

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

21-P-289

COMMONWEALTH

vs.

ANTHONY B. TRAPPIER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Before us is the Commonwealth's interlocutory appeal from an order allowing the defendant's motion to suppress. At issue is whether the police were justified in ordering the defendant out of his vehicle to conduct field sobriety tests. The motion judge found that the police had no concerns for their safety or the safety of the public and that there was no reasonable suspicion of criminal activity. Consequently, the motion judge determined that the exit order was not justified. We conclude otherwise and reverse the order allowing the defendant's motion to suppress.

Background. We summarize the facts as found by the judge, supplemented by uncontroverted facts adduced at the motion hearing. See Commonwealth v. Torres, 433 Mass. 669, 670 (2001).

On June 1, 2018, at about 1:30 A.M., Officer Matthew MacFadzen of the Bridgewater police department responded to "a dispatch of an erratic operator on Pleasant Street," a road which passes by the police station in Bridgewater.¹ The car in question was described as a gray sedan. Officer MacFadzen was parked in the side lot of the police station when he heard the dispatch. Soon thereafter, he observed a car matching the description stop at a green light in front of the police station for about ten seconds. Officer MacFadzen pulled up behind the defendant's car, activated his cruiser's emergency lights, and "made a motor vehicle stop." The driver, later identified as the defendant, produced his license and registration without incident. At this point, another officer, Ryan Thayer, arrived and took over the investigation. In response to Officer Thayer's questions, the defendant stated that he had stopped because he was using the GPS feature on his phone when his phone died. Officer Thayer detected a "strong odor of alcohol" and asked the defendant if he consumed any alcohol, to which the defendant replied, "yes."² Officer Thayer then ordered the defendant out of the car and conducted several field sobriety

¹ There is no dispute that the dispatch was based on information received from a 911 call placed by a caller whose identity was known to the police.

² The judge mistakenly attributes these observations to Officer MacFadzen instead of Officer Thayer.

tests. The defendant performed poorly. Officer Thayer formed the opinion that the defendant was under the influence of alcohol and placed him under arrest.

On the basis of these facts, the judge concluded that Officer MacFadzen lawfully stopped the defendant because he had observed the defendant commit a motor vehicle infraction by stopping at a green light. She went on to conclude, however, that the police had no basis to order the defendant out of the car. Specifically, she found that "the Commonwealth did not supply any evidence of safety concerns or the testimony of the 911 caller to support the immediate exit order of the defendant. There was no information supplied about erratic driving or public safety issue." The judge further observed that the police failed to establish that they had a reasonable suspicion of criminal activity to justify an "immediate exit order." The judge noted that the defendant was not given the opportunity to perform "preliminary divided attention tests such as the ABCs and/or counting backwards before he was ordered to exit the car." The judge then concluded that the "exit order was pretextual and not constitutionally justified" and subsequently allowed the motion to suppress.³

³ Given our conclusion that the exit order was justified and the absence of any findings that support the conclusion that the exit order was pretextual, we need not address this basis for the judge's order.

Discussion. The defendant's motion to suppress challenged the stop of his vehicle and the exit order. As noted, the motion was allowed on the basis that the exit order was not justified, which is the subject of the Commonwealth's appeal. Although the defendant has not cross-appealed, he urges us to affirm the order allowing the motion to suppress on the ground that the stop was unconstitutional. "To avoid the possibility of continuing controversy over the same evidence, we will permit the defendant to raise the propriety of the [stop] under the umbrella of the government's appeal" (quotations omitted). Commonwealth v. Meneide, 89 Mass. App. Ct. 448, 451 (2016).

1. The stop. As noted, the motion judge determined that the motor vehicle stop was valid based on an "observed motor vehicle violation, [i.e.,] stopping at a green light." See Commonwealth v. Santana, 420 Mass. 205, 207 (1995). The defendant challenges that finding by claiming that there is no legal prohibition to stopping at a green light, and where, as here, there were no cars on the road and traffic was not impeded or obstructed, the judge erred in concluding that he had committed a traffic violation.

We need not decide whether a ten second pause at a green light -- with nothing more -- amounts to a motor vehicle infraction because even if we were to assume that such conduct does not amount to a per se motor vehicle infraction, the motor

vehicle stop was justified on the basis that Officer MacFadzen had reasonable suspicion that the defendant's driving, as reported by the 911 caller, presented a danger to others and to public safety. See Commonwealth v. Smigliano, 427 Mass. 490, 492 (1998) (erratic driving may give rise to a reasonable suspicion that a driver is impaired, permitting an investigatory stop). See also Commonwealth v. Bartlett, 465 Mass. 112, 117-118 (2013) (officer's observations of erratic driving gave rise to "reasonable suspicion that the defendant's driving presented an immediate danger to others and to public safety," and stop was proper "in order to ensure that the defendant's erratic operation did not endanger other drivers, and in order to determine whether the defendant was operating while under the influence of drugs or alcohol"); Commonwealth v. Davis, 63 Mass. App. Ct. 88, 91 (2005) (anonymous report of erratic driver "sufficient to conclude that an emergency existed, requiring immediate action for the protection of life and property of both the operator and the general public," and "[b]y motioning the driver to pull over, the officer acted reasonably and proportionally given the situation").

2. Exit order. "[A]n exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police

are conducting a search of the vehicle on other grounds."

Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020).

Contrary to the conclusion reached by the judge, Officer Thayer had a reasonable concern for his safety and the safety of the public. The odor of alcohol and the defendant's admission that he had consumed alcohol provided an adequate basis for Officer Thayer to take the necessary steps to confirm the defendant's sobriety.⁴ Commonwealth v. Blais, 428 Mass. 294, 298 (1998). Those steps appropriately included an exit order to administer field sobriety tests so that Officer Thayer could "assure himself that he [was] not turning loose a drunk driver on the traveling public." Id. ("[a] drunk driver let loose on the highways is a deadly menace, not only to the officer, but also to anyone sharing the highways with him").

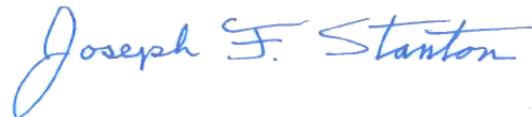
In addition, based on the odor of alcohol and the defendant's admission that he had consumed alcohol, Officer Thayer had a reasonable suspicion that the defendant was committing a crime, namely, operating a motor vehicle while under the influence of alcohol. This suspicion provided a second independent basis for the exit order. See Commonwealth

⁴ We do not agree with the judge's suggestion that Officer Thayer should have conducted "preliminary divided attention tests" before giving the exit order. We are not aware of any case that requires the administration of such tests prior to conducting roadside assessments.

v. Bazinet, 76 Mass. App. Ct. 908, 908-909 (2010) (mere odor of alcohol sufficient reasonable suspicion to detain operator for investigation at sobriety checkpoint).

Order allowing motion to suppress reversed.

By the Court (Vuono, Shin & Singh, JJ.⁵),



Clerk

Entered: April 14, 2022.

⁵ The panelists are listed in order of seniority.