SJC-12610

COMMONWEALTH vs. ZACHARIAH J. LAROSE.

Hampshire. January 10, 2019. - October 10, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Motor Vehicle, Operation. Constitutional Law, Search and seizure, Reasonable suspicion. Search and Seizure, Motor vehicle, Reasonable suspicion. Practice, Criminal, Motion to suppress. Statute, Construction. Words, "Lane."

Complaint received and sworn to in the Eastern Hampshire Division of the District Court Department on June 20, 2016.

A pretrial motion to suppress evidence was heard by Thomas H. Estes, J.

An application for leave to prosecute an interlocutory appeal was allowed by Lowy, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

David Rassoul Rangaviz, Committee for Public Counsel Services, for the defendant.

Thomas H. Townsend, Assistant District Attorney, for the Commonwealth.

Michael A. DelSignore & Julie Gaudreau, for National College for DUI Defense, Inc., amicus curiae, submitted a brief.

CYPHER, J. This case is before us on further appellate review from an unpublished memorandum and order of the Appeals Court pursuant to its rule 1:28, see Commonwealth v. Larose, 93 Mass. App. Ct. 1113 (2018), concerning whether a police officer's stop of the defendant's motor vehicle for failing to drive entirely within a marked traffic lane was reasonable, and therefore valid, under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. As a result of observations and further inquiry made by the officer during the stop, the defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of G. L. c. 90, § 24, and a marked lanes violation in accordance with G. L. c. 89, § 4A (§ 4A), a civil motor vehicle infraction punishable by a fine of not more than one hundred dollars.[1]

A Superior Court judge allowed the defendant's motion to suppress "all evidence related to the illegal seizure" on the ground that the defendant had not violated § 4A and, as a result, the stop of his motor vehicle was not reasonable. A

[1] With certain exceptions not relevant here, a civil motor vehicle infraction is a motor vehicle law violation "for which the maximum penalty does not provide for imprisonment." G. L. c. 90C, § 1. This includes marked lanes violations. G. L. c. 89, § 5.

single justice of this court granted the Commonwealth leave to appeal from the allowance of the motion and reported the matter to the Appeals Court, which reversed.

We granted the defendant's request for further appellate review to consider whether the defendant violated § 4A when he crossed the right-side fog line[2] one time for two or three seconds. We conclude that in this case, where the circumstances suggest that the defendant both failed to operate his motor vehicle entirely within his lane of travel and moved from his lane of travel without first ascertaining the safety of that movement, the defendant violated § 4A and the ensuing traffic stop was reasonable. Accordingly, we vacate the judge's order. [3]

Background. We recount the facts as found by the motion judge, supplemented by uncontroverted evidence from the suppression hearing. Commonwealth v. Alexis, 481 Mass. 91, 93 (2018).

A police officer stopped the defendant's motor vehicle in the early morning hours on Route 202, a two-lane highway with a

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[2] "The term 'fog line' generally refers to 'the white line on the right-hand side of [a road] that separates the driving lane from the shoulder.'" United States v. Lawrence, 675 Fed. Appx. 1, 1 n.1 (1st Cir. 2017), quoting United States v. Diaz, 802 F.3d 234, 238 n.8 (2d Cir. 2015). See Commonwealth v. Bartlett, 465 Mass. 112, 114 (2013) (officer observed motor vehicle cross "fog line" on right side of road).

[3] We acknowledge the amicus brief submitted by the National College for DUI Defense, Inc.

single lane of travel in each direction, after observing the defendant, who was traveling in the northbound travel lane directly in front of the officer, cross the right-side fog line "one time for two to three seconds." A video recording taken from the officer's dashboard camera and admitted in evidence showed the right-side tires of the defendant's motor vehicle cross over the right-side fog line, straddle the northbound travel lane and the narrow road shoulder for a few seconds, and return to entirely within the bounds of the northbound travel lane.[4]

This stop led to the defendant's arrest for operating a motor vehicle while under the influence of intoxicating liquor. Before trial, the defendant moved to suppress certain evidence gathered as a result of the stop, arguing that the stop was conducted "without probable cause" and "without there having been a traffic violation and without reasonable suspicion of criminal activity."[5] Section 4A provides in pertinent part:

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[4] We have reviewed the recording. See Commonwealth v. Johnson, 481 Mass. 710, 714 (2019) ("we review any factual findings of the motion judge that were based entirely on the documentary evidence de novo" [quotation and citation omitted]). Nonetheless, in light of our and the dissent's divergent views of the recording, we confine our analysis to the judge's explicit finding that the defendant crossed the right-side fog line one time for two or three seconds.

[5] The defendant argued in his motion to suppress that there was no probable cause to stop the vehicle for a lane violation

> "When any way has been divided into lanes, the driver of a vehicle shall so drive that the vehicle shall be entirely within a single lane, and he shall not move from the lane in which he is driving until he has first ascertained if such movement can be made with safety."

The motion judge concluded that "crossing a fog line one time for a few seconds does not constitute a marked lane violation" and that, therefore, the initial stop of the defendant's motor vehicle was not lawful. In reaching that conclusion, he reasoned that a "fog line does not serve to divide lanes" and, "even if the fog line is a marked lane for the purposes of the statute, there is no indication . . . that the defendant's crossing the fog line was unsafe."

Discussion. In reviewing a ruling on a motion to suppress, "we adopt the motion judge's subsidiary findings of fact absent clear error, but we independently determine the correctness of the judge's application of constitutional principles to the facts as found" (citation omitted). Commonwealth v. Buckley, 478 Mass. 861, 864 (2018).

A police stop of a moving automobile constitutes a seizure and, therefore, must be reasonable in order to comply with the Fourth Amendment and with art. 14. See Buckley, 478 Mass. at 865; Commonwealth v. Rodriguez, 472 Mass. 767, 773 (2015). We consistently have held that a stop is reasonable, and therefore

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and argued in the memorandum in support of the motion that there was also no reasonable suspicion of criminal activity.

constitutional, where an officer has observed a traffic infraction and, as a result, has actual cause to believe that the driver violated an applicable motor vehicle law.[6] See

[6] Many of our traffic statutes create offenses in which whether a driver has committed a violation will be immediately apparent to an observing officer. See J.F. Comerford, Massachusetts Motor Vehicle Stops Benchbook 17 (2016) ("In the typical case, the quantum of evidence necessary to stop a motor vehicle for a civil motor vehicle infraction is not at issue. Direct observation by a police officer of an equipment violation or moving violation provides actual cause for a stop and issuance of a citation"). See, e.g., G. L. c. 90, § 17 (traveling in excess of posted speed limited); G. L. c. 89, § 9 (failure to stop at stop sign); G. L. c. 90, § 14B (failure to signal before turning or stopping). Others might require some degree of investigation before an officer has the quantum of proof necessary to issue a warning or citation. See, e.g., G. L. c. 90, § 9D (prohibited degree of window tint); G. L. c. 90, § 8M (use of mobile telephone by driver under age eighteen); G. L. c. 90, § 7AA (failure to secure child under age eight who is fifty-seven inches tall or shorter in child passenger restraint, or failure to secure child between ages eight and twelve or over fifty-seven inches tall with seat belt). In circumstances where a violation is not at once obvious, we have indicated that "an officer's reasonable suspicion of a possible, but unconfirmed, motor vehicle violation sufficiently justifies an investigatory traffic stop in order to verify or dispel that suspicion." Commonwealth v. Washington, 459 Mass. 32, 39 n.14 (2011). See Commonwealth v. Rodriguez, 472 Mass. 767, 774 (2015) ("in the civil traffic law violation context, appellate decisions in Massachusetts have deemed constitutionally permissible stops that factually appeared to satisfy either the probable cause or reasonable suspicion standard"). See also Commonwealth v. Brazeau, 64 Mass. App. Ct. 65, 69 (2005) (officer's observation of certain items hanging from rearview mirror did not amount to reasonable suspicion and so did not justify stop for violation of statute prohibiting driving with anything that might interfere with or impede operation of vehicle); Commonwealth v. Baez, 47 Mass. App. Ct. 115, 118 (1999) (standard to be used in determining legality of stop based on suspected violation of statute governing tinting of car windows is whether officer reasonably suspected, based on his or her visual observations, that tinting

Buckley, supra at 868; Commonwealth v. Santana, 420 Mass. 205, 208 (1995) (reasonable for police to stop driver who violated motor vehicle law); Commonwealth v. Bacon, 381 Mass. 642, 644 (1980) (police warranted in stopping vehicle where police observed traffic violation).

We have applied this test, often referred to as the authorization test, without regard for the gravity or magnitude of the perceived violation.[7] See, e.g., Commonwealth v. Cordero, 477 Mass. 237, 242 (2017) (impermissible degree of window tint, and broken tail and brake lights); Commonwealth v. Amado, 474 Mass. 147, 151 (2016) (unlit registration plate); Commonwealth v. Feyenord, 445 Mass. 72, 75 (2005), cert. denied, 546 U.S. 1187 (2006) (inoperable headlight in daytime); Commonwealth v. Torres, 433 Mass. 669, 673 (2001) (failure to stop at stop sign); Commonwealth v. Damon, 82 Mass. App. Ct. 164, 168 (2012) (failure to signal turn). And we have maintained this bright-line test despite numerous challenges. See Buckley, 478 Mass. at 866-868 (rejecting standard that would require extended examination of police's underlying motives for conducting stop

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of windows exceeded permissible limits). Cf. Commonwealth v. Whitehead, 49 Mass. App. Ct. 905, 906 (2000) (belief that commission of civil motor vehicle infraction is imminent does not justify investigatory stop).

[7] The dissent agrees that even a minor violation of a motor vehicle law may be the basis of a stop. Post at .

in favor of authorization test, which avoids "often-speculative probing of the police's 'true' motives, while at the same time providing an administrable rule" that clarifies exactly when police may conduct traffic stop); Santana, 420 Mass. at 208-209 (rejecting "reasonable police officer" test and articulating authorization test).

Permitting police to conduct these types of stops promotes compliance with our motor vehicle laws and "'serves the significant government interest' of ensuring public safety on our roadways." Buckley, 478 Mass. at 869. See Rodriguez, 472 Mass. at 776–777. As we more fully explained in Rodriguez:

> "[M]any of our traffic violation statutes regulate moving cars and relate directly to the promotion of public safety; even those laws that have to do with maintaining a vehicle's equipment in accordance with certain standards may also be safety-related. . . . Permitting stops based on reasonable suspicion or probable cause that these laws may have been violated gives police the ability to immediately address potential safety hazards on the road. Thus, although a vehicle stop does represent a significant intrusion into an individual's privacy, the government interest in allowing such stops for the purpose of promoting compliance with our automobile laws is clear and compelling."

Id. The marked lanes statute is no exception. The salient issue before us then is whether the defendant, in briefly crossing the right-side fog line, violated § 4A.

1. Violation of § 4A. We never have addressed explicitly whether crossing a fog line is a marked lanes violation, although we once noted in dicta that a driver whose motor

vehicle had swerved over the fog line, back into the travel lane, over the double yellow lines separating the travel lanes, and back over the fog line had committed "three marked lanes violations." Commonwealth v. Jewett, 471 Mass. 624, 625 (2015). See United States v. Lawrence, 675 Fed. Appx. 1, 5 (1st Cir. 2017) (noting lack of any definitive commentary on issue by Massachusetts courts); United States vs. Herrera, U.S. Dist. Ct., No. 17-cr-10112-ADB (D. Mass. Feb. 22, 2018) (recognizing uncertainty regarding application of § 4A).

We begin with the language of the statute.[8] Section 4A provides in pertinent part:

> "When any way has been divided into lanes, the driver of a vehicle shall so drive that the vehicle shall be entirely within a single lane, and he shall not move from the lane

[8] We interpret a statute according to the intent of the Legislature, which we ascertain from all the statute's words, "construed by the ordinary and approved usage of the language" and "considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished" (citation omitted). Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006). See generally G. L. c. 4, § 6, Third. "Ordinarily, where the language of a statute is plain and unambiguous, it is conclusive as to legislative intent"; however, "we will not adopt a literal construction of a statute if the consequences of doing so are absurd or unreasonable, such that it could not be what the Legislature intended" (quotation and citation omitted). Ciani v. MacGrath, 481 Mass. 174, 178 (2019). Our principal objective is to ascertain and effectuate the intent of the Legislature in a way that is consonant with sound reason and common sense. Commonwealth v. Curran, 478 Mass. 630, 633-634 (2018).

> in which he is driving until he has first ascertained if such movement can be made with safety."[9]

We presume, as we must, that the Legislature intended "what the words of the statute say" (citation omitted). Sheehan v. Weaver, 467 Mass. 734, 737 (2014). Accordingly, we read § 4A as commanding drivers to adhere to two distinct directives. First, drivers must operate entirely within a single lane. We take that to mean that drivers must maintain their lanes and avoid drifting or swerving into an adjoining lane or the shoulder. Second, drivers must not move from their respective travel lanes without first ascertaining whether it is safe to do so. That the Legislature intended for these two directives to operate independently is demonstrated by the Legislature's inclusion of two legal predicates directing the actions of drivers and conscious separation of those predicates by a comma and the conjunction "and."[10] See Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006) (sentence structure informs interpretation); Flemings v. Contributory Retirement Appeal Bd.,

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[9] See 720 Code Mass. Regs. § 9.06(1) (1996) (predecessor of § 4A, directing motorists to drive entirely within marked lanes).

[10] The legal predicate directs that the legal subject act in the manner prescribed by the Legislature; it is the verb that directs or permits action or inaction. 1A N.J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction, § 21:8 (7th ed. 2007).

431 Mass. 374, 378 (2000) (relying on word "and" to conclude statute set out two independent requirements); Taylor v. Burke, 69 Mass. App. Ct. 77, 81 (2007) (comma regularly used to separate ideas or elements within sentence). Accord Lawrence, 675 Fed. Appx. at 4 (§ 4A "imposes one requirement when motorists travel or 'drive' on a particular 'way' that has been divided into 'lanes' and another when they try to depart or 'move from' one of these lanes, such as when pulling off and stopping on the side of the road or turning onto another road").[11] Consistent with this interpretation, a driver may violate the statute either by failing to maintain the driver's intended lane of travel or by failing to ascertain the safety of a movement from that lane before executing that movement.

The defendant argues, consistent with the motion judge's reasoning and that of the dissent, that § 4A does not require adherence to two distinct directives. Rather, they read the statute as essentially prohibiting unsafe movements only, the necessary implication being that drivers cannot violate the statute by either failing to drive entirely within their lane of

[11] We recognize, as does the dissent, that § 4A has been applied inconsistently by courts across the Commonwealth. Post at note 4. We do not agree that the language of the statute is ambiguous, however. To the extent that there is inconsistent application, it is a function of a lack of appellate law interpreting the statute and not a result of ambiguous language.

travel or moving from that lane unless, in either event, it is in fact unsafe to do so.[12] We are not persuaded.

First, the defendant's position has the undesirable effect of affording drivers unfettered discretion to ignore lane markings so long as they do not in fact make unsafe movements. Not only does this interpretation render the Legislature's command to drive entirely within a single lane meaningless, which we strive to avoid, see Ciani v. MacGrath, 481 Mass. 174, 179 (2019), but it also is entirely inconsistent with the clear, obligatory language of the statute that requires drivers to maintain their lanes regardless of whether a failure to do so would be in fact unsafe.[13] It also would have the practical

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[12] The dissent maintains that a driver violates § 4A "only if he or she moves from a marked lane in which one otherwise must drive, or straddles two lanes of travel, when in either event it is unsafe to do so." Post at .

[13] A comparison of § 4A to the marked lanes provision of the Uniform Vehicle Code (code), adopted by seemingly every other State, illustrates this point. Although our marked lanes statute bears a strong resemblance to that embodied in the code, it differs in a key respect. The code provides that vehicles must be driven "as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (emphasis added). Uniform Vehicle Code and Model Traffic Ordinance § 11-309, at 143 (rev. 1968). Our version is not so forgiving. The Legislature has considered whether and to what extent to bring our motor vehicle laws in conformity with the code, see Report of the Registrar of Motor Vehicles Relative to the Advisability of Revising the Laws of Massachusetts Relative to Motor Vehicles, 1952 House Doc. No. 1950 (including side-by-side comparison of each Massachusetts motor vehicle law and its code counterpart), and has declined to revise the

effect of requiring law enforcement officials to engage in a "no harm, no foul" type of analysis before initiating a stop and prohibit them from taking action until a driver's maneuvers are sufficiently "unsafe," which might risk the safety of the driver and others in the vicinity. Common sense dictates that this cannot be what the Legislature intended. See Rodriguez, 472 Mass. at 776–777 (police need ability to address immediately potential safety hazards on road). We do not require such an analysis for other traffic violations and see no reason to require one here.[14] See G. L. c. 90, § 14B (failure to signal

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language of § 4A. See id. at 60; St. 1952, c. 461, § 1 (adding § 4A to G. L. c. 89). In addition, the Legislature has used "practicable" and similar language in other sections of c. 89. See, e.g., G. L. c. 89, §§ 4 ("Whenever on any way, public or private, there is not an unobstructed view of the road for at least four hundred feet, the driver of every vehicle shall keep his vehicle on the right of the middle of the traveled part of the way, whenever it is safe and practicable so to do"); G. L. c. 89, § 7C (b) ("Upon approaching a stationary emergency vehicle, highway maintenance vehicle or recovery vehicle with flashing lights an operator shall . . . proceed with due caution, reduce the speed of the vehicle to that of a reasonable and safe speed for road conditions, and, if practicable . . . yield the right-of-way by making a lane change into a lane not adjacent to that of the emergency response vehicle, highway maintenance vehicle or recovery vehicle"). This further bolsters our conclusion that the Legislature's omission of the word "practicable," or any other language affording drivers some degree of latitude in compliance, in § 4A was purposeful. See Commonwealth v. Dodge, 428 Mass. 860, 865 (1999) (where Legislature has employed specific language in one section of act, but not in another, language should not be implied where it is not present).

[14] The dissent would find a marked lanes violation only where a driver "moves from a marked lane in which one otherwise

before stopping or turning); G. L. c. 90, § 17 (exceeding posted speed limit); G. L. c. 89, § 9 (failure to stop at stop sign).

Second, and perhaps more saliently, the plain language of the statute does not prohibit unsafe movements; rather, the second directive requires that drivers assess the safety of any movement from their respective lanes of travel before making said movement. Interpreting the statute as prohibiting unsafe movements only reads into the statute a requirement that is neither reflected in nor called for by the statute's plain language. Accordingly, we maintain that a driver may run afoul of § 4A by either failing to maintain his or her lane or failing to assess the safety of a movement from his or her lane regardless of whether a particular movement created a safety issue. We emphasize also that an officer has discretion as to when to stop drivers for such possible violations. We do not mean to require or imply that a stop should be made in all such instances.

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must drive, or straddles two lanes of travel, when in either event it is unsafe to do so," post at , and claims that this construction "of an otherwise ambiguous traffic statute" best effectuates the Legislature's intent to promote public safety, id. We disagree for essentially the same reasons we rejected the defendant's comparable interpretation. The dissent's construction puts officers in the difficult position of waiting for sufficient danger before initiating a stop and ignores the clear, mandatory language of the statute.

In addition, and of particular relevance to this case, we note that it is not only purposeful lane departures that may endanger other drivers or pedestrians. Nonpurposeful, i.e., unintentional or accidental, lane excursions, by necessary implication, are made without the driver first ascertaining their safety. Such inadvertent maneuvers may cause as much danger or damage as those made deliberately. Indeed, considering the obvious danger posed by inattentive or impaired drivers, it would make little sense for the Legislature to allow for unintended lane diversions so long as, by pure happenstance, the diversion did not cause actual harm to fellow drivers, bicyclists, pedestrians, or myriad others sharing the road.

It is axiomatic that in order for traffic to flow safely, drivers and others sharing the road must be able to quickly and accurately anticipate one another's movements and respond accordingly. When individual drivers, purposefully or otherwise, fail to operate in conformity with applicable traffic rules, particularly one as fundamental as the directive to drive entirely within one lane, they pose a serious danger to themselves and others. To hold otherwise would be inconsistent with the Legislature's intent in enacting traffic laws generally, as well as G. L. c. 89 specifically, which was to promote the orderly and safe flow of traffic. See Patrican v. Garvey, 287 Mass. 62, 64 (1934) (laws designed to regulate

conduct of travelers upon public ways were enacted to end that general welfare of community may be promoted); 1927 House Doc. No. 112, at 3-10 (traffic laws enacted with aim of improving traffic safety and reducing traffic deaths); St. 1951, c. 646, emergency preamble, amending G. L. c. 89, §§ 1, 4 (intent was to effectuate "immediate preservation of the public safety" on roads). See generally Black's Law Dictionary 1802 (11th ed. 2019) (defining "traffic regulation" as "[a] prescribed rule of conduct for traffic; a rule intended to promote the orderly and safe flow of traffic").

This is not to say that drivers may never move from their respective lanes of travel, either entirely in order to change lanes or exit the roadway, or partially to avoid an obstacle or other hazard in their lane, but only to say that drivers must operate entirely within the bounds of one lane until and unless they decide to move from that lane and, in the event they choose to so move, that movement must be preceded by an assessment of its safety. We agree with the dissent that an overly narrow reading of § 4A could lead to absurd results. Nonetheless, we think that our interpretation avoids the absurdity with which the dissent is concerned and is consistent with related traffic laws that make room for necessary and purposeful lane deviations that can be made safely. See, e.g., G. L. c. 89, § 2 (when passing, "[i]f it is not possible to overtake a bicycle or other

vehicle at a safe distance in the same lane, the overtaking vehicle shall use all or part of an adjacent lane if it is safe to do so or wait for a safe opportunity to overtake"); G. L. c. 89, § 5 (§ 4A does not apply to drivers "acting in conformity with the direction of a police officer" or to instances where "construction or repair is being performed which prohibits passage in the ordinary travel lane or lanes"); G. L. c. 89, § 7A ("Upon the approach of any fire apparatus, police vehicle, ambulance or disaster vehicle which is going to a fire or responding to call, alarm or emergency situation, every person driving a vehicle on a way shall immediately drive said vehicle as far as possible toward the right-hand curb or side of said way and shall keep the same at a standstill until such fire apparatus, police vehicle, ambulance or disaster vehicle has passed").

Nonetheless, in this case, the circumstances suggest that the defendant violated § 4A in two ways: he failed to operate his motor vehicle entirely within a single lane of travel; and he moved inadvertently from his lane of travel onto the road shoulder, the necessary implication being that he did not first ascertain that his movement onto the shoulder could be made safely. The defendant did not use his turn signal to indicate an intention to move out of the northbound travel lane; he did not reduce his speed in order to come to a complete stop on the

road shoulder; he returned entirely to within the confines of the northbound travel lane after only a few seconds; and there was no visible hazard or other obstacle in the road that might explain his brief digression onto the shoulder. In these circumstances, the violation was clear and the ensuing stop was reasonable.

2. Marked lane defined. We further conclude that the defendant's position that § 4A prohibits the crossing of pavement markings that separate only lanes of traffic finds no support in the plain language of the statute. The Legislature's use of the phrase "entirely within" when describing a motor vehicle's position necessarily implies that a lane is bounded on either side and that it is impermissible to deviate from those boundaries. G. L. c. 89, § 4A. Moreover, the defendant's suggestion that the fog line does not demarcate the right edge of the travel lane is undermined by applicable highway regulations and, as the Appeals Court noted, strains the bounds of common sense. The Department of Transportation (department) is responsible for constructing and maintaining State highways as well as installing and maintaining all signage and traffic markings necessary to protect the traveling public in accordance with the department's current manual on uniform traffic control devices. G. L. c. 85, § 2. See Twomey v. Commonwealth, 444 Mass. 58, 61 (2005). The department defines a "lane" as "a

longitudinal strip of roadway of sufficient width to accommodate the passage of a single line of vehicles, whether or not the bounds of the lane are indicated by pavement markings or longitudinal construction joints," and a road "shoulder" as "that part of the paved surface of a way lying outside solid traffic lines." 700 Code Mass. Regs. § 7.02 (2016).[15] See United States Department of Transportation, Manual on Uniform Traffic Control Devices § 3B.06 (Dec. 2009) ("If used, edge line pavement markings shall delineate the right or left edges of a roadway. . . . [R]ight edge line pavement markings shall consist of a normal solid white line to delineate the right-hand edge of the roadway"); id. at § 3B.07 ("Edge line markings may be used where edge delineation is desirable to minimize unnecessary driving on paved shoulders or on refuge areas that have lesser structural pavement strength than the adjacent roadway"). Therefore, a fog line does not merely alert drivers to the edge of the travel lane. Rather, it marks the right-hand edge of the travel lane and serves to separate the travel lane from the road shoulder. Accord Jewett, 471 Mass. at 625 (noting in dicta that crossing fog line is marked lanes violation). Cf. Commonwealth v. Gonsalves, 429 Mass. 658, 659-660 (1999)

[15] See 720 Code Mass. Regs. § 9.01 (1996) (defining "roadway" as "[t]hat portion of a highway between regularly established curb lines or that part, exclusive of shoulders, improved and intended to be used for vehicular traffic").

(officer observed motor vehicle travel "over the marked lane" into breakdown lane and cited driver for marked lanes violation).

3. Pretextual stops. Finally, we are not persuaded by the defendant's argument that our holding today will give officers "carte blanche to stop almost every car on the road" and inevitably result in a deluge of pretextual stops for innocuous traffic violations. Pretext is not an issue in this case, cf. Buckley, 478 Mass. at 870 ("This brings us to the more obvious deficiency in the defendant's appeal to the racial profiling context: the fact that racial profiling is not an issue in this case"); and if the issue of pretext arises in another case, we have an established framework for assessing whether a traffic stop is impermissibly pretextual. See id. at 870-871, citing Commonwealth v. Lora, 451 Mass. 425, 437, 439-440 (2008) (if defendant can establish that traffic stop is product of selective enforcement predicated on race and thus violative of constitutional right to equal protection of laws, evidence seized in course of stop should be suppressed under exclusionary rule). As we noted in Buckley, supra at 871, to the extent that we must review the adequacy of our framework for assessing whether a stop is impermissibly pretextual, "we wait to do so in a case where a driver has actually alleged and laid a proper foundation" for such a claim.

Moreover, the argument advanced by the defendant and alluded to by the dissent that, because perfect compliance with all traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given driver in a violation, creating an unacceptable risk of pretextual stops, has been rejected. See Whren v. United States, 517 U.S. 806, 810 (1996); Buckley, 478 Mass. at 866 n.10 (rejecting argument mirroring that of petitioners in Whren, supra). The dissent worries that the consequences of this decision may result in selective enforcement and "mischief," but its redefinition of the marked lane statute does not alleviate the mischief with which it is concerned. The dissent's concerns are not caused by our interpretation of the statute. Rather, they are a function of the enforcement of all the traffic laws by police officers who are entitled to lawfully use their discretion in issuing traffic citations. See G. L. c. 90C, § 3 (A) (1) ("If a police officer observes or has brought to the officer's attention the occurrence of a civil motor vehicle infraction, the officer may issue a written warning or may cite the violator for a civil motor vehicle infraction . . ."). See also Buckley, supra at 879 (recognizing that law enforcement officers enjoy considerable discretion in exercising some selectivity for purposes consistent with public interest); Lora, 451 Mass. at 437 (same). Interpreting the statute to require

actual unsafety does not preclude the potential for pretextual stops, which is rooted ultimately in officer discretion.[16]

Conclusion. For the reasons set forth supra, because the judge found that the defendant drove out of the marked travel lane when crossing over the fog line, the observing police officer had sufficient reason to stop the defendant for a marked lanes violation. The order allowing the defendant's motion to suppress is vacated, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

[16] We note that the court is tasked with construing the marked lane statute as written and is obliged to stay in its lane. If the Legislature is concerned that too many drivers are being stopped for minor marked lane infractions, then it may amend § 4A or pass other corrective legislation.

LENK, J. (dissenting, with whom Gants, C.J., and Budd, J., join). I agree with the court that, unless a traffic stop is the product of selective enforcement predicated on race, a stop is legally justified where the police have observed a violation of a motor vehicle law, even a seemingly minor one. I also agree that, if the defendant had violated G. L. c. 89, § 4A, when, as the motion judge found, he crossed over the fog line "one time for two to three seconds," under circumstances where "there is no indication . . . that the defendant's crossing the fog line was unsafe," the stop would have been lawful. I dissent because I conclude that the conduct found by the motion judge[1] does not amount to a violation of G. L. c. 89, § 4A, and the stop therefore was not lawful.

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[1] The judge heard testimony from the arresting officer and reviewed the dashboard video footage taken from the police cruiser. The officer testified that the defendant was "drifting in and out of the lanes," "having a hard time maintaining [his] lanes" and crossed the fog line by "two feet." The judge explicitly rejected this version of events in light of the "stark contrast" between the testimony and what the video footage shows. He observed that the arresting officer either "[did] not have a clear recollection of the events or [was] confusing this incident with another." The judge's findings, upon which I rely, were as follows:

> "The video shows the Defendant's vehicle cross over the fog line one time for two to three seconds. It does not show the Defendant's vehicle touching or crossing over the double yellow lines at any time. Otherwise, the Defendant appears to be operating his vehicle in a normal fashion (including during the stop)."

In my view, a driver violates G. L. c. 89, § 4A, only if he or she moves from a marked lane in which one otherwise must drive, or straddles two lanes of travel, when in either event it is unsafe to do so. This construction of an otherwise ambiguous traffic statute best effectuates the Legislature's intent and comports with common sense by (1) avoiding the barrage of absurdities that follows; (2) harmonizing the statute's language with its core purpose of promoting public safety; and (3) minimizing the likelihood of selective enforcement of our traffic laws.

General Laws c. 89, § 4A, provides, in relevant part:

> "When any way has been divided into lanes, the driver of a vehicle shall so drive that the vehicle shall be entirely within a single lane, and he shall not move from the lane in which he is driving until he has first ascertained if such movement can be made with safety."

The court today concludes that this sentence sets forth two separate directives, and that, with one small movement, a driver may be pulled over and cited for a violation of both. Ante at . More specifically, the court declares that the fog line demarcates the edge of a travel lane, and that, by once crossing the fog line, albeit safely and for no more than three seconds, the defendant has violated the law in two ways: (1) by moving, he did not drive the vehicle "entirely within a single lane"; and (2) he may have made that movement without first ascertaining whether it was safe -- even though, objectively, it

was. Id. at . As to the latter determination, the court concludes that "the circumstances suggest" that the movement was inadvertent[2] and that the defendant did not determine whether it was safe to move before he crossed the fog line, leading to a violation of the second directive. According to the judge's findings, however, "there [are] no . . . facts" in this record that might indicate that the driver's movement was, in any way, unsafe.[3]

Unlike the court, I do not view the language of G. L. c. 89, § 4A, as being plain and unambiguous in its "command[] [to] drivers to adhere to two distinct directives," ante at , nor do I necessarily stand alone in thinking so. See United

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[2] The court today appears to conflate our well-established standards regarding a lawful traffic stop. Ante at . An officer may not stop, seize, or search a vehicle based upon a mere suggestion or hunch that a driver has committed a traffic violation. See Commonwealth v. Lora, 451 Mass. 425, 436 (2008), quoting Whren v. United States, 517 U.S. 806, 810 (1996) ("the decision to stop an automobile is reasonable for [purposes of the Fourth Amendment to the United States Constitution] 'where the police have probable cause to believe that a traffic violation has occurred'"). Nor may an officer stop and seize a vehicle and its occupants based upon a subjective or good faith belief that a violation has occurred. See Commonwealth v. Buckley, 478 Mass. 861, 867 (2018) (courts evaluate "validity of police conduct on the basis of objective facts and circumstances, without consideration of the subjective motivations underlying that conduct").

[3] Insofar as the court suggests that the defendant "straddle[d]" his travel lane and the shoulder of the road, ante at , the motion judge found only that the driver "cross[ed] over the fog line one time for two to three seconds" and did not "cross[] over the double yellow lines at any time."

States vs. Herrera, U.S. Dist. Ct., No. 17-cr-10112-ADB (D. Mass. Feb. 22, 2018) (there is "ambiguity in the Massachusetts marked lane statute as to whether it applies only to unsafe lane crossings"); United States vs. Lawrence, U.S. Dist. Ct., No. 13-cr-10245-MLW (D. Mass. Feb. 25, 2016) (marked lanes statute is "doubtful in construction" and "ambiguous" regarding fog line crossings), aff'd, United States v. Lawrence, 675 Fed. Appx. 1, 5 (1st Cir. 2017) (recognizing, but not resolving, ambiguity in marked lanes statute).[4]

Under the court's literal interpretation of the statute, a driver commits a marked lanes violation every time he or she crosses a lane marker or fog line, even for a fraction of a

[4] The statute is ambiguous not because of the lack of appellate cases interpreting it, see ante at note 11, but because of its language. Underscoring this ambiguity is the fact that courts across the Commonwealth have interpreted G. L. c. 89, § 4A, as applying only to unsafe lane deviations. See, e.g., Commonwealth vs. Blanchard, Mass. Super. Ct., Nos. 17-0034 & 17-0044 (Franklin County Dec. 29, 2017) (no lanes violation where there was no evidence that crossing double yellow line was unsafe); Commonwealth vs. Caballero, Mass. Super. Ct., No. BRCR200900991 (Bristol County Nov. 12, 2012) (no lanes violation for straddling lane markings briefly because it was not unsafe); Commonwealth vs. Santos, Mass. Super. Ct. No. 06-754 (Norfolk County May 18, 2007) (no lanes violation for crossing fog line twice); Commonwealth vs. Girardi, Mass. Dist. Ct., No. 0128-CR-0267 (N. Berkshire Div. Dec. 3, 2001) (no lanes violation for crossing fog line once). See also Zion v. Colonial Wholesale Beverages, Inc., 54 Mass. App. Ct. 1117 (2002) (unpublished) (no lanes violation where car straddled yellow line to avoid another car). But see Commonwealth v. Gaffney, 91 Mass. App. Ct. 1132 (2017) (unpublished) (crossing over fog line repeatedly is marked lanes violation).

second, when it otherwise is safe to do so. In the court's view, a driver violates G. L. c. 89, § 4A, if the driver moves over the fog line in an effort to dodge a pot hole or patch of ice, or to avoid another vehicle that drifts too close during perilous weather conditions. A driver also would commit a violation if, ever so slightly, he or she crosses the fog line in order to give more room to a large vehicle, a bicyclist, or a pedestrian, or to steer clear of an animal that has darted out onto the road. In fact, as best as I can tell, a driver would violate G. L. c. 89, § 4A, every time he or she crosses over a lane marker in order to exit a highway, to pull onto the shoulder of a highway to change drivers when tired, or to pull into a gasoline station, parking lot, or driveway.

Indeed, if the language of the statute is read this literally, any lane change would, for just an instant, violate the statute because the driver would not then be driving the vehicle "entirely within a single lane." Of course, this interpretation would be absurd, but its silliness only demonstrates that the language of the first clause cannot be construed in such a literal or narrow manner. See, e.g., Ciani v. MacGrath, 481 Mass. 174, 178 (2019) (courts "will not adopt a literal construction of a statute if the consequences of doing so are 'absurd or unreasonable'" [citation omitted]); Commonwealth v. Chamberlin, 473 Mass. 653, 660 (2016)

(interpretation cannot lead to "illogical result" [citation omitted]). Cf. Lawrence, 675 Fed. Appx. at 5-6 ("Of course, it would be nonsensical to read [§] 4A in a way such that a violation arises when a driver causes his or her vehicle to cross a fog line even when it is unsafe to continue driving in a given travel lane").[5]

Nor can the language of the first clause be read in isolation. See Casseus v. Eastern Bus. Co., 478 Mass. 786, 795

[5] The court appears to acknowledge that there must be room for these deviations, but to do so, reads into the statute the element of intentionality (or purposeful movement) in order to avoid some of the absurdities that result. Ante at . Rather than reading this new element into G. L. c. 89, § 4A, our duty is to interpret the statute, as written, so that it may constitute "a harmonious whole consistent with the legislative purpose" (citation omitted). See Perez v. Bay State Ambulance & Hosp. Rental Serv., Inc., 413 Mass. 670, 678 (1992). The marked lanes provision, as I construe it, ensures that an officer need not hypothesize about a driver's subjective purpose in having made a lane movement before deciding whether there is actual cause to stop and cite the driver for a violation.

Along the same lines, that the Legislature has codified certain situations that require a driver to pull over for a fire truck or ambulance, G. L. c. 89, § 7A, or to follow the direction of a police officer, G. L. c. 89, § 5, also does not exhaust the list of circumstances in which deviating from a lane is necessary. Ante at . Rather than crafting an exemption for every possible situation in which a driver may need to move from his or her lane of travel, the Legislature instead drew the line at lane maneuvers that are not safe. G. L. c. 89, § 4A. This solution was, and remains, the most sensible. An officer need not guess at which swerves were motivated by a patch of black ice, a driver's need to sneeze, or a squirrel on the road; rather, police are tasked with a far simpler determination: Was the maneuver objectively safe? The Legislature burdens officers with no more complicated a determination, and neither should we.

(2018) (statutory provision must be construed in its entirety). The "stay in one lane" part of the sentence thus cannot be severed from the rest of the sentence, which recognizes that a driver nonetheless lawfully may "move" from that lane if "such movement can be made with safety." See G. L. c. 89, § 4A. Indeed, the phrase "move from the lane in which he [or she] is driving" is far broader than "changing the lane" in which he or she is driving, in that it includes any movement that the driver ascertains to be safe. It therefore includes a lane diversion made safely to give more room to a bicyclist or other vehicle.

In contrast to the court's literal reading of the statute, the alternative interpretation I offer, i.e., that the statute is violated when a driver moves from a marked lane in which one otherwise must drive, or straddles two lanes, when in either event it is unsafe to do so, serves public safety without engendering absurd results.[6] It harmonizes the statute's language with its "main object to be accomplished," see Harvard

[6] As a result of further inquiry, police charged the defendant with operating a vehicle while under the influence, G. L. c. 90, § 24, and a marked lanes violation, G. L. c. 89, § 4A. While I certainly share the court's concern about drunk driving and the devastation that it occasions, it cannot affect our construction of the traffic statute at issue. Nor may it affect our view of the legality of the stop predicated upon a violation of that traffic statute, a stop that itself has the potential to be lethal in consequence. See Buckley, 478 Mass. at 877, n.3 (2018) (Budd, J., concurring) (documenting recent fatalities during routine traffic stops for African-Americans). See also discussion, infra.

Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006), which is to effectuate "immediate preservation of the public safety" on the roads, see St. 1951, c. 646, emergency preamble, amending G. L. c. 89, §§ 1, 4. In sum, the court's construction does not comport with what it correctly recognizes to be our "principal objective" in interpreting the meaning of a statute -- "to ascertain and effectuate the intent of the Legislature in a way that is consonant with sound reason and common sense." Ante at note 8.[7]

[7] The court makes much of the Legislature's not having adopted any provisions of the long compendium that is the Uniform Vehicle Code and Model Traffic Ordinance (code). It infers from this that the Legislature specifically declined to include the "as nearly as practicable" language when drafting G. L. c. 89, § 4A. Uniform Vehicle Code and Model Traffic Ordinance § 11-309, at 143 (rev. 1968). The court bases this inference only upon the Legislature's having declined to adopt any section of the code. Ante at note 13. It is somewhat of a red herring to suggest that the omission was intentional, where nothing indicates that the Legislature focused on this particular language in any way. In any event, the statute's purpose is not about practicability or about promoting strict lane integrity; it is about ensuring public safety on the roads.

Further, in those few States that sever their statutes in the same way that the court does today, the absurdities we have discussed remain avoidable because the code requires drivers to stay within a single lane only "to the extent practicable." See generally State v. Regis, 208 N.J. 439, 449 & n.3 (2011) (citing this "crucial phrase" to justify reading statute as two distinct directives). Thus, a driver would not violate that statute when dodging a bicyclist or swerving ever so slightly from his or her lane of travel, because the requirement that one drive entirely within one lane in those instances would no longer be "practicable." Where G. L. c. 89, § 4A, does not include such language, the decision to sever the statute in this manner only serves to allow these absurdities to prevail; it requires

I also worry about the consequences of the court's decision and the mischief it may occasion. Although this defendant does not complain of selective enforcement based on race, it is surely a concern where a statute is construed in such a way that many, if not most, licensed drivers will become serial scofflaws. Where the court's interpretation of this statute also affords an officer "discretion as to when to stop drivers for such possible violations," ante at , or to stop anyone who crosses a fog line in order to investigate whether that action was intentional, it increases the risk of pretextual stops. We must take what we have learned about implicit bias, how "pretextual stops disproportionately affect people of color," and "explore what can be done to mitigate the harm caused by this practice." See Commonwealth v. Buckley, 478 Mass. 861, 876-877 (2018) (Budd, J., concurring). This is so even when traffic stops do not result in any criminal charges; they still can be humiliating, terrifying, and, at times, lethal for African-American drivers, as well as for members of other marginalized groups. Id. at 876-877, nn.1, 3. Heeding the time-tested admonition that an ounce of prevention is worth a pound of cure, this is yet another reason to reject the court's

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strict, single-lane travel, without any exception for a driver's agency in moving from his or her lane when otherwise safe (and practicable) to deviate from that lane.

unnecessarily rigid reading of this otherwise ambiguous traffic statute, and the attendant problems that likely will arise in its wake.

Because there is no evidence that the defendant in this case made any unsafe movements across the fog line, or that he was driving in more than one lane, I would conclude that his conduct did not amount to a violation of G. L. c. 89, § 4A.[8] The motor vehicle stop predicated on a supposed violation therefore was unlawful, and the motion judge's suppression of the fruits of that stop should be affirmed. Because the court would reverse, I respectfully dissent.

[8] Moreover, where a statute with criminal consequences is genuinely capable of being construed in two or more fashions, the rule of lenity guides its interpreters toward resolving that ambiguity in favor of a criminal defendant. See Crandon v. United States, 494 U.S. 152, 174, 178 (1990) (Scalia, J., concurring in the judgment). See also Commonwealth v. Carrion, 431 Mass. 44, 45-46 (2000); United States v. Chanthasouxat, 342 F.3d 1271, 1279 (11th Cir. 2003) (construing civil traffic law in defendant's favor because court "decline[d] to use the vagueness of a statute against a defendant"); Whitfield v. United States, 99 A.3d 650, 656 n.14 (D.C. 2014) ("it is within the spirit of the law to apply the rule of lenity to civil traffic regulations"). Indeed, here, because the defendant was charged with a marked lanes violation, he must be afforded the benefit of the ambiguity in our construction of the statute.