

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

19-P-1538

COMMONWEALTH

vs.

JASON RAMOS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Commonwealth appeals from an order suppressing evidence found during and after a search of the trunk of the defendant's motor vehicle. The Commonwealth argues that police had probable cause to believe that the trunk of the vehicle, which was on a public way, contained contraband or evidence of a crime. We affirm.

Background.<sup>1</sup> On October 2, 2015, Detectives Nazaire Paul and Christopher McDermott of the Brockton Police Department were

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<sup>1</sup> After argument, we remanded the matter for additional factual findings, which the motion judge provided on November 1, 2021. We rely on these findings supplemented with factual findings in the motion judge's original order and order dated February 2, 2018, provided those earlier findings do not detract from the later findings. When reviewing a judge's ruling on a motion to suppress, "we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the judge's] ultimate findings and conclusions of law" (quotation omitted). Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

in an unmarked police cruiser with an officer from Ashland when they effected a traffic stop of a Cadillac driven by the defendant for speeding. McDermott approached the driver's side of the Cadillac and requested the defendant's identification. The defendant produced a worn paper temporary license issued by the State of New Hampshire. Detective McDermott returned to the police cruiser to contact dispatch.

Meanwhile, Detective Paul and the Ashland officer spoke to the defendant. Paul observed the defendant to be wearing clothing and paraphernalia associated with the "Outlaws," a nationally known gang with a Brockton chapter known to carry weapons and firearms. Paul asked the defendant to step out of the car, which he did. The police did not know the defendant's license status at the time Paul ordered him out of the vehicle.<sup>2</sup>

Paul conducted a patfrisk and felt a holster but that holster was empty. Paul asked the defendant if he had a gun in the car and the defendant responded that he did not. Paul did not provide the defendant with Miranda warnings before inquiring

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<sup>2</sup> Eventually, dispatch reported that the defendant's license was expired and nonrenewable. Detective McDermott testified that the defendant protested at the scene that there was a mistake because his license was active. Paul testified that the defendant did not protest until they were back at the station. The motion judge credited McDermott and did not credit Paul on this point. McDermott had concerns about the accuracy of the information received at the scene and when he arrived at the station he confirmed that the defendant did in fact have a valid New Hampshire license.

whether the defendant had a license to carry a firearm.<sup>3</sup> The defendant responded that he was from New Hampshire and did not need a license to carry a firearm in New Hampshire.

Detective Paul then asked whether he could search the defendant's car and the defendant consented. The detectives searched the passenger compartment and the glove box and found "nothing." Once the officers were about to go in the trunk, the defendant withdrew his consent to search.

One of the detectives then handcuffed the defendant and Paul opened the trunk and found a handgun and an unsealed, partially consumed, bottle of liquor. At that point, a detective Almeida advised the defendant of his rights and performed another patfrisk and discovered a stun gun on the defendant's person. The detectives then transported the defendant to the police station.

The defendant filed a motion to suppress "any and all items, including but not limited to the alleged firearm." Initially, the motion judge denied the defendant's motion to suppress. After the defendant filed a motion to reconsider, on February 2, 2018, the judge entered amended findings and an order suppressing evidence found during and after the search of

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<sup>3</sup> Our remand order specifically asked, in relevant part, "whether Detective Paul asked the defendant without providing Miranda warnings whether he had a license to carry a firearm (LTC) or if Paul demanded a LTC to carry or did neither."

the defendant's trunk. At our request, the judge made supplemental findings of fact.

Discussion. The defendant does not contest the legality of the initial stop. See Commonwealth v. Bacon, 381 Mass. 642, 644 (1980) ("Where the police have observed a traffic violation, they are warranted in stopping a vehicle"). Passing over the lawfulness of the exit order and the patfrisk,<sup>4</sup> we turn to the Commonwealth's argument that there was probable cause to search the trunk. Where, as here, the search of the motor vehicle was made without a warrant, "the Commonwealth bears the burden to establish that a warrantless search fell within an exception to the warrant requirement." Commonwealth v. Davis, 481 Mass. 210, 217 (2019).

On appeal, the Commonwealth argues that the search of the defendant's trunk fell under the automobile exception to the warrant requirement.<sup>5</sup> See generally Commonwealth v. Johnson, 461

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<sup>4</sup> We have held that gang clothing and membership in a gang alone do not justify a patfrisk. Compare Commonwealth v. Pierre P., 53 Mass. App. Ct. 215 (2001) (patfrisk not supported by officer's belief juvenile was dangerous based on late hour, large number of youth in a high crime area, gang clothing, and knowledge that one youth was gang member), with Commonwealth v. Heon, 44 Mass. App. Ct. 254 (1998) (upholding patfrisk of motorcyclist wearing gang insignia where he was moving body looking for registration, gang was currently in violent feud with rival gang, contrasting facts as not a search only because person wore gang clothing).

<sup>5</sup> We also pass over whether the Commonwealth's general reference at the motion hearing to "exigent circumstances" without any

Mass. 44, 49 (2011). The shortcoming in the Commonwealth's argument is that the automobile exception still requires probable cause. Here, based on the empty holster, the Commonwealth had probable cause that a firearm may have been in the Cadillac trunk. Commonwealth v. Toole, 389 Mass. 159, 163 (1983) ("empty holster and ammunition found on the defendant certainly created probable cause to believe that there was a gun in the [vehicle]"). The empty holster does not establish probable cause to believe that an illegal firearm was in the vehicle's trunk. Commonwealth v. Haskell, 438 Mass. 790, 793 (2003) ("Because it is legal in Massachusetts to carry a handgun if properly licensed, a report that an individual possesses a handgun, without any additional information suggesting criminal activity, does not create a reasonable suspicion that a crime is or will be committed"); Commonwealth v. Couture, 407 Mass. 178,

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reference to probable cause or the "automobile exception" was sufficient to preserve its argument that the automobile exception to the warrant requirements of the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights applies. Compare Commonwealth v. Agosto, 428 Mass. 31, 34 (1998) ("The inherent mobility of an automobile is the exigent circumstance that justifies a warrantless search at the time of a vehicular stop," although such a search must be supported by probable cause), with Commonwealth v. Nicholson, 58 Mass. App. Ct. 601, 607 n.7 (2003) ("We have held that probable cause alone justifies a warrantless search of a motor vehicle seized without a warrant while parked in a public place, 'whether or not exigent circumstances prevailed at either the time of the seizure or the time of the search'" [citation omitted]).

183, cert. denied, 498 U.S. 951 (1990) ("The mere possession of a handgun was not sufficient to give rise to a reasonable suspicion that the defendant was illegally carrying that gun . . .")

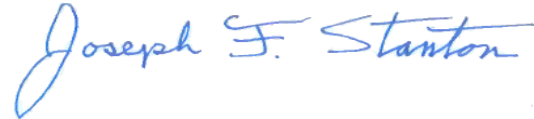
Paul then questioned the defendant without providing him Miranda warnings and the defendant denied having a firearm in the trunk and stated that in New Hampshire one does not need a license to carry a gun. The Commonwealth's contention that Paul was permitted to and did demand that the defendant produce a license to carry fails because of the motion judge's additional finding that Paul inquired whether the defendant had a license to carry a firearm rather than demanding such a license.

Haskell, 438 Mass. at 796 (police are required to give Miranda warnings before asking whether a person possesses a valid permit to possess a firearm but not before demanding a suspect in custody produce one). The defendant was in custody and his

answers must be suppressed. See id. Accordingly, the police lacked probable cause to search the trunk of the vehicle.<sup>6</sup>

Order dated February 2, 2018,  
affirmed.

By the Court (Rubin, Milkey &  
Henry, JJ.<sup>7</sup>),



Clerk

Entered: December 3, 2021.

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<sup>6</sup> In its brief, the Commonwealth disclaimed reliance on any argument that the search was a lawful inventory search of the vehicle. See Toole, 389 Mass. at 163 n.7 (accepting similar disclaimer).

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