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Police Legal News

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Police Legal News is a free monthly newsletter designed to provide police officials with the latest news and information regarding court and administrative agency decisions affecting the Massachusetts law enforcement community.

Topic areas will include: summaries of SJC & Appeals Court decisions, search & seizure, motor vehicle, and criminal law, labor relations law & highlights of recent decisions of the Mass. Labor Relations Commission, Civil Service Commission cases, police civil l

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Bypass Based on Limited G.L. c. 94C History Upheld – Boston Police Department

In the case of Lencol Monteiro v. Boston Police Department, the Civil Service Commission ruled that the Boston Police Department had sound and sufficient reasons for bypassing Monteiro for selection as a police officer in the City of Boston.

In April of 2000, five years before Monteiro was to be bypassed, as a result of a mistaken identity, he was wrongfully arrested for felony charges related to rape and kidnapping. These charges were promptly dismissed. However, at the time of his arrest, Monteiro was found to be in possession of three bags of marijuana.

Monteiro claimed that the pants he was wearing the night of his arrest, which contained the marijuana, belonged to his brother and that he was unaware of the marijuana.

In August of 2000, Boston Police Officers assigned to the drug control unit observed Monteiro and four other individuals taking turns rolling dice and exchanging currency. They also observed one of the individuals, but not Monteiro, purchase crack cocaine. All five of the individuals under surveillance, including Monteiro, were placed under arrest. Monteiro was charged with gaming.

The above-described incidents a limited, but troubling pattern linking Monteiro to illegal drugs, thus disqualifying him for appointment as a Boston police officer.

MBTA's Refusal to Hire Individual who was Unable to Work Weekends Constituted Discrimination

The Supreme Judicial Court recently ruled that the MBTA committed discrimination when it refused to hire a Seventh-Day Adventist for his inability to work on the certain days including Saturdays and Sundays.

G.L. c. 151B § 4 protects employees or applicants from discrimination based on religious beliefs. Once an employee notifies an employer that an em practice requires him or her to violate a religious practice compelled by a sincerely held belief, the employer must either make accommodation for the individual or prove that any such

The analysis of whether the accommodation creates an on the particular nature and operations

exercised its managerial discretion in

religious obligations could have been

The primary issue in this case is that the MBTA failed to explore any reasonable accommodation of the applicant s beliefs. For example, the employer failed to explore the possibility of swapping shifts or using accrued vacation time as an accommodation.

However, this is not to say that had an exploration been undertaken that the outcome would have been beneficial to the party claiming discrimination. The SJC noted that should such an investigation reveal that accommodations would result in the imposition of an undue hardship on the employer, no such accommodations

case was its failure to explore such accommodations.

The court also indicated that collective bargaining agreements may assist

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Melrose Union Claims Discrimination

In the case of the City of Melrose & Melrose Association of City Hall Employees, the DLR dismissed the

discrimination because the Union failed to prove that the City took the adverse

hours) to discourage the protected activity.

A public employer that retaliates or discriminates against an employee for engaging in activity protected by Section 2 of the Law violates Section 10(a)(3) of the Law. Southern Worcester Reg. Voc. School District v. Labor Relations Commission, 386 Mass. 414 (1982); School Committee of Boston v. Labor Relations Commission, 40 Mass. App. Ct. 327 (1996). To establish a prima facie case of discrimination, a charging party must show that: (1) an employee was engaged in activity protected by Section 2 of the Law; (2) the employer knew of that conduct; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action to discourage the protected activity. Quincy School Committee, 27 MLC 83, 92 (2000); Town of Clinton, 12 MLC 1361, 1365 (1985).

The City was experiencing legitimate financial difficulties and the Union was unable to prove that that the City's plans for resolving them departed significantly from prior efforts. Also, there was no documented history of animosity between the City and the Association.

As a result, the Association has not established the fourth element of the prima facie case necessary for an alleged violation of G.L. c. 150 § 10(a)(3).

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"There was no evidence that Duncan (or the others) had any possessory interest in the trash can or in the property where it was situated. To the contrary, the evidence indicated that the defendants chose to abandon or hide the guns in a place over which they did not control access."

UPCOMING CPS SEMINARS

- **2008 Mass. Educators 2-Day Clinic on School Law & Discipline** (March 5 & 12, 2008)
- **2008 Firearms Updates** (Feb. 28, 2008)
- **2008 Police Polygraph** (NEW) (March 4, 2008)
- **Imposing Discipline in Police Agencies** (March 20, 2008)
- **1 Day Dwelling House Search Seminar** (March 21, 2008)
- **Updated CORI & Public Records Law** (May 7, 2008)
- **Annual Detective Clinic 2008** (February 6 & 7 and 13 &14, 2008)

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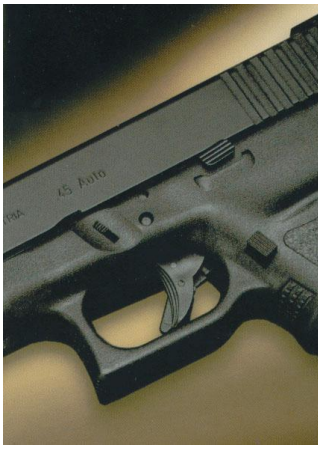
From theCourts

Decisions of Interest to Massachusetts Police Officers



COMMONWEALTH vs. CALVIN M. DUNCAN

At approximately midnight on June 22, 2003, Brockton police Detectives Christopher McDermott and Officer Andrew Kalp responded to a 911 phone call reporting what the caller thought might have been gunshots in the area of a large party that seemed to be getting out of control. McDermott and Kalp arrived at the scene within thirty to forty seconds.

They saw three men, later identified as Duncan, Lemar, and Rashad Wilson, walking in their direction. When the men got closer, it appeared that they recognized McDermott and Kalp as police officers, and they looked like they were going to flee. The three men picked up their pace and turned in behind a nearby fence. The lead man was Duncan, who was momentarily out of police sight when he ducked behind the fence. The three men were bunched together; Lemar was directly behind Duncan. "They were so close together it looked like they were almost one, one person."

When they came out from behind the fence, the three men resumed walking in the direction of the officers. The officers stopped them, pat frisked them, and asked them for identification. Officer Kalp went behind the fence and found two hand guns in a trash barrel. They were covered by a piece of paper and were resting on top of other trash. The guns were hot to the touch and completely dry. The paper on top of the guns and the trash underneath the guns were wet; it had rained earlier that night and it was still drizzling. The defendants were arrested.

As the defendants were being handcuffed, Clifford Montron came out of a nearby driveway and approached Officer Shane Cantone. Cantone instructed Montron to leave; Montron refused. While Detective McDermott spoke with Montron, Officer Cantone checked the area of the driveway. Under some bushes to the left of the driveway, Cantone discovered a handgun. Montron alone was arrested for charges relating to this gun.

Defendant Duncan argues that it was error to deny his motion to suppress the guns because the 911 call provided an insufficient basis for the investigatory stop of him and the others.

It was the burden to prove both that he had a subjective expectation of privacy in the trash can and that society would recognize this expectation as reasonable. He carried neither of these burdens.

There was no evidence that Duncan (or the others) had any possessory interest in the trash can or in the property where it was situated. To the contrary, the evidence indicated that the defendants chose to abandon or hide the guns in a place over which they did not control access. See Commonwealth v. Straw, 422 Mass. 756, 761- 762 (1996) (citing cases). Thus, for constitutional purposes, no search of the trash can took place, and the motion to suppress was properly denied.

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MORE UPCOMING CPS SEMINARS

- **Internet Sting Ops. Cracking Down on Pedophilia in Massachusetts** (Feb. 5, 2008)
- **2008 Imposing Discipline in Police Agencies** (March 20, 2008)
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Step out of the Car Please: Motor Vehicle Exit Orders in Massachusetts

Excepts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 4)

Motor Vehicle Exit Orders (Continued from the January issue of Police Legal News)

MVs—Invalid Exit Orders—Delayed Detention (proportionality)

Exit Orders Following Speeding Investigation (delayed detention)
In Commonwealth v. Bartlett, 41 Mass. App. Ct. 468 (1996), state police stopped an automobile with four occupants for speeding. The operator produced a facially valid license and r

trooper then ordered a passenger out from the vehicle. As the passenger was alighting from the vehicle, the trooper observed cocaine. The evidence was suppressed. The Court stated that the stop should have ended after the operator produced the proper documentation and received either a speeding citation or oral reprimand. The delayed detention produced the incriminating evidence.

Exit Orders Following OUI Investigation (delayed detention)
In Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554 (1996), a police officer effected a car stop for erratic operation suspecting OUI. The vehicle contained the driver and four passengers. The officer then observed a furtive movement by a rear seat passenger, who appeared to be bending forward as if to place an object under the seat in front of him. The operator was order out from the vehicle. After checking her license and registration, the officer found them to be in order. The officer also concluded that she was sober and allowed her to return to the car. In Ellsworth, the investigating officer testified that at that point his investigation regarding any moving violation was over. However, he was still concerned that the rear seat passenger might have been concealing a gun because of his movements in the car. Police then ordered that passenger out from the vehicle. As the passenger left the vehicle, police observed marijuana on his shirt. Police then asked the owner of the

wner consented. After everyone was ordered from the vehicle, police discovered several bags of marijuana. Additional contraband was then discovered on the passengers. Again, as in Bartlett, the Court concluded that the justifiable threshold inquiry was finished after the driver had produced a valid license and registration, and the investigating officer had determined that no moving traffic violation occurred. The vehicle should have been permitted to leave. Likewise, the delayed detention produced the incriminating evidence.

EDITOR'S IMPORTANT NOTE ***after*** he determined the validity of the The precise problem here was that the investigating police officer did not order the occupants out of the vehicle before the justifiable threshold inquiry.

EDITOR'S IMPORTANT NOTE: If an officer effects a traffic stop under the above circumstances, he or she may want to await a backup unit prior to ordering the occupants out from the vehicle. As long as the exit order occurs before the justifiable threshold inquiry,

Exit Orders Following Tailgating Investigation (delayed detention)
In Commonwealth v. Davis, 41 Mass. App. Ct. 793 (1996), a State Trooper stopped the defendant because she was tailgating the cruiser. After a check of her license and registration showed that her paperwork was in order, she was given a verbal warning and permitted to leave. The defendant drove away at a high rate of speed. The trooper then immediately stopped her again for speeding. The trooper noticed sy and bloodshot. The defendant then performed a number of roadside field sobriety tests which she completed successfully. At that point, the trooper did not contemplate arresting the defendant for OUI or for any other crime. However, the trooper asked the defendant if she had any sharp objects on her. When the defendant responded in the negative, the trooper conducted a patfrisk of her. As the trooper was conducting the frisk, the defendant removed a bag from her coat and esting the defendant for the marijuana, the trooper discovered a firearm and ammunition in the vehicle during an inventory search. As in both Bartlett and Ellsworth above, the driver here should have been let go once the formalities of the traffic stop had been completed. Similarly, it was the delayed detention which produced the incriminating evidence.

EDITOR'S NOTE: This case presented an automobile stop for a CMVI, with no cause before the initiation of the frisk to believe any criminal offense had occurred. Although her conduct may have been nervous and agitated, there was no gesture or conduct indicating the sonable suspicion th

March, 2008 issue of Police Legal News]

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Skirting Around the 4th AMD
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Attorney Patrick M. Rogers, has lectured to thousands of police officers on various legal topics. He has over twenty years of police law enforcement experience and has authored a number of textbooks that are used state-wide by thousands of police officers everyday.

Attorney Brian E. Simoneau is an experienced police labor law practitioner with particular expertise in Massachusetts Civil Service matters.