COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUPREME JUDICIAL COURT NO. SJC-12745

COMMONWEALTH

v.

SHAWN MANSUR

BRIEF FOR THE DEFENDANT ON APPEAL FROM THE MARLBOROUGH DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Massachusetts Cases

Statutes

STATEMENT OF THE ISSUE

1. Some Of The Motor Vehicle Offenses Contained In G. L. c. 90 Do Not Require Operation. Must These Offenses Be Treated As Criminal Offenses In Accordance With The Definitions Contained In G. L. c. 90C, s. 1?

STATEMENT OF THE CASE

The Marlborough District Court issued a three-count complaint on April 19, 2018, charging the defendant, Shawn Mansur, with (1) operating under the influence of alcohol, (2) possession of an open container of alcohol in a motor vehicle, and (3) failure to have a valid inspection sticker.[1] (R. 3). A jury trial was held on October 31, 2018. (R. 5-6). The question as to whether possession of an open container of alcohol in a motor vehicle is a civil or criminal offense was raised prior to trial.[2] (Tr. 17-22). The defendant argued that it is a civil offense and therefore should not be submitted to the jury. (Tr. 17-22). The judge disagreed and ruled that it is a criminal offense. (Tr. 17-22, 29). The defendant's trial therefore involved two charges: operating under the influence of alcohol and possession of an open

[1] The defendant's record appendix will be cited by page number as (R. _).
[2] The trial transcript will be cited by page number as (Tr. _).

container of alcohol in a motor vehicle. (Tr. 35-36). The jury acquitted the defendant of the charge of operating under the influence of alcohol, but found him guilty of possessing an open container of alcohol in a motor vehicle. (Tr. 252-253). The trial judge fined the defendant $100 for this offense. (Tr. 258). The trial judge also found the defendant civilly responsible for failing to have a valid inspection sticker and fined him $50 as a result. (Tr. 258). The defendant filed a timely notice of appeal from his criminal conviction for possessing an open container of alcohol in a motor vehicle. (R. 8).

STATEMENT OF FACTS

The following subsections describe both the trial testimony and the argument made by the defendant with respect to the charge of possessing an open container of alcohol in a motor vehicle.

A. Factual Background.

The defendant was driving a vehicle in Marlborough on the evening of April 18, 2018. (Tr. 136-138). The defendant's vehicle had an expired inspection sticker. (Tr. 138-139). A state trooper pulled the defendant over as a result. (Tr. 139). The trooper exited his cruiser and spoke with the

defendant. (Tr. 140). The trooper observed that the defendant's speech was "heavily slurred" and that his eyes were a "little bloodshot". (Tr. 142). The trooper asked the defendant if he had been drinking. (Tr. 142). The defendant stated that he had two or three drinks. (Tr. 143). The trooper subsequently asked the defendant to exit his vehicle in order to perform some field sobriety tests. (Tr. 143). The defendant completed the one-legged stand test and the walk and turn test. (Tr. 143-150). The trooper thereafter concluded that the defendant was intoxicated and arrested him. (Tr. 150-151).

After arresting the defendant, the trooper called for a tow truck to remove the defendant's vehicle from the roadway. (Tr. 150). The trooper searched the defendant's vehicle before the tow truck arrived. (Tr. 150-151). The trooper found an open bottle of Pabst Blue Ribbon beer behind the passenger seat. (Tr. 150-151).

B. The Trial.

As noted above, the defendant was criminally charged with operating a motor vehicle under the influence of alcohol and possessing an open container of alcohol in a motor vehicle. (Tr. 35-36). Prior to

trial, the defendant argued that possession of an open container of alcohol in a motor vehicle is a civil offense. (Tr. 17-22). The defendant argued that the offense qualifies as a "civil motor vehicle infraction" under G. L. c. 90C, s. 1, because the maximum penalty does not provide for imprisonment. (Tr. 17-22). To support his argument, the defendant relied upon an administrative regulation jointly promulgated by the Chief Justice of the District Court and the Registrar of Motor Vehicles. (Tr. 17-19; R. 9-38). This regulation includes a table of citable motor vehicle offenses that distinguishes between civil and criminal offenses. (R. 9-38). According to the table, possession of an open container of alcohol in a motor vehicle is a civil offense. (R. 9, 24).

The trial judge disagreed with the table's conclusion. (Tr. 18-22, 29). He concluded that footnote 7 in *Commonwealth v. Johnson*, 461 Mass. 44 (2011), established that possession of an open container of alcohol in a motor vehicle is a criminal offense. (Tr. 18-22, 29). He further reasoned that the offense does not fit the definition of an "automobile law violation" under G. L. c. 90C, s. 1, and thus cannot meet the definition of a "civil motor vehicle

infraction" under the same section. (Tr. 18-22, 29). The judge reasoned that the offense does not fall under the definition of an "automobile law violation" because operation is not a required element. (R. 18-22, 29). The defendant objected to the judge's decision to treat the offense as a criminal offense and the judge subsequently confirmed that the issue was preserved for appellate review. (Tr. 29, 102).

The jury acquitted the defendant of operating under the influence of alcohol, but found him guilty of possessing an open container of alcohol in a motor vehicle. (Tr. 252-253).

ARGUMENT

I. THE LEGISLATURE DID NOT INTEND TO CRIMINALIZE ALL MOTOR VEHICLE OFFENSES THAT DO NOT REQUIRE OPERATION.

The defendant's conviction for possession of an open container of alcohol in a motor vehicle should be vacated because the Legislature did not intend for this to be a criminal offense. Under the current statutory framework, all motor vehicle offenses that do not include operation as a required element must be categorized as criminal offenses. This is true even if the offense is only punishable by a monetary fine. This result is absurd and runs contrary to the

Legislature's intent. The Legislature did not intend for motor vehicle offenses that are solely punishable by a fine to be criminal offenses simply because they do not involve operation. Instead, the Legislature intended to make all motor vehicle offenses that are solely punishable by a fine into civil offenses, regardless of whether operation is a required element of the offense or not.

A. A Strict Application Of The Definitions Contained In G. L. c. 90C, s. 1, Creates An Absurd Result.

Most offenses that involve a motor vehicle are codified in G. L. c. 90. To determine whether an offense in this chapter is criminal or civil, one must consult the definitions contained in G. L. c. 90C, s. 1. This section contains two critical definitions: "automobile law violation" and "civil motor vehicle infraction." An "automobile law violation" is defined as "any violation of any statute, ordinance, by-law or regulation relating to the operation or control of motor vehicles." G. L. c. 90C, s. 1. A "civil motor vehicle infraction" is defined as "an automobile law violation for which the maximum penalty does not provide for imprisonment." *Id*. As the latter definition makes clear, an offense must first qualify

as an "automobile law violation" in order to be considered a "civil motor vehicle infraction." *Id.* To meet the statutory definition of an "automobile law violation", the offense at issue must "necessarily and exclusively encompass the 'operation or control' of a motor vehicle." *Commonwealth v. Giannino*, 371 Mass. 700, 702 (1977). Put another way, the offense must have operation or control as a required element. *Id.* at 702-703.

The majority of offenses contained in G. L. c. 90 require operation as an element and therefore meet the definition of an "automobile law violation." For these offenses, the question of civil versus criminal liability is simple. If the offense can be punished by imprisonment, then the offense is criminal. Otherwise, the offense is civil.

Though this statutory scheme is easily applicable to offenses that require operation, it leads to absurdity when applied to offenses that do not require operation. Because operation is not a required element, these offenses do not meet the definition of an "automobile law violation." They consequently cannot meet the definition of a "civil motor vehicle infraction." Every offense that does not require

operation must therefore be treated as a criminal offense. This includes offenses that are solely punishable by a fine. The following are examples of some of the offenses that fall into this category:

> Possession of an open container of alcohol in a motor vehicle, G. L. c. 90, s. 24I – Punishable by a fine of not less than $100 nor more than $500.
>
> Failure to wear a seat belt as a passenger, G. L. c. 90, s. 13A – Punishable by a fine of $25.
>
> Negligently opening a car door, G. L. c. 90, s. 14 – Punishable by a fine of $100.
>
> Improper use of a handicap parking placard, G. L. c. 90, s. 2 – Punishable by a fine of $500 for the first offense and $1,000 for any subsequent offense.
>
> Failure to wear protective headgear as a passenger on a motorcycle, G. L. c. 90, s. 7 - Punishable by a fine of not more than $35 for the first offense, not less than $35 nor more than $75 for a second offense, and not less than $75 nor more than $150 for any subsequent offenses. Punishment imposed pursuant to G. L. c. 90, s. 20.
>
> Fueling a school bus with passengers inside, G. L. c. 90, s. 7B(5) - Punishable by a fine of not more than $35 for the first offense, not less than $35 nor more than $75 for a second offense, and not less than $75 nor more than $150 for any subsequent offenses. Punishment imposed pursuant to G. L. c. 90, s. 20.
>
> Equipping a motor vehicle with windows obscured by nontransparent material, G. L. c. 90, s. 9D - Punishable by a fine of up to $250.

It is illogical that the Legislature would prescribe monetary fines for these offenses, yet nevertheless intend for them to be punished as criminal offenses simply because they do not involve operation as a required element. There is no rational explanation for why the Legislature would want to treat offenses that do not involve operation harsher than offenses that do involve operation. In fact, it would only be logical to prescribe harsher punishments for operation offenses, as any offense that involves operation is inherently going to be more dangerous than an offense that does not.

The dichotomy of treatment between like offenses demonstrates the absurdity of categorizing all offenses that do not involve operation as criminal offenses. G. L. c. 90, s. 13A, requires the operator of a motor vehicle to wear a seat belt. Failure to do so is punishable by a $25 fine plus an additional $25 for every passenger in the vehicle who is not wearing a seat belt. The statute also requires any passenger riding in a motor vehicle to wear a seat belt. Any passenger who fails to do so can be punished with a $25 fine. While these offenses are basically the same, they are treated differently as a result of the

definitions contained in G. L. c. 90C, s. 1. Failing to wear a seat belt as an operator qualifies as an "automobile law violation" because it includes operation as a required element. It also meets the definition of a "civil motor vehicle infraction" because it is only punishable by a fine. Thus, it is a civil offense. In contrast, failing to wear a seat belt as a passenger does not qualify as an "automobile law violation" because it does not require operation. It therefore cannot meet the definition of a "civil motor vehicle infraction" and must be treated as a criminal offense. This result is patently absurd. No logic can explain why failure to wear a seat belt as an operator is a civil offense while failure to wear a seat belt as a passenger is a criminal offense.

The absurdity does not stop here. Consider a comparison between the offense of failing to stop for a blind pedestrian and the offense of negligently opening a car door. Failing to stop for a blind pedestrian is punishable by a fine of no less than $100 and no more than $500 under G. L. c. 90, s. 14A. Negligently opening a car door is punishable by a fine of no more than $100 under G. L. c. 90, s. 14. Even though failing to stop for a blind person is

punishable by a larger fine, it is a civil offense because it requires operation and thus can meet the definition of an "automobile law violation." In contrast, negligently opening a car door is a criminal offense because it does not require operation and therefore cannot satisfy the definition of an "automobile law violation."

The Legislature clearly did not intend to create this completely arbitrary distinction between civil and criminal motor vehicle offenses in G. L. c. 90. Thus, the judiciary is not constrained to follow the plain language of the 90C definitions. "While a court must normally follow the plain language of a statute, it need not adhere strictly to the statutory words if to do so would lead to an absurd result or contravene the clear intent of the Legislature." *Commonwealth v. Rahim*, 441 Mass. 273, 278 (2004). In such a situation, the judiciary is empowered to interpret the statutory provision at issue "so as to make it an effectual piece of legislation in harmony with common sense and sound reason." *Commonwealth v. Williams*, 427 Mass. 59, 62 (1998).

B. The Court Should Treat Every Motor Vehicle Offense That Is Solely Punishable By A Fine As A Civil Offense.

The most logical way to apply the 90C definitions is to extend the definition of a "civil motor vehicle infraction" to every offense contained in G. L. c. 90 regardless as to whether operation is a required element of the offense or not. Every motor vehicle offense that is solely punishable by a fine would therefore be a civil offense. There would no longer be an arbitrary distinction between offenses that involve operation as a required element and those that do not.

This is exactly the analysis employed by the Chief Justice of the District Court and the Registrar of Motor Vehicles when they jointly promulgated a table of citable motor vehicle offenses in 2013. (R. 9-38). This table treats every offense that is solely punishable by a fine as a civil offense regardless of whether the offense requires operation or not. For example, it categorizes possession of an open container of alcohol in a motor vehicle and negligently opening a car door as civil offenses, even though these offenses do not require operation. (R. 10, 20, 24). The Chief Justice and the Registrar must have recognized that a literal application of the 90C

definitions would result in all offenses that do not require operation being classified as criminal offenses. They must have further recognized the absurdity of this result and ultimately decided to partially ignore the 90C definitions in order to reach a reasonable result. This reasonable result classifies offenses that are solely punishable by a fine as civil offenses and all other offenses as criminal offenses.

The trial courts have largely followed this analysis instead of employing a literal application of the 90C definitions. For example, most trial courts have treated possession of an open container of alcohol in a motor vehicle as a civil offense even though it does not require operation.[3] The standard

[3] See *Commonwealth v. Blethen*, 77 Mass. App. Ct. 1106 (Jun. 29, 2010) (unpublished opinion) (defendant found civilly responsible on charge of possessing an open container of alcohol in a motor vehicle); *Commonwealth v. Burgess*, 89 Mass. App. Ct. 1112 (March 14, 2016) (unpublished opinion) (same); *Commonwealth v. Fanning*, 78 Mass. App. Ct. 1109 (Nov. 26, 2010) (unpublished opinion) (same); *Commonwealth v. Trite*s, 69 Mass. App. Ct. 1106 (Jun. 7, 2007) (unpublished opinion) (same); *Commonwealth v. Loja*, 92 Mass. App. Ct. 1124 (Jan. 26, 2018) (unpublished opinion) (same); *Commonwealth v. Musick*, 92 Mass. App. Ct. 1112 (Oct. 31, 2017) (unpublished opinion) (same); *Commonwealth v. McMullen*, 93 Mass. App. Ct. 1107 (Apr. 25, 2018) (unpublished opinion) (same); *Commonwealth v. Rosado*, 86 Mass. App. Ct. 1101 (Jul. 2, 2014) (unpublished opinion) (same); *Commonwealth v. Ficco*, 87 Mass. App. Ct. 1104 (Feb. 6, 2015) (unpublished opinion) (same);

criminal complaint in fact states that this offense is a "civil motor vehicle infraction" that is listed on the complaint "for procedural purposes only." (R. 3).

It is hardly surprising that most trial courts have already taken to applying the 90C definitions in a logical manner instead of strictly adhering to the plain language of the statute. Logic dictates that the determination of whether an offense is civil or criminal should be made by looking to the potential punishment. In contrast, there is no logic to support categorically treating all offenses that do not involve operation as criminal offenses. The logical interpretation that leads to a reasonable result should prevail over the plain language interpretation that leads to an absurd result. See *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336 (1982) (literal interpretation would guarantee all private school students transportation to their school no

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Commonwealth v. Byam, 81 Mass. App. Ct. 1122 (Mar. 21, 2012) (unpublished opinion) (same); *Commonwealth v. Camara*, 91 Mass. App. Ct. 1111 (Mar. 17, 2017) (unpublished opinion) (defendant found not responsible on charge of possessing an open container alcohol in a motor vehicle); *Commonwealth v. Croce*, 90 Mass. App. Ct. 1à05 (Sep. 13, 2016) (unpublished opinion) (same); *Commonwealth v. Carroll*, 93 Mass. App. Ct. 1113 (May 31, 2018) (unpublished opinion) (same). All of these cases are included in the record appendix. (R. 39-71).

matter the distance; interpretation leading to reasonable result applied instead); *Dillon v. Massachusetts Bay Transp. Authy.*, 49 Mass. App. Ct. 309, 315-316 (2000) (literal interpretation of wiretap statute would create absurd result; statute interpreted logically to avoid such a result). In keeping consistent with this practice, the Court should apply the 90C definition of a "civil motor vehicle infraction" to all the motor vehicle offenses contained in G. L. c. 90, no matter if the offense involves operation as a required element or not. This logical interpretation would classify offenses that are solely punishable by a fine as civil offenses and all other offenses as criminal offenses.

C. Contrary To The Trial Judge's Ruling, Neither The Plain Language Of The 90C Definitions Nor The SJC's Ruling in *Johnson* Control The Outcome Of This Case.

Even though most trial courts have applied the 90C definitions so as to reach the reasonable result described above, this analysis has not been universally accepted.[4] The instant case is a prime

[4] See *Commonwealth v. Tynan*, 79 Mass. App. Ct. 1104 (Mar. 22, 2011) (unpublished opinion) (defendant criminally convicted on charge of possessing an open container of alcohol in a motor vehicle); *Commonwealth v. Eleves*, 92 Mass. App. Ct. 1104 (Aug. 23, 2017)

example. The trial judge here looked to the definition of an "automobile law violation" and ruled that possession of an open container of alcohol in a motor vehicle does not "strictly fall within [this definition] because the issue of operation is not an element of the offense." (Tr. 18). The judge therefore concluded that the offense must be treated as a criminal offense despite the fact that it is solely punishable by a fine. (Tr. 17-22). The judge can hardly be faulted for strictly adhering to the statutory definitions of an "automobile law violation" and a "civil motor vehicle infraction," as the judiciary is "constrained to follow the plain language of a statute when its language is plain and unambiguous." *Commissioner of Rev. v. Cargill, Inc.*, 429 Mass. 79, 82 (1999). Furthermore, as the judge recognized, dicta located in footnote 7 of the SJC's decision in *Commonwealth v. Johnson*, 461 Mass. 44 (2011), suggests that possession of an open container of alcohol in a motor vehicle is a criminal offense.

Though the judge's rationale is understandable, neither *Johnson* nor the plain language of the 90C

(unpublished opinion) (same). These cases are included in the record appendix. (R. 72-78).

definitions should control the outcome of this case. Courts are not required to strictly adhere to the plain language of a statute "if to do so would lead to an absurd result or contravene the clear intent of the Legislature. *Rahim*, 441 Mass. at 278. As explained above, strict adherence to the 90C definitions creates a whole host of absurdities. Furthermore, *Johnson* is far from controlling precedent. The issue raised in *Johnson* was the propriety of the warrantless search of the defendant's vehicle. 461 Mass. at 48-51. In a single-sentence footnote, the SJC wrote that "possession of an open container of alcohol in a motor vehicle is a misdemeanor" and cited G. l. c. 90, s. 24I. *Id*. at 50 n.7. This statement was plainly dicta. The question of whether possession of an open container of alcohol in a motor vehicle is a civil or criminal offense was irrelevant to the outcome of the case. It is unlikely that the Court even considered this question in its analysis of the probable cause issue. Thus, the footnote in *Johnson* can hardly be seen as controlling precedent. See *Commonwealth v. Dayton*, 477 Mass. 224, 227 (2017) ("[W]here . . . this Court has discussed the relevant language of the statute only in nonbinding dicta, it can hardly be

said that we have explicated the statute or put our judicial construction on it.").

CONCLUSION

For the above-stated reasons, the defendant requests that the Court vacate his criminal conviction for possessing an open container of alcohol and remand the case to the lower court along with an order requiring the court to treat this offense as a civil offense.

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STATUTORY ADDENDUM

G. L. c. 90, s. 2

Any person who wrongfully displays a handicapped plate on or a placard in a motor vehicle parked in a designated handicapped parking space or in a regular metered space or in a commercial parking space shall be subject to a fine of $500 for a first offense and $1,000 for a second or subsequent offense.

G. L. c. 90, s. 7

Every person operating a motorcycle or riding as a passenger on a motorcycle or in a sidecar attached to a motorcycle shall wear protective head gear conforming with such minimum standards of construction and performance as the registrar may prescribe, and no person operating a motorcycle shall permit any other person to ride as a passenger on such motorcycle or in a sidecar attached to such motorcycle unless such passenger is wearing such protective head gear, except that no protective head gear shall be required if the motorcyclist is participating in a properly permitted public parade and is 18 years of age or older.

G. L. c. 90, s. 7B(5)

No fueling shall take place while any school bus is occupied by passengers.

G. L. c. 90, s. 9D

No person shall operate any motor vehicle upon any public way or upon any way to which the public shall have the right of access with . . . nontransparent or sunscreen material, window application, reflective film or nonreflective film used in any way to cover or treat the front windshield, the side windows immediately adjacent to the right and left of the operator's seat, the side windows immediately to the rear of the operator's seat and the front passenger seat and the rear window, so as to make such windshield and said window glass areas in any way nontransparent or obscured from either the interior or exterior thereof.

No person shall . . . equip . . . a motor vehicle in the commonwealth in violation of the provisions of this section; provided, however, that nothing in this section shall be

construed to prohibit the manufacture or sale of reflective or nonreflective film in the commonwealth.

Violations of any provisions of this section shall be punishable by a fine of not more than two hundred and fifty dollars. Upon a third or subsequent conviction of a violation of the provisions of this section, the registrar shall suspend the operator's license of a person so convicted for a period not to exceed ninety days.

G. L. c. 90, s. 13A

Any person who operates a motor vehicle without a safety belt, and any person sixteen years of age or over who rides as a passenger in a motor vehicle without wearing a safety belt in violation of this section, shall be subject to a fine of twenty-five dollars.

G. L. c. 90, s. 14

No person shall open a door on a motor vehicle unless it is reasonably safe to do so without interfering with the movement of other traffic, including bicyclists and pedestrians. Whoever violates the preceding sentence shall be punished by a fine of not more than $100.

G. L. c. 90, s. 14A

Whenever a totally or partially blind pedestrian, guided by a guide dog or carrying in a raised or extended position a cane or walking stick which is white in color or white tipped with red, crosses or attempts to cross a way, the driver of every vehicle approaching the place where such pedestrian is crossing or attempting to cross shall bring his vehicle to a full stop, and before proceeding shall take such precautions as may be necessary to avoid injuring such pedestrian.

Whoever violates any provision of this section shall be punished by a fine of no less than one hundred nor more than five hundred dollars.

G. L. c. 90, s. 24I

Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, possesses an open container of alcoholic beverage in the

passenger area of any motor vehicle shall be punished by a fine of not less than $100 nor more than $500.

G. L. c. 90C, s. 1

"Automobile law violation" - any violation of any statute, ordinance, by-law or regulation relating to the operation or control of motor vehicles other than a violation (1) of any rule, regulation, order, ordinance or by-law regulating the parking of motor vehicles established by any city or town or by any commission or body empowered by law to make such rules and regulations therein, or (2) of any provision of chapter one hundred and fifty-nine B. A recreation vehicle and a snow vehicle, both as defined in section 20 of chapter 90B, a motorized bicycle and motorized scooter, both as defined in section 1 of chapter 90, shall be considered a motor vehicle for the purposes of this chapter. A motor boat, as defined in section one of chapter ninety B, shall not be considered a motor vehicle for purposes of this chapter.

"Civil motor vehicle infraction" - an automobile law violation for which the maximum penalty does not provide for imprisonment, excepting: (a) operation of a motor vehicle in violation of the first paragraph of section 10 of chapter 90; (b) a violation of sections 23, 25, or 34J of chapter 90; and (c) any automobile law violation committed by a juvenile who does not hold a valid operator's license.

CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that I have served a copy of the defendant's brief and record appendix to Assistant District Attorney Thomas D. Ralph, Middlesex County District Attorney's Office, 15 Commonwealth Avenue, Woburn, MA 01801. I have made service via email.

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CERTIFICATE OF COMPLIANCE

I, Edward Crane, hereby certify, that this brief complies with all applicable rules of court pertaining to the filing of documents. This application was written using Courier New font in 12-point size with 10 characters per inch. There are 18 non-excluded pages that count towards the 50-page limit imposed by Mass. R. App. Pro. 20(a)(2)(A).

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