COMMONWEALTH vs. EPI S. BAEZ.

No. 24-P-546.

Hampden. July 1, 2025. – October 24, 2025.

Present: Ditkoff, Hand, & Grant, JJ.

Motor Vehicle, Operating under the influence. Intoxication. Alcoholic Liquors, Motor vehicle. Evidence, Intoxication, Right to obtain evidence. Practice, Criminal, Dismissal.

Complaint received and sworn to in the Chicopee Division of the District Court Department on August 15, 2022.

A motion to dismiss was heard by Bethzaida Sanabria-Vega, J.

Christopher Nickels, Assistant District Attorney, for the Commonwealth.
Matthew S. Hutchinson for the defendant.

DITKOFF, J. By statute, police arresting a defendant for operating a motor vehicle while under the influence of intoxicating liquor (OUI) must inform the defendant immediately upon booking that the defendant has the right to be examined by a physician of the defendant's choice. G. L. c. 263, § 5A. The

police must also give the defendant a copy of the statutory text or post it "in a conspicuous place." G. L. c. 263, § 5A. Here, the defendant was properly informed of his right to an independent physician but was neither provided with a copy of the statutory text nor was it posted in the police station. For that reason, a District Court judge dismissed a charge of OUI, G. L. c. 90 § 24 (1) (a) (1), against the defendant. As we discern no error in the judge's determination that the Commonwealth failed to demonstrate that the defendant was not prejudiced by the failure to give him (or post) the text of G. L. c. 263, § 5A, we affirm.

1. Background. In the early hours of August 14, 2022, a police officer observed a motor vehicle, driven by the defendant, traveling forty-five miles per hour in an area with a posted thirty miles per hour speed limit. The officer followed the vehicle to an intersection where the defendant stopped at a red light in a left-turn-only lane. The officer queried the vehicle's plates and discovered that the registered owner, the defendant, had a suspended license to operate a motor vehicle. The defendant then crept his vehicle forward and turned left while the light remained red. The officer activated his cruiser's emergency lights and pulled over the defendant.

When the officer approached the vehicle and spoke with the defendant, he "observed [the defendant] to have slurred speech

and red bloodshot, glassy eyes," and "detected an odor of alcoholic beverage coming from inside the vehicle as well as coming from his breath." In response to the officer's request for his (suspended) license and registration, the defendant attempted to give the officer his passport card before he ultimately provided the requested documents. When asked, the defendant stated he had consumed three drinks at a bar in Springfield earlier that night. Given these responses, the officer had the defendant perform field sobriety tests, which the defendant "did not complete to [the officer's] . . . expectations." The only specific example provided was that, during the nine-step walk and turn test, the defendant remained on the line while walking away but was "offline" on the nine steps back.[1] The officer arrested the defendant and transported him to the Chicopee police station.

During booking, at 4:09 A.M., the officer described the defendant's right to examination by an independent physician, reading him the text of G. L. c. 263, § 5A, verbatim at a normal speed and volume. The statute appeared on a statutory rights and consent form that also informed the defendant of his right to use a telephone, G. L. c. 276, § 33A; requested his consent

[1] The officer confirmed that the defendant was not belligerent or rude to him during their interaction.

to a breathalyzer; and warned him that his license would be suspended if he refused. After the officer read all the statutory language contained in the form to the defendant, he slid it to him to sign. The defendant signed the form, checking the box to decline a breathalyzer. The form was in the defendant's possession for approximately eight seconds, but he was not allowed to keep it. At the time, there was no poster with the statutory text in the police station.[2]

The motion judge found "[the defendant] did not look obviously intoxicated on the booking video." The video recording shows that, throughout the booking process, the defendant was alert, attentive, and compliant with directions, and that he engaged in conversation and responded appropriately to the officers' questions.

The bail commissioner imposed bail of $100 at approximately 9:29 A.M. The defendant immediately paid and left with his property at 9:32 A.M.

The defendant was charged with OUI and operating a motor vehicle after a license suspension, G. L. c. 90, § 23. The defendant moved to dismiss the OUI count on the ground that there was a violation of G. L. c. 263, § 5A. After an

[2] A poster with the statutory text was installed over one year later.

evidentiary hearing, the judge allowed the motion and dismissed the OUI count. This interlocutory appeal followed.

2. Standard of review. "The burden is on the defendant[] . . . to establish the facts, if any, necessary to support a motion to dismiss." Commonwealth v. Pond, 24 Mass. App. Ct. 546, 551 (1987), quoting Commonwealth v. Benjamin, 358 Mass. 672, 676 n.5 (1971). On review, "we defer to the [motion] judge's finding[s] of fact in the absence of clear error." Commonwealth v. Milo M., 433 Mass. 149, 153 (2001), quoting Commonwealth v. King, 429 Mass. 169, 172 (1999). "[W]e accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" Commonwealth v. Hand, 104 Mass. App. Ct. 815, 820 (2024), quoting Commonwealth v. Fisher, 492 Mass. 823, 837-838 (2023). "Our deference to the judge's assessment of the weight and credibility of testimonial evidence includes inferences 'derived reasonably from the testimony.'" Commonwealth v. Gonzalez, 487 Mass. 661, 668 (2021), quoting Commonwealth v. Kennedy, 426 Mass. 703, 708 (1998).

3. Statutory requirement. General Laws c. 263, § 5A, provides the following:

> "A person held in custody at a police station or other place of detention, charged with operating a motor vehicle while under the influence of intoxicating liquor, shall have the right, at his request and at his expense, to be examined immediately by a physician selected by him. The

> police official in charge of such station or place of detention, or his designee, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it. Such person shall, immediately upon being booked, be given a copy of this section unless such a copy is posted in the police station or other place of detention in a conspicuous place to which such person has access" (emphasis added).

The statute as originally written did not have the last sentence, and thus required only that the police "inform" the defendant of the right to be examined by an independent physician. St. 1958, c. 401. In 1960, the Legislature added the requirement that a copy of § 5A be given to the defendant (or posted). St. 1960, c. 237. Accord Commonwealth v. Gruska, 30 Mass. App. Ct. 940, 941 (1991).[3] The goal of both requirements is to ensure that defendants are put on timely notice of their ability to opt for an examination by an independent physician. See Commonwealth v. Carey, 26 Mass. App. Ct. 339, 344 (1988) ("The important point is that the defendant was informed of the right to be examined by a physician of his choice"). Timely notice is critical to this statute because "[t]he right to an independent medical examination under § 5A . . . is a right meant to enhance the establishment of the truth

[3] As originally written, the statute required that "[t]he police official in charge" of the police station provide the notification. St. 1958, c. 501. In 1983, the statute was broadened to allow "his designee" to do so. St. 1983, c. 557. See Commonwealth v. Carey, 26 Mass. App. Ct. 339, 344 (1988).

of the accusation by enabling the defendant to obtain potentially exculpatory evidence." King, 429 Mass. at 179. Remedies for noncompliance, such as dismissal or exclusion of evidence, "may also serve to deter future violations, but that is a secondary consideration." Id.[4]

Here, the informing requirement was fulfilled when the officer read the text of § 5A to the defendant during booking. The giving or posting requirement was not met as a copy of § 5A was neither posted in the police department nor given to the defendant until his release.[5]

4. Remedies. a. Overview. "Section 5A does not state the consequences that should flow from a violation of its terms." King, 429 Mass. at 177, quoting Commonwealth v. Ames, 410 Mass. 603, 607 (1991). The Supreme Judicial Court has held that, in instances where a breathalyzer was performed,

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[4] In practice, the right is quite limited. If invoked, the police have no duty to assist the defendant in obtaining an examination by an independent physician. "They need only inform him of his rights and allow him access to a telephone." Commonwealth v. Alano, 388 Mass. 871, 879 (1983). Accord Commonwealth v. Finelli, 422 Mass. 860, 862 (1996) ("The onus is on the arrestee to arrange for the independent testing").

[5] The Commonwealth has not argued that briefly providing the defendant with a copy of the statutory text complied with the requirement that the defendant "be given a copy of this section." G. L. c. 263, § 5A. Accordingly, we do not reach this issue, though we note the defendant was given the text for three to four minutes in Gruska, and we nonetheless concluded that the police did not comply with the statute. 30 Mass. App. Ct. at 941.

"ordinarily, the appropriate remedy . . . is the suppression of the breathalyzer result . . . and of certain other police testimony." Commonwealth v. Hampe, 419 Mass. 514, 523 (1995). Conversely, in cases where no breathalyzer was administered, "the [§ 5A] violation itself is prima facie evidence that the defendant has been prejudiced in that his opportunity to obtain and present potentially exculpatory evidence has been restricted or destroyed." King, supra at 180-181. Where, as here, no breathalyzer was performed, the presumptive remedy is dismissal, absent an applicable exception. See Commonwealth v. Andrade, 389 Mass. 874, 878 (1983) ("Dismissal of a complaint may not be an appropriate or necessary remedy in all cases. Rather, each case must be considered on its own set of facts and a remedy adequate to cure potential or actual prejudice resulting from a violation of G. L. c. 263, § 5A, should be allowed" [citation omitted]).

There are three judicially recognized situations in which the "presumption of prejudice . . . may be overcome." King, 429 Mass. at 181. These are (1) "by overwhelming evidence of intoxication," id.; (2) by "exigent circumstances . . . which might have justified the police officers' failure to communicate the defendant's right to him," Andrade, 389 Mass. at 879; or (3) "by other evidence indicating that the omission was not prejudicial in the circumstances," King, supra.

b. Overwhelming evidence of intoxication. Contrary to the Commonwealth's contention, no overwhelming evidence of the defendant's intoxication was shown. The Supreme Judicial Court has held that, where "persuasive evidence [of intoxication] existed . . . apart from the officers' testimony (as shown on videotape, for example), it could fairly be said that the defendant was not prejudiced by the police officers' violation of G. L. c. 263 § 5A." Andrade, 389 Mass. at 882. Here, the officer's observations (even assuming they can be considered under Andrade), although providing some evidence of intoxication, do not rise to the level of overwhelming evidence. Running a red light after coming to a full stop late at night and stepping off the line during the walk and turn test provided little evidence of intoxication. Even when combined with the traditional indicia of intoxication -- slurred speech, odor of alcohol, admission to consuming three drinks earlier that night, and bloodshot eyes -- the evidence presented to the motion judge left the defendant with a defendable case. Contrast Commonwealth v. Priestley, 419 Mass. 678, 682 (1995) (overwhelming evidence where defendant "admits to imbibing a considerable amount of alcohol," "admits to erratic operation," and acknowledged failing three field sobriety tests). Based on our review of the booking video, we, like the motion judge, conclude that it provides no evidence of intoxication, much less

overwhelming evidence. Cf. id. at 684 (O'Connor, J., concurring) ("If there had been a videotape of the defendant's booking, or other evidence equally unchallengeable, showing uncontestably that the defendant was drunk at 4 A.M. or later, then it could be said with confidence that blood test evidence would not have helped the defendant at trial").

c. Exigency. The Commonwealth properly does not claim that there was an exigency excusing full compliance with G. L. c. 263, § 5A. The defendant was uninjured and reported as much to the police. Contrast Commonwealth v. Atencio, 12 Mass. App. Ct. 747, 749-750 (1981) (dismissal not required where defendant was seriously injured in automobile accident and taken to hospital after being charged with OUI). No other reason was provided why it would have been impractical to provide the defendant with a copy of the statutory text or to post it in the police station. Cf. Andrade, 389 Mass. at 879 ("There is . . . no indication that the defendant was belligerent or otherwise so unwilling or unable to cooperate as to justify the failure to comply").

d. Other evidence indicating that the omission was not prejudicial. The courts have applied the third exception to presumptive dismissal where the circumstances establish that the defendant would not have acted differently if there had been full compliance with the statute. For example, in Ames, 410

Mass. at 604, the defendant had been in an automobile collision which left a motorcyclist dead. The police found the defendant asleep at his brother's house and took him to the hospital. Id. A police officer explained to the defendant that he could have a blood test but not a breathalyzer because none were available at the hospital. Id. at 606. The defendant declined a blood test twice, opting to wait until he could have a breathalyzer at the police station. Id. The judge "inferred, as he was justified in doing so on the evidence, that the defendant, who was in consultation with his father, declined the blood test at the hospital and asked for a breathalyzer test because he believed that the passage of time would reduce the possibility of an inculpatory test result." Id. at 607. As a result, the judge found that there was no prejudice from the police officer's failure to inform the defendant he could choose which physician administered the blood test "because, if he had been so advised, he would not have changed his mind and had a blood test." Id. The Supreme Judicial Court affirmed, concluding "that the failure of the police, approximately four hours after the accident, to advise the defendant at the hospital that he was entitled to an examination by a physician of his own choice was inconsequential." Id. at 608.

In Commonwealth v. McIntyre, 36 Mass. App. Ct. 193, 200 (1994), a police officer failed to inform the defendant about

his right to examination by an independent physician because the officer incorrectly believed "that the police were not required to allow him to have a blood alcohol content test because he had refused to take the breathalyzer test." The defendant, however, was an attorney, and requested a blood test. Id. His father asked the police officer to transport the defendant to a nearby hospital for a blood test. Id. at 201. We agreed with the motion judge "that the defendant, perhaps because he was an attorney, was well aware of his rights pursuant to G. L. c. 263, § 5A," and thus "literal compliance would not have afforded the defendant notice beyond that required by the statute." Id. at 203, quoting Gruska, 30 Mass. App. Ct. at 941.

In Commonwealth v. Gruska, 30 Mass. App. Ct. at 941, the police read the defendant the statutory text but did not provide him with a copy, and the text was not posted at the police station. The defendant "was given an opportunity to read the statute" but "showed no interest in it." Id. Because the defendant was injured, the police then brought him to the hospital for treatment of his injuries. Id. at 942. He did not request a blood test at the hospital. Id. We reversed the order of dismissal because "literal compliance would not have afforded the defendant notice beyond that required by the statute." Id. at 941.

Finally, in Commonwealth v. Carey, 26 Mass. App. Ct. 339, 343-344 (1988), the defendant was given his § 5A notice by the booking officer, but argued that he was entitled to dismissal of the OUI charge because that officer had not been designated to dispense that information.[6] We held that, even if this were so, "the failing would not rise to anything resembling a failure to give the necessary warning entirely, and, therefore, would not require suppression or dismissal. The important point is that the defendant was informed of the right to be examined by a physician of his choice." Id. at 344. In each of these cases, the Commonwealth established an absence of prejudice where it demonstrated from the circumstances that strict compliance with the statute would not have changed the defendant's actions.

The present case is dissimilar to those cases. There was no compelling evidence that the defendant separately understood his rights, as in McIntrye, 36 Mass. App. Ct. at 203. The defendant was not brought to a hospital where he declined to request a blood test, as in Ames, 410 Mass. at 607, and in Gruska, 30 Mass. App. Ct. at 942. The judge did not infer from the evidence, and certainly was not required to infer, that the defendant decided not to request a blood test because he feared

[6] The defendant in Carey made no argument that the notice he was given did not otherwise comply with the requirements of § 5A. See Carey, 26 Mass. App. Ct. at 342, 343-344.

an inculpatory result, as in Ames, supra. See Gonzalez, 487 Mass. at 668 (choice between reasonable inferences is for motion judge). Nor was the violation trivial, as it was in Carey, 26 Mass. App. Ct. at 343-344, where the claimed violation was failure to properly designate the officer providing notice of the defendant's rights. The Legislature has determined that written provision of the right to be examined by an independent physician assists criminal defendants in a way that oral provision alone does not, and thus we cannot consider the absence of a writing to be "hypertechnical." Id. at 344. See St. 1960, c. 237. In the absence of affirmative evidence that the defendant would not have acted differently if provided the written text as required by statute, the judge properly dismissed the OUI count.

5. Conclusion. The dismissal of the charge of OUI is affirmed, and the case is remanded for further proceedings on the remaining charge.

So ordered.