

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1030

COMMONWEALTH

vs.

JOHN LAYTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his convictions of operating a motor vehicle while under the influence of liquor (OUI), G. L. c. 90, § 24 (1) (a) (1), as a fourth and subsequent offense, negligent operation of a motor vehicle, G. L. c. 90, § 24 (2) (a), and operating a motor vehicle with a revoked license, G. L. c. 90, § 23.<sup>1</sup> On appeal, he argues that his motion to suppress was erroneously denied, and that the evidence was insufficient to prove he was the driver of the vehicle. We affirm.

Motion to suppress. The motion judge fully credited the testimony of State Trooper Austin Dooley, the sole witness at

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<sup>1</sup> After a jury found the defendant guilty of OUI, he pleaded guilty to the subsequent offense portion of that indictment. The other convictions also resulted from the jury trial.

the suppression hearing, who testified as follows.<sup>2</sup> Around 6 P.M. on New Year's Eve, 2016, a Nissan van "spun out" in Wareham and came to rest perpendicular to, and partially off, the ramp connecting Route 195 to Route 25. Two motorists stopped their vehicles in order to help, and saw a man emerge from the driver's side of the van and run into the woods. The motorists saw no other occupants in the van. State police arrived within ten minutes, and noted mismatched license plates on the van's front and back, which they determined were registered to two different vehicles. A State police helicopter quickly arrived and, using infrared technology, located an individual lying prone in the woods about one quarter-mile from the accident.<sup>3</sup> Trooper Dooley and another trooper drove their cruisers to the woodline off the highway near where the individual was located. As the troopers prepared to enter the dark woods, they were unsure what to expect. Trooper Dooley reversed his jacket so the reflectors were not visible, and carried a flashlight. The other trooper carried a rifle. The helicopter hovered above,

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<sup>2</sup> "In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given . . . testimony presented at the motion hearing." Commonwealth v. Meneus, 476 Mass. 231, 234 (2017), quoting Commonwealth v. Wilson, 441 Mass. 390, 393 (2004).

<sup>3</sup> The individual remained motionless until later roused by police.

making a loud noise. Approximately thirty feet into the woods, the officers encountered the defendant, who lay face down on the ground with his hands beneath him, not visible. He did not respond or move even when the troopers shouted, "[S]tate police, let me see your hands." Trooper Dooley ran to the defendant, and quickly handcuffed and raised him. The defendant smelled of liquor, was belligerent, had slurred and nonsensical speech, and could not stand on his own. Trooper Dooley saw a set of keys on the ground beneath where the defendant lay, one of which later turned out to operate the van.<sup>4</sup>

The defendant argues that the police did not have reasonable suspicion that he had committed a crime when they approached and seized him in the woods.<sup>5</sup> We disagree; the officers had reasonable suspicion that the defendant had operated the van while under the influence of alcohol.<sup>6</sup> The

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<sup>4</sup> The keys were handed over to a tow truck operator who confirmed that one of them operated the van.

<sup>5</sup> An officer may seize an individual when the officer has "an objectively reasonable suspicion of criminal activity, based on specific and articulable facts." Commonwealth v. Stoute, 422 Mass. 782, 789 (1996), citing Terry v. Ohio, 392 U.S. 1, 21 (1968). "We view the facts and circumstances as a whole," Commonwealth v. Williams, 422 Mass. 111, 116 (1996), bearing in mind the "specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his [or her] experience." Stoute, supra at 790, quoting Terry, supra at 27.

<sup>6</sup> The Commonwealth also suggests that a number of vehicular misdemeanor offenses were sufficient bases upon which to seize the defendant. However, none of them is an arrestable offense.

driver was the only occupant of the van, and he had lost control of the vehicle while driving on a public way. The defendant was located in the woods alone, not far from the scene, and not long after the accident. No one else was present in the woods, which contained no homes, structures, or roads besides the highways. There was no obvious reason for the defendant to be in that location but for having fled the accident. These facts supplied reasonable suspicion that the defendant was the driver of the van. Other circumstances gave reasonable suspicion that the defendant had operated the van while under the influence of an intoxicating substance. Specifically, the driver lost control of the van for no apparent reason, he left the vehicle in an unsafe position, and he ignored offers of help and instead headed into the woods on a cold winter night, where he passed out so profoundly that he neither responded to the noise of the hovering helicopter above or to the voices of the officers yelling below. And it was New Year's Eve.

We are also unpersuaded by the defendant's argument that the troopers exceeded the reasonable scope of the stop when they approached him with a gun drawn and handcuffed him.

"'Once the [valid basis] for a stop [is] established, "the pertinent inquiry is whether the degree of intrusion is reasonable in the circumstances." . . . The extent of the

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See G. L. c. 90, § 21 (motor vehicle offenses that are arrestable without warrant); Commonwealth v. Ubilez, 88 Mass. App. Ct. 814, 820-821 (2016).

danger is important in assessing whether the force used by the police in the encounter was commensurate with their suspicion. . . .' Commonwealth v. Emuakpor, 57 Mass. App. Ct. 192, 199 (2003). (Citations omitted.) . . . When police officers have reasonable suspicion to stop someone, drawing a handgun . . . may be permissible based on safety concerns. See Commonwealth v. Johnson, 413 Mass. 598, 600 (1992); Commonwealth v. Owens, 414 Mass. 595, 600 (1993). The crucial safety question is the extent of the danger at the time the police used force."

Commonwealth v. McKoy, 83 Mass. App. Ct. 309, 313 (2013).

Further, in performing an investigatory stop, police may handcuff an individual when "the[] detention is commensurate with the purpose of the stop." Commonwealth v. Feyenord, 445 Mass. 72, 77 (2005), cert. denied, 546 U.S. 1187 (2006), quoting Commonwealth v. Torres, 424 Mass. 153, 162 (1997).

Here there were sufficient "fear-provoking circumstances," Commonwealth v. Bottari, 395 Mass. 777, 782 (1985): the officers were walking into dark woods not knowing what or who they might find, the driver of the van had acted erratically and was driving a vehicle with plates that belonged to different vehicles (a fact indicative of criminal activity), he had fled the scene of the accident and into unpopulated woods, it was dark and the officers' only source of light was a flashlight, the person in the woods did not respond to their directives and his hands were not visible, and he did not show his hands when commanded to do so. See Commonwealth v. Haskell, 438 Mass. 790, 794 (2003), quoting Commonwealth v. Robbins, 407 Mass. 147, 152

(1990) ("The Constitution does not require officers 'to gamble with their personal safety,' and police officers conducting a threshold inquiry may take reasonable precautions, including drawing their weapons, when the circumstances give rise to legitimate safety concerns").

Finally, the defendant argues that the van keys should be suppressed even though he acknowledges that they "became visible to the police after they had bodily lifted him off the ground, onto his knees, and placed him in handcuffs." But under the plain view doctrine, police may seize an object without a warrant where, as here, they inadvertently view it from a position they are lawfully in, they have a lawful right of access to the object, and the incriminating character of the object is immediately apparent. Commonwealth v. Balicki, 436 Mass. 1, 8 (2002), citing Commonwealth v. D'Amour, 428 Mass. 725, 730-731 (1999).

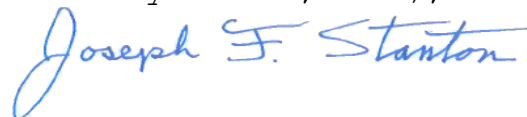
Required finding motion. We review the denial of a motion for a required finding to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). "A conviction may be based on circumstantial evidence alone," Commonwealth v. Platt,

440 Mass. 396, 401 (2003), and "[t]he Commonwealth need not 'exclude every reasonable hypothesis of innocence' to prove its case," id., quoting Commonwealth v. Merola, 405 Mass. 529, 533-534 (1989).

Here, the defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was the driver of the van. Viewing the evidence in the required light, the jury could easily infer that the man found passed out in the woods with the van keys under him was the driver of the van. The fact that the defendant told police that a different man drove the van, and that the defendant's witness testified that she saw a different man driving the van earlier that evening, did not detract from the sufficiency of the Commonwealth's evidence, but were simply conflicts for the jury to resolve. Platt, 440 Mass. at 401, quoting Commonwealth v. Lydon, 413 Mass. 309, 312 (1992) ("If the evidence lends itself to several conflicting interpretations, it is the province of the jury to resolve the discrepancy and 'determine where the truth lies'").

Judgments affirmed.

By the Court (Wolohojian,  
Milkey & Hand, JJ.<sup>7</sup>),



Clerk

Entered: July 30, 2019.

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<sup>7</sup> The panelists are listed in order of seniority.