



Legal Update

September 2020

The Appeals Court holds that the conduct of a New Hampshire police officer, who activated his cruiser lights and sirens in attempt to stop a vehicle driving erratically from New Hampshire into Massachusetts, did not rise to the level of an arrest, but instead was a reasonable measure to ensure public safety.

Commonwealth v. Lariviere, Mass. App. Ct. No. 18-P-1674 (2020): On October 12, 2017, Officer Daniel Henderson of the Seabrook, New Hampshire, Police Department was patrolling Route 1A in Seabrook when he saw a vehicle operated by the defendant straddle the dotted white line dividing the two southbound lanes of the road. The defendant's vehicle then drifted almost halfway into the left lane of traffic and back to the right southbound lane, and continued to weave repeatedly within the right lane. Officer Henderson activated his cruiser's emergency lights. The defendant did not pull over, but continued driving in the right-hand lane until he crossed the state line between Seabrook, New Hampshire into Salisbury, Massachusetts. At this point, Officer Henderson activated the cruiser's siren and the defendant pulled over approximately fifty yards ahead.

Officer Henderson remained in his cruiser and contacted the Salisbury Police Department. He made no direct contact with the defendant. Approximately five (5) minutes later, Officer Jeremy

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Kelley of the Salisbury Police Department arrived at the scene and he spoke with Officer Henderson. During his interaction with the defendant Officer Kelley observed the defendant's eyes were bloodshot and glassy, his speech was slow and slurred, and he smelled alcohol on the defendant's breath. After Officer Kelley conducted field sobriety tests, he arrested the defendant for operating under the influence of alcohol.

The defendant was indicted for operating a motor vehicle while under the influence of intoxicating liquor (OUI), fifth offense, and for operating a motor vehicle after his license had been suspended for OUI. He filed a motion to suppress evidence obtained as a result of an allegedly improper stop in Salisbury, Massachusetts, by a New Hampshire police officer.

The judge denied the motion and found that a police officer cannot act outside his jurisdiction unless specifically authorized by statute or in the performance of a valid citizen's arrest at common law, see *Commonwealth v. Twombly*, 435 Mass. 440, 442 (2001). Relying upon G. L. c. 41, § 98A, the judge found that an officer who sees a person committing an arrestable offense in his jurisdiction can arrest a person in another jurisdiction upon "fresh and continued pursuit." Here, the judge found that § 98A applied because Officer Henderson saw the defendant commit the arrestable offense of failing to stop for a police officer in New Hampshire and then pursued him into Massachusetts. Second, the judge determined that Officer Henderson's actions did not amount to an arrest, but were preventative measures in the interests of public safety.

Commonwealth v. Limone, 460 Mass. 834, 840 (2011).

Conclusion: The Appeals Court held that Officer Henderson's actions amounted to a reasonable investigatory stop by a citizen, rather than an arrest and therefore it affirmed the denial of the motion to suppress.

Issue: Did Officer Henderson's actions amount to an arrest of the defendant in Massachusetts?

Pursuant to common law, a police officer cannot make a warrantless arrest outside of his territorial jurisdiction." *Commonwealth v. Grise*, 398 Mass. 247, 249 (1986). "An officer may make a warrantless arrest outside his jurisdiction if a private person would have been permitted to make a 'citizen's arrest' under the same circumstances." *Commonwealth v. Bartlett*, 465 Mass. 112, (2013). However, "a private citizen may not make an arrest for a misdemeanor, including driving while under the influence." *Id.* The issue was whether Officer Henderson's conduct rose to the level of an arrest.

Whether an encounter was an arrest or merely a stop depends on the proportional relationship of the degree of intrusiveness on the defendant to the degree of suspicion that prompted the intrusion. *Commonwealth v. Willis*, 415 Mass. 814, 819 (1993). "If an officer exceeds the scope of an investigatory stop, the seizure becomes an arrest." *Commonwealth v. Manha*, 479
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Mass. 44, 48 (2018). This determination is highly fact-specific and "depends upon the circumstances of each case." *Id.* The detention of a motorist in a routine traffic stop, without more, does not rise to the level of an arrest. See *Commonwealth v. Ayre*, 31 Mass. App. Ct. 17, (1991).

Here, Officer Henderson effected the stop in Massachusetts by means of his cruiser's lights and sirens, and made no other contact with the defendant. Based on these circumstances, Officer Henderson's actions did not rise to the level of an arrest and were more akin to a "reasonable investigatory stop by a citizen." *Limone*, 460 Mass. at 840.

In *Limone*, an off-duty extraterritorial police officer approached the driver of a stopped vehicle that had collided with his vehicle. After a brief exchange in which he identified himself as a police officer, the officer, suspecting the driver was intoxicated, ordered the driver to step from the vehicle. *Id.* He then reached into the vehicle and removed the keys from the ignition before ordering the driver back into the vehicle. *Id.* at 835-836. The SJC found that the actions of the off-duty officer were minimally intrusive and fell short of an arrest. *Id.* at 841, 842.

Similarly, Officer Henderson activated his lights and attempted to initiate stop while in his own jurisdiction. When the defendant crossed the border into Massachusetts, Officer Henderson did nothing more than add his cruiser's sirens and simply pulled up behind him. Officer Henderson took no action while waiting for the arrival of local authorities. Furthermore, Officer Henderson "did not ask the defendant for a license and registration, nor did he investigate, collect evidence, or ask the defendant perform field sobriety tests." Officer Henderson also did not touch the defendant, draw any weapons, speak to the defendant, take away his keys, or order the defendant to get out of the vehicle. "All these facts, suggest that the stop was a "reasonable measure, short of arrest, to ensure public safety." *Id.* at 843.

Note: The motion judge noted that § 98A, by its express terms, is not limited to intrastate police action, and he construed the statute to authorize the pursuit of the defendant by Henderson, an out-of-State officer. The defendant countered that § 98A authorizes only "extraterritorial arrests between governmental entities wholly within the Commonwealth." Because the court concluded that Officer Henderson did not arrest the defendant, the court did not resolve the question whether the territorial scope of G. L. c. 41, § 98A, is limited to the Commonwealth.

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