motor vehicle recklessly, or operates such a vehicle negligently so that the lives or safety of the public might be endangered . . . shall be punished." To establish guilt under the statute, "the Commonwealth must prove that the defendant (1) operated a motor vehicle, (2) upon a public way, and (3) (recklessly or) negligently so that the lives or safety of the public might be endangered" (citation omitted). Commonwealth v. Daley, 66 Mass. App. Ct. 254, 255 (2006). We are concerned here only with the third of these elements.⁷

That element "only requires proof that the lives or safety of the public might be endangered, not that they were endangered." Daley, 66 Mass. App. Ct. at 256. Although many negligent operation cases involve "evidence of a collision, a

⁷ There is no dispute that the defendant was operating the vehicle. Nor does the defendant challenge that the town hall metered parking lot was a public way. See G. L. c. 90, § 24 (2) (a) (public way is "any way or . . . place to which the public has a right of access, or any place to which members of the public have access as invitees or licensees"). To determine whether a way is public, "we look to see if the 'physical circumstances of the way are such that members of the public may reasonably conclude that it is open for travel'" (citation omitted). Commonwealth v. Belliveau, 76 Mass. App. Ct. 830, 832-833 (2010). The town hall parking lot here is located in the downtown business area, connects intersecting streets, is associated with the town hall (a public building), and has parking meters. See id. at 833; Commonwealth v. Hart, 26 Mass. App. Ct. 235, 237 (1988) (intersecting streets and general use by the public).

near collision, a swerve, a departure from marked lanes, or any erratic movement of the motor vehicle other than speed significantly lower than the speed limit," Commonwealth v. Teixeira, 95 Mass. App. Ct. 367, 369 (2019), "[a] defendant's driving need not have been erratic to support a conviction of negligent operation, so long as the conduct, taken as a whole, might have endangered the lives and safety of the public." Id. at 370. See Commonwealth v. Ross, 92 Mass. App. Ct. 377 (2017) (sustaining conviction of negligent operation even in absence of collision or near collision, considering time and place to determine whether defendant's conduct might have endangered lives of public). "The question is whether the defendant's driving had the potential to cause danger to the public, not whether it actually did." Commonwealth v. Sousa, 88 Mass. App. Ct. 47, 51 (2015). One may operate a vehicle "in such a way that would endanger the public although no other person is on the street." Commonwealth v. Constantino, 443 Mass. 521, 526-527 (2005).

Here, there was reasonable suspicion that the defendant's operation of the vehicle while her passenger's torso was extended out the window and she was yelling might have endangered the lives and safety of the public. The defendant's view out the side window was necessarily obstructed as was, it could be inferred, her ability to see and use the side view

mirror. Driving in such circumstances endangered others on the road. Moreover, the passenger's position and behavior was a significant distraction to the defendant and to other motorists late at night in a busy area. This, too, endangered the lives or safety of others. See Teixeira, 95 Mass. App. Ct. at 370-371 (even without evidence of erratic driving, jury could conclude defendant put lives of public in danger when he consumed alcohol, drove substantially below speed limit while holding cell phone one foot from his face). See also Ross, 92 Mass. App. Ct. at 380 (defendant speeding on dark tree- and fence-lined road, at night, through residential area during Memorial Day weekend); Commonwealth v. Ferreira, 70 Mass. App. Ct. 32, 33-35 (2007) (driver accelerated and fishtailed out of parking spot in parking lot with no pedestrians nearby or other erratic driving); Commonwealth v. Duffy, 62 Mass. App. Ct. 921 (2004) (defendant and two others riding motorcycles in populated neighborhood on holiday afternoon at speeds twice speed limit). We accordingly conclude that the defendant's act of driving while her passenger had her torso extended out the window and was yelling was sufficient to give the officer reasonable suspicion of negligent operation under G. L. c. 90, § 24 (2) (a), because it posed a risk to others on the road.

The defendant argues that the word "public" as used in the statute must be interpreted to mean only those persons outside

the car. Thus, she continues, driving in a way that would endanger the lives or safety of only those within the vehicle is not prohibited under G. L. c. 90, § 24 (2) (a). However, we see nothing in the statutory language or purpose to suggest such a limitation, nor has the defendant pointed to any legal authority to support her proposition.⁸

Independent of having reasonable suspicion of negligent operation under G. L. c. 90, § 24 (2) (a), the officer was also justified in stopping the car for a civil traffic violation under G. L. c. 90, § 13, which, among other things, provides that:

"No person, except firefighters or garbage collectors, or operators of fire trucks or garbage trucks, . . . shall hang onto the outside of, or the rear-end of any vehicle, . . . and no operator of a motor vehicle shall knowingly permit any person to hang onto or ride on the outside or rear-end of the vehicle"⁹

⁸ Our own research has located only one case arguably considering the issue on similar statutory language, and it does not help the defendant here. See State v. Saulnier, 109 R.I. 11, 12 n.1, 16 (1971) (jury question existed as to whether defendant should have known his operation of vehicle "created a risk to the safety of his passenger" under Rhode Island General Laws § 31-27-4, which provided, "Any person who operates a motor vehicle . . . recklessly so that the lives or safety of the public might be endangered" [emphasis added]).

⁹ Given that the Commonwealth did not seek to justify the stop on this basis at the motion to suppress, it would ordinarily be foreclosed from doing so for the first time on appeal. See Commonwealth v. Bettencourt, 447 Mass. 631, 633 (2006). Here, though, the issue was addressed by the defendant below, and the judge considered it. Therefore, the considerations underlying the Bettencourt rule, id. at 634, are not present.

Neither reasonable suspicion nor probable cause of criminal conduct are required to stop a vehicle where an officer has observed a civil traffic infraction; instead, the observed traffic violation alone provides sufficient basis for the stop. Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020); Commonwealth v. Rodriguez, 472 Mass. 767, 774 n.15 (2015); Commonwealth v. Bacon, 381 Mass. 642, 644 (1980). Thus, the question here is whether the officer's observation that the defendant was driving with a passenger hanging onto the roof of the car with her torso extended out the window was a civil traffic violation under G. L. c. 90, § 13.

The defendant argues it was not. In her view, the passenger did not "hang onto" the outside of the car because her feet were still inside the car. Although the defendant acknowledges that the passenger was holding onto the roof while her torso was extended outside of the car, she asks that we interpret the statute to apply only where a person is fully outside the vehicle, or freely suspended from its exterior. To support her position, she points to the fact that the statute excludes firefighters and garbage collectors from the prohibition against "hang[ing] onto" vehicles. In the defendant's view, because the legislature exempted garbage collectors and firefighters, who are commonly known to hang onto

their vehicles while fully outside them, driving with a person who is only partially hanging outside a vehicle is not prohibited.

The plain meaning of the phrase "hang onto" does not support the defendant's position. See Commonwealth v. Wassilie, 482 Mass. 562, 573 (2019) ("A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result"). "[H]ang on to" means "to hold, grip, or keep tenaciously." Merriam-Webster's Collegiate Dictionary 566 (11th ed. 2012). The use of the preposition "onto" as opposed to "from" is meaningful in this context. While the phrase "hang from" denotes suspension, see id., "hang onto" does not. Here, the defendant's passenger was holding onto the roof of the car, presumably to steady herself as her torso was extended outside the window.¹⁰ The defendant was thus driving with a person "hanging onto" the outside of her car, and the officer was justified in stopping the defendant for a civil traffic violation under G. L. c. 90, § 13.

Order allowing motion to
suppress reversed.

¹⁰ This case is therefore unlike the situation in which a person holds onto some exterior portion of the car while seated in it; for example, a driver who holds the top of the door frame while resting her left arm on the open window while driving.