COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1204

COMMONWEALTH

vs.

ROBERT GERVET, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial, the defendant, Robert Gervet, Jr., was found guilty of carrying a firearm without a license. See G. L. c. 269, § 10 (a). In a subsequent jury waived trial, he was found guilty of carrying a firearm without a license, third offense.[1] See G. L. c. 269, § 10 (a) & (d). On appeal, he contends that two motion judges erred in denying his motions to (1) suppress evidence obtained from the search of his vehicle and (2) suppress statements made to police officers that were obtained in violation of his Miranda rights and were involuntary. We affirm.

[1] The defendant was also convicted of carrying a loaded firearm without a license, but the Commonwealth entered a nolle prosequi as to this offense. See G. L. c. 269, § 10 (n). He was acquitted of resisting arrest. See G. L. c. 268, § 32B.

Discussion. "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 . . . . We review independently the application of constitutional principles to the facts found." Commonwealth v. Cordero, 477 Mass. 237, 241 (2017), quoting Commonwealth v. Amado, 474 Mass. 147, 151 (2016).

1. Stop. The defendant contends that the motion judge erred in denying his motion to suppress evidence seized from the car because (1) the trooper lacked reasonable suspicion to initiate the stop and (2) the stop was prolonged beyond its legally permissible purpose.

"We summarize the facts as found by the motion judge," Commonwealth v. Evelyn, 485 Mass. 691, 693 (2020), "supplemented by evidence in the record that is uncontroverted and that was implicitly credited by the judge." Commonwealth v. Warren, 475 Mass. 530, 531 (2016). At approximately 8 A.M. on February 1, 2018, Massachusetts State Police Trooper Peter Towle was monitoring traffic on Route 138 north when he saw a gray Ford Taurus sedan pass him "with heavily tinted windows." The side windows appeared to be "well below the . . . [thirty five] percent tint level" permitted by G. L. c. 90, § 9D. The trooper

could see the driver only in silhouette. Trooper Towle pulled into traffic and activated his blue lights and siren.[2] When the car stopped, the trooper approached the driver's side window.

The defendant produced his license but not the registration. The defendant "opened the center console, opened a blue folder, tapped his legs and arms, and announced 'I can't find the registration.'" Trooper Towle then said, "[Y]ou checked everywhere but the glovebox. Could it be in the glovebox?" At that point, the trooper moved to the passenger side of the car. The passenger side window was open four to six inches. Trooper Towle noted that the defendant was not putting the key into the glovebox and said so. The defendant then slowly opened the glovebox, the trooper saw a silver revolver, and the defendant slammed the glovebox shut.

The trooper attempted to reach inside the passenger side window but failed and he returned to the driver's side to remove the defendant from the car. The trooper grabbed the defendant's arm. The defendant tried to "rip away" from the trooper and reached for the glove box. The trooper broadcast a transmission requesting assistance. He then dove into the car. He was able

[2] While waiting at a red light, the trooper checked the car's registration and learned the registered owner's name (Robert Gervet), date of birth, and criminal history, which included firearms and narcotics offenses. The defendant was also on probation.

to place the defendant in handcuffs with assistance from arriving officers. The defendant was arrested, and the troopers recovered the gun during a search of the car.

a. Reasonable suspicion. For the first time on appeal, the defendant argues that the stop was improper because the trooper lacked reasonable suspicion that the car windows were excessively tinted. The defendant did not raise the argument in his motion to suppress, and the Commonwealth asserts that he has waived the issue. However, the record is sufficient to permit us to review the claim of error. See Commonwealth v. Santos, 95 Mass. App. Ct. 791, 795 (2019).[3] We conclude there was none.

"[T]he fact that a traffic law has been violated is, generally speaking, a legally sufficient basis to justify stopping a vehicle." Commonwealth v. Buckley, 478 Mass. 861, 869 (2018). "[T]he standard to be used in determining the legality of a stop based on a suspected violation of [G. L.] c. 90, § 9D, is whether the officer reasonably suspected, based

[3] "Appellate review of a waived claim may result in one of following outcomes: (1) if the record is incomplete or otherwise not adequate to permit review on the merits, the defendant, who has the burden of producing a record that is adequate to permit review, is left to pursue a remedy, if any, in the trial court and appellate relief is denied[;] or (2) if the record permits review on the merits and (a) there is no error, then there is no risk of a miscarriage of justice and appellate relief is denied, or (b) there is error, we review the record as a whole to determine whether the error created a substantial risk of a miscarriage of justice." Santos, 95 Mass. App. Ct. at 795.

on his visual observations, that the tinting of the windows exceeded the permissible limits of § 9D." Commonwealth v. Baez, 47 Mass. App. Ct. 115, 118 (1999).[4] Here, the trooper's testimony regarding his observation, based on experience, that the window tint exceeded the permissible limit was sufficient to establish reasonable suspicion. Id. The motion judge did not err in concluding that the trooper was permitted to conduct an investigatory stop.

b. Scope. The defendant next contends that Trooper Towle impermissibly prolonged the stop by asking him to look for the registration in the glovebox while moving to the passenger side of the window. "A routine traffic stop may not last longer than 'reasonably necessary to effectuate the purpose of the stop.'" Cordero, 477 Mass. at 241, quoting Amado, 474 Mass. at 151. "The nature of the stop, i.e., for a traffic offense, defines the scope of the initial inquiry by a police officer." Buckley, 478 Mass. at 873, quoting Commonwealth v. Bartlett, 41 Mass. App. Ct. 468, 470 (1996). Authority for the seizure thus "ends 'when tasks tied to the traffic infraction are -- or reasonably should have been -- completed.'" Cordero, supra at 242, quoting Rodriguez v. United States, 575 U.S. 348, 354 (2015).

[4] After the defendant was arrested, Trooper Solomini arrived on the scene with a tint meter. He took a reading of the car's front side window, which registered at five percent.

A police officer who has stopped a car for a civil motor vehicle infraction may ask for license and registration. See Cordero, 477 Mass. at 242; Commonwealth v. Torres, 424 Mass. 153, 158 (1997). The defendant was required by law to carry the registration in the car or on his person. See G. L. c. 90, § 11 ("Every person operating a motor vehicle shall have the certificate of registration for the vehicle . . . and his license to operate, upon his person or in the vehicle, in some easily accessible place"). The trooper's questions were directed to locating the registration, and therefore concerned a task tied to the traffic violation that was the basis of the stop. Cordero, supra. The trooper's questions did not deviate from this path or digress into general investigative questioning. Contrast Commonwealth v. Soriano-Lara, 99 Mass. App. Ct. 525, 530 (2021). The motion judge did not err in finding that the trooper was pursuing a lawful purpose in inquiring about the registration.

The defendant also contends that the trooper prolonged the stop by directing the defendant to look in the glove compartment, thus transforming the stop into a "de facto search" of the car. The fundamental premise underlying this argument is that because the trooper knew that the car was registered to the defendant, the trooper had "no need" to inquire further and no permissible basis for doing so. The premise is fatally flawed

because the defendant was required to have the registration on his person or in his vehicle. See G. L. c. 90, § 11. Failure to have the registration is itself a civil infraction. Cordero, 477 Mass. at 242.

The defendant's corollary contention is that the trooper's suggestion that the defendant look in the glove compartment constituted a compelled search without consent, or as motion counsel argued, "the functional equivalent of the officer doing it himself." The facts, however, did not require a finding that a search occurred. The trooper did not order the defendant to open the glovebox, nor did he reach in and open the glovebox himself. The fact that the trooper did not inform the defendant he had a right to refuse to open the glovebox is not determinative. See Buckley, 478 Mass. at 876. There was no error.

2. Statements. a. Waiver. The defendant contends that the motion judge erred in determining that the defendant understood and waived his constitutional rights before making incriminating statements to police officers. See Miranda v. Arizona, 384 U.S. 436 (1966). "In reviewing a judge's determination regarding a knowing waiver of Miranda rights and voluntariness, we grant substantial deference to the judge's ultimate conclusions and we will not reject a judge's subsidiary findings if they are warranted by the evidence" (quotation and

citation omitted). Commonwealth v. Martinez, 458 Mass. 684, 691 (2011). "The questions we must answer are: '(1) whether there has been a knowing and intelligent waiver of the Miranda requirements; and (2) whether, in the totality of the circumstances, the [statements] given were the product of a free will.'" Id., quoting Commonwealth v. Mello, 420 Mass. 375, 383 (1995). However, "[t]o sustain its burden of proof on the waiver issue, the Commonwealth is not required to show an explicit statement by the defendant that he is waiving his rights." Commonwealth v. Corriveau, 396 Mass. 319, 330 (1985). See Commonwealth v. Garcia, 379 Mass. 422, 430 (1980).

A different motion judge made the following findings after an evidentiary hearing. The defendant was arrested by Trooper Towle and an off-duty police officer, Officer Lucas, three to four minutes after the stop. Trooper Towle placed the defendant in the back of his cruiser and read him his Miranda rights from a card. The defendant's demeanor was defeated, and he did not respond. Trooper Towle did not ask any further questions. Once the defendant was transported to the Milton barracks and taken into the booking area, his Miranda rights were read again from a large placard hanging on the wall. Trooper Towle did not recall if the defendant made any response. Thereafter, during the booking process, Trooper Towle asked the defendant whether he was aware that the firearm was in the car. In response, the

defendant stated that he was aware, and explained that he had been shot at two days prior and was carrying the weapon for protection.

Trooper Christopher St. Ives, who was contacted by Towle, arrived and read the defendant his rights from a card. The defendant signed the Miranda waiver. The defendant provided similar responses to Trooper St. Ives's questions.

The defendant first argues that the motion judge erred in finding that he knowingly, intelligently, and voluntarily waived his Miranda rights because he did not affirmatively respond to the Trooper Towles's first two Miranda warnings. The motion judge determined that the defendant understood the Miranda warnings even though he did not verbally articulate this understanding. The motion judge considered the defendant's physical and mental condition, experience with the criminal justice system,[5] and ability to speak and understand English. See Commonwealth v. Walker, 466 Mass. 268, 274 (2013) (relevant factors include "promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the

[5] The trooper testified that the defendant was on probation at the time of his arrest and had a "prior history with the courts." From these facts, the judge could permissibly infer that the defendant had received Miranda warnings in the past.

discussion of a deal or leniency . . . and the details of the interrogation, including the recitation of Miranda warnings" [citation omitted]). See also Commonwealth v. Brown, 474 Mass. 576, 584 (2016). The motion judge's findings that the conversation was "calmly presented" had an evidentiary basis in the record. See Walker, supra. Finally, after being twice Mirandized, the defendant spoke. A valid Miranda waiver may be demonstrated by the defendant's "outward behavior," particularly where the defendant indicates that he understands his rights by choosing to speak. Garcia, 379 Mass. at 429–430.[6] The motion judge did not err in finding that the defendant made a knowing, intelligent, and voluntary waiver of his Miranda rights.[7]

b. Voluntariness. The defendant maintains that the statements to the troopers were involuntary because he had recently been in a physical struggle with three officers and had

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[6] This is not to say that we condone the practice of failing to obtain an express waiver. As the Supreme Judicial Court has observed in the context of revocation of the right to remain silent, "[w]hen law enforcement officials reasonably do not know whether a suspect wants to invoke the right to remain silent, there can be no dispute that it is a 'good police practice' for them to stop questioning on any other subject and ask the suspect to make his choice clear." Commonwealth v. Clarke, 461 Mass. 336, 351–352 (2012), quoting Davis v. United States, 512 U.S. 452, 461 (1994).

[7] Because we conclude that the defendant waived his Miranda rights, we reject his argument that the statements made to Trooper St. Ives were the fruits of an unlawful interrogation. Wong Sun v. United States, 371 U.S. 471, 487 (1963). For the reasons stated infra, we also conclude that the statements made to Trooper St. Ives were voluntary.

been forcibly removed from his car. "Although both require the same totality of the circumstances test, the voluntariness of a defendant's statements is a distinct inquiry from the question of the voluntariness of a Miranda waiver." Commonwealth v. Walters, 485 Mass. 271, 279 (2020).

The motion judge found that, despite the recent physical struggle with police officers, the defendant's demeanor was calm and the conversation was, at times, even "lighthearted." The testimony of the troopers, which the judge credited, show that the defendant's responses to questions were rational, appropriate, and to the point. The circumstances of his arrest were no doubt upsetting, but the fact that the defendant may have been upset or disturbed does not render his statements involuntary. See Walters, 485 Mass. at 279. The defendant was rational and alert and there is no evidence that the defendant was injured, impaired, or that his will was overborne in any way. See Commonwealth v. Welch, 487 Mass. 425, 438-439 (2021). We discern no error in the motion judge's determination that the

defendant's statements to the troopers were voluntary. See Walker, 466 Mass. at 274-275.

Judgment affirmed.

By the Court (Sullivan, Ditkoff & Hershfang, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: October 15, 2021.

[8] The panelists are listed in order of seniority.