

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-212

COMMONWEALTH

vs.

JOSEPH F. MCCARTHY, THIRD.

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 evidence recovered following the warrantless stop of his vehicle. We affirm.

Background. We summarize the judge's pertinent findings of fact. On May 22, 2019, at approximately 11:45 A.M., Lieutenant Todd Bazarewsky of the Middleborough Police Department was working a paid detail at the corner of Pine and East Streets when he heard a radio dispatch regarding a possible domestic dispute at an address on Pine Street, a short distance away. The dispatch, based on a 911 call, reported that the defendant had been at a home, attempting to get in; that he had driven away in a tan Jeep Grand Cherokee; and that he was possibly intoxicated. The judge found that "a short time later . . .

Lieutenant Bazarewsky observed a vehicle matching that description [and] signaled that motor vehicle to stop, which it did without incident." Bazarewsky identified the driver as the defendant; other officers then arrived, spoke to the defendant, and attempted to administer field sobriety tests. The defendant was arrested for operating under the influence of alcohol (OUI), and an inventory search of his Jeep located several cans of beer. Although the dispatch call stated that the Jeep was tan,¹ the inventory sheet completed by one of the officers indicated that the Jeep was green, as did a police computer assisted dispatch (CAD) sheet generated in connection with the incident.

On the defendant's motion to suppress the fruits of the vehicle stop, the judge ruled that although the 911 caller was reliable, "[t]he description of a 'tan Grand Cherokee' with no other details could have fit a large number of vehicles on the public roads in the area of the vehicle stop. Further, the fact that the [d]efendant was stopped in a green Grand Cherokee as opposed to a tan Grand Cherokee as reported makes the stop even more random and more likely that an innocent person would be needlessly stopped." Accordingly, the judge ruled that there

¹ A recording of the 911 call was admitted at the suppression hearing; the caller stated that the vehicle was a tan Jeep Grand Cherokee.

was no reasonable suspicion to support the stop and allowed the motion to suppress.

Discussion. We accept the judge's subsidiary findings unless clearly erroneous, see Commonwealth v. White, 374 Mass. 132, 137 (1977), aff'd by an equally divided Court, 439 U.S. 280 (1978), and we make an "independent determination on the correctness of the judge's application of constitutional principles to the facts as found" (quotation omitted). Commonwealth v. Haas, 373 Mass. 545, 550 (1977), S.C., 398 Mass. 806 (1986).

"An investigatory automobile stop requires that the Commonwealth prove that the officer has a reasonable suspicion that the occupants have committed, are committing, or are about to commit a crime" (quotation omitted). Commonwealth v. Lyons, 409 Mass. 16, 19 (1990). See Commonwealth v. Depina, 456 Mass. 238, 242 (2010). When a vehicle is stopped based on a broadcast description, "the Commonwealth must show that the description provided sufficient detail to allow the police officer relying on the radio transmission reasonably to suspect that a motor vehicle matching the description was occupied by a person or persons who committed the crime under investigation." Commonwealth v. Lopes, 455 Mass. 147, 157 (2009). "The description need not be as singular as a registration plate number, but it must not be so broad as to fit a large number of

motor vehicles in the area where the stop occurred." Id. "We have no hard and fast rule governing the required level of particularity; our constitutional analysis ultimately is practical, balancing the risk that an innocent person whose vehicle matches the description will be needlessly stopped with the risk that a guilty person will be allowed to escape." Id. at 158.

Importantly, some inconsistencies between the broadcast description and the vehicle being stopped do not necessarily foreclose the existence of reasonable suspicion. See Lopes, 455 Mass. at 158-159. See also Commonwealth v. Ancrum, 65 Mass. App. Ct. 647, 653-654 (2006); Commonwealth v. Emuakpor, 57 Mass. App. Ct. 192, 197-198 (2003). The question such discrepancies raise is sometimes framed as whether an objectively reasonable police officer, considering all of the circumstances, would have passed over the vehicle (instead of stopping it) due to the discrepancy. See Lopes, supra at 158; Emuakpor, supra at 198.

In this case, we assume *arguendo* that the reliable 911 caller's observation of a tan Jeep Grand Cherokee being driven by a person possibly operating under the influence of alcohol would provide reasonable suspicion for Bazarewsky to stop a vehicle that was seen in reasonably close temporal and spatial proximity to the caller's reported observation and that matched the caller's description. Here, of course, the judge found that

"the [d]efendant was stopped in a green Grand Cherokee as opposed to a tan Grand Cherokee as reported."² We nevertheless further assume arguendo that if Bazarewsky reasonably believed the Jeep to be tan when he observed it, he would have reasonable suspicion for the stop, even if on closer inspection the Jeep turned out to be green. See Commonwealth v. Bernard, 84 Mass. App. Ct. 771, 773 n.2 (2014) (noting that under Federal law, at least, reasonable mistake of fact does not negate otherwise-reasonable suspicion for traffic stop); Commonwealth v. Rivas, 77 Mass. App. Ct. 210, 216 n.6 (2010) (same).

But here, the judge made no finding that Bazarewsky's perception that the Jeep was tan was reasonable. More important, the Commonwealth, which bore the burden of establishing the reasonableness of the stop, see Lyons, 409 Mass. at 19, failed to adduce any evidence that would have enabled the judge to make such a finding. The Commonwealth could have asked Bazarewsky, for example, whether the Jeep

² We recognize that the judge also found that Bazarewsky had stopped a vehicle "matching [the broadcast] description." To reconcile these findings, we interpret the judge as having found that Bazarewsky believed at the time of the stop that the vehicle matched the description, but that the vehicle did not in fact match, being green rather than tan. The Commonwealth's brief, similarly, states that "Bzarewsky considered the Jeep he pulled over to be a tan Jeep," and then offers reasons (albeit without support in the record) why a green vehicle could appear to be tan, or vice versa. Neither the Commonwealth nor the defendant suggests that a remand is appropriate for clarified or further findings.

initially looked tan to him, whether it looked green once he stopped it, and whether lighting conditions, the condition of the car's exterior, his vision, or other factors contributed to the discrepancy between the Jeep's reported color and its actual color. The Commonwealth did not do so.

Accordingly, the question becomes whether reasonable suspicion was established by Bazarewsky's observation of a Jeep Grand Cherokee, of uncertain color, in temporal and spatial proximity to a reported observation of a tan Jeep Grand Cherokee with a possibly intoxicated driver. We conclude that these factors alone -- without the additional factor of a color match between the vehicle reported and the vehicle stopped -- did not establish reasonable suspicion in these circumstances.

The Commonwealth cites no case in which such a general description of a vehicle, coupled with temporal and spatial proximity, has been held sufficient. The cases on which the Commonwealth relies involved significant additional information that either matched the observed vehicle to the reported vehicle or otherwise contributed to reasonable suspicion. See, e.g., Lopes, 455 Mass. at 158 (Cape Verdean flag hanging in vehicle); Commonwealth v. Riggins, 366 Mass. 81, 87 (1974) (vehicle color, direction of travel, description of occupants); Ancrum, 65 Mass. App. Ct. at 652 (vehicle's two-toned coloring, match of one of colors, long taillights, description of two vehicle occupants);

Emuakpor, 57 Mass. App. Ct. at 194-195 (suspicious behavior of vehicle occupants).³ Here, in contrast, the Commonwealth offered no additional evidence -- such as whether Bazarewsky observed that the Jeep's driver was male before he pulled it over, whether the Jeep was being driven in a manner suggesting its driver was intoxicated, or whether the character of the roads in the area increased the likelihood that the Jeep Bazarewsky saw was coming from the location where the 911 caller observed it -- that supported reasonable suspicion.

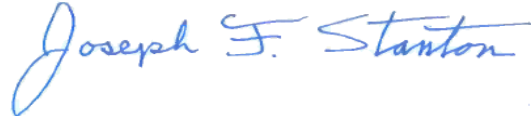
Considering all of the circumstances, it was reasonable for Bazarewsky to act upon the relatively general information that the operator of a tan Jeep Grand Cherokee was operating under the influence of alcohol. However, in absence of evidence that Bazarewsky reasonably perceived the defendant's Jeep to be tan, the Commonwealth failed to show that the "risk that a guilty person [would] be allowed to escape" if Bazarewsky did not stop the Jeep outweighed the "risk that an innocent person

³ Our parenthetical descriptions are not intended to capture all of the factors held to support reasonable suspicion in any of the cited cases.

. . .[would] be needlessly stopped." Lopes, 455 Mass. at 158.

Order allowing motion to
suppress affirmed.

By the Court (Kinder, Sacks &
D'Angelo, JJ.⁴),



Clerk

Entered: June 8, 2022.

⁴ The panelists are listed in order of seniority.