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Police Legal News

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Commonwealth Police Service, Inc.
Post Office Box 58
Assonet, MA 02702
508-644-2116
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www.commonwealthpolice.net

Legal Questions:
E-Mail Attorney Patrick M. Rogers

General Questions:
E-Mail Elizabeth Sullivan

Published by:

Commonwealth Police Service, Inc.
Attorney Patrick M. Rogers
Post Office Box 58
Assonet, MA 02702
Phone: 508-644-2116
Fax: 508-644-2670
www.commonwealthpolice.net

Attorney Brian E. Simoneau
161 Worcester Road, Suite 200
Framingham, MA 01701
Phone: 508-881-1119
Fax: 508-302-0212
www.policelaborlaw.com

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 liability, etc…

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Modig v. Worcester Police Department
Police Officer Bypass Decision Upheld

In the case of Modig v. Worcester Police Department, the Civil Service Commission upheld an original appointment bypass, in part, on the following grounds:

The Appellant admitted that while employed at Ken's Foods, he would not report as expected simply because he did not get along with one of his supervisors, who would assign him a job that he did not like or thought was beneath him. This raised legitimate concerns about the Appellant's ability to treat all citizens equally in the eyes of the law. The concern was a reasonable and rational conclusion based upon the Appellant's continued reference to his co-workers as immigrants and his references to being treated as an immigrant and assigned job tasks typically assigned to undocumented workers.

Also, the Appellant apparently had a poor driving history. Finally, the Appellant failed to disclose, in his application, that he had previously applied for a position with the Town of Uxbridge.

After a full hearing, the Civil Service Commission determined that the City had sustained its burden of proving reasonable justification for bypassing the Appellant.

Download the Full Text of the Case.

Duty of Fair Representation:
Local 3, Firemen & Oilers, SIEU and Anthony Matteo, Jr.

While plowing snow, Anthony Matteo, Jr., was in two separate accidents with other vehicles. The police discovered marijuana in the cab of his snow plow and Matteo was arrested. He voluntarily took a drug test and tested positive for marijuana metabolites. The City terminated Matteo and his union representatives told him that he could appeal the termination to the Civil Service Commission or he could grieve the termination under the collective bargaining agreement. They specifically informed him that, if he should grieve his termination, the Union's Executive Board would have to vote on whether to take his grievance to arbitration. They stated that, based on the information presently available to them, they would recommend to the Union's Executive Board not to take Matteo's grievance to arbitration. They also expressed their concern that he had cost the Union too much money in the past in handling his grievances against the City.

Matteo informed the Union that that he was going to pursue the matter through Civil Service. Matteo filed his Civil Service appeal on April 12, 2005.

The Duty of Fair Representation

Once a union acquires the right to act for and negotiate agreements on behalf of employees in a bargaining unit, § 5 of the Law imposes on that union the obligation to represent all bargaining unit members without discrimination and without regard to employee organization membership.

A union breaches its statutory responsibility to bargaining unit members if its actions toward an employee, during the performance of its duties as the exclusive collective bargaining representative, are unlawfully motivated, arbitrary, perfunctory or reflective of inexcusable neglect.

If the facts support a finding that a union has breached its duty of fair representation, the Commission concludes that the union has violated § 10(b)(1) of the Law. When the Commission reviews the actions and decisions of a union, the Commission does not determine whether the action was sound or substitute its judgment for that of the union. NAGE and Longo, 26 MLC 57, 58 (1999).

Matteo claimed that the Union should have processed a grievance on his behalf and agreed to take that grievance to arbitration. However, the Commission does not require an employee organization to file grievances when the affected employee has not requested that assistance. AFSCME, Council 93 and Pierce, 23 MLC 279, 281 (1997) (unit member must present sufficient and credible evidence to establish that she requested the employee organization to process her grievance, or that the employee organization assumed that duty, before the Commission can consider whether the employee organization breached its duty of fair representation in handling that grievance). Here, Matteo does not allege that he asked the Union to file grievances or take any other action under the Agreement. Indeed, the Union indicates, without rebuttal from Matteo, that he informed the Union he wanted to appeal his termination through Civil Service procedures. Furthermore, once Matteo filed his Civil Service appeal Union was precluded under the CBA from filing a grievance over that same issue. Accordingly, the Commission dismissed this count of the complaint.

Local 3, Firemen & Oilers, SIEU and Anthony Matteo, Jr. Continued from Page 2

Next, Matteo argued that the Union never provided him with information about how to challenge the City's decision to terminate his employment. However, it is undisputed that the Union gave Matteo, a unit member experienced in the processing of grievances to arbitration, the option of grieving his termination or appealing that decision to the Civil Service Commission. Hence, the Commission did not find probable cause to believe that the Union violated § 10(b)(1) of the Law in the manner alleged by Matteo, and this portion of his charge was dismissed.

Matteo also protested the decision not to recommend taking a grievance over his termination to arbitration unless new information was disclosed. There was nothing in the parties' written submissions to indicate that this decision was not a reasonable one at the time. While Matteo denied using marijuana on March 1st, he tested positive for marijuana metabolities on March 2nd. Furthermore, a co-worker of Matteo's told police that he had seen him using marijuana on March 1st and testified at Matteo's termination regarding his alleged use of marijuana on March 1st. Matteo also had a history of disciplinary trouble with the City. Moreover, the parties' written submissions show that Matteo's alleged drug possession coincided with two separate accidents, and that both a co-worker and a police officer disputed Matteo's denial of using marijuana. Considering the factors that relate to whether just cause exists,[1] the Union's acknowledgement that Matteo's termination grievance lacked merit and would entail unwarranted costs was not unreasonable or done perfunctorily or arbitrarily. See, Graham v. Quincy Food Service Employees Ass'n and Hosp., Library & Public Employees Union, 407 Mass. 601, 606 (1990) (grievant's demonstration that grievance is meritorious not sufficient to survive a motion for summary judgment if the union's failure to press grievance was the result of a reasonable and good faith belief that the grievance lacked merit); Fitchburg School Committee, 9 MLC 1399, 1414 (1982) (Commission has recognized that a bargaining unit includes different voices with varying needs, and that a union must, at times, choose from among those voices and act in a way that it believes is best for the unit as a whole). Therefore, the Commission did not find probable cause to believe that the Union violated § 10(b)(1) of the Law in the manner alleged by Matteo, and this portion of his charge was dismissed.

"A nonconsensual entry and search, prior to obtaining a warrant, requires exigent circumstances"

From the Courts

Commonwealth v. Streeter, Mass. Appeals Court, March 25, 2008

The strong aroma of marijuana emanating from an apartment led police to knock on its front door and announce their presence. The nervous behavior and evasive answers of the defendant, Matthew Streeter, and the known presence of others in the apartment, resulted in the police requiring the locked apartment to be opened and a limited search to be conducted, prior to obtaining a search warrant. Inside the apartment they saw marijuana in plain view, and one officer felt a gun in a closed bag. At issue is whether the evidence obtained from inside the apartment should have been excised from the search warrant affidavit, and whether the affidavit, shorn of improper information, provided probable cause to search the apartment.

Applying Commonwealth v. DeJesus, 439 Mass. 616, 621 (2003), the motion judge concluded that the police should not have entered the apartment prior to seeking to obtain a search warrant because there was not specific information to support an objective reasonable belief that evidence would be destroyed unless such preventive measures were taken. Therefore the evidence they observed inside the apartment would have to be excised from the search warrant affidavit, and without such evidence the affidavit did not establish probable cause.

In DeJesus, the SJC set out the substantive standards and analytical approach applicable to this case. The court emphasized that "[t]he right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy. It was just this sort of intrusion that the 4th Amendment and Article 14 of the Mass. Declaration of Rights was designed to circumscribe by the general requirement of probable cause." Id. at 619, quoting from Commonwealth v. Forde, 367 Mass. 798, 805 (1975). Establishing probable cause to believe that evidence of criminal activity would be found in the home was, the court held, only the first step in the analysis. A nonconsensual entry and search, prior to obtaining a warrant, requires exigent circumstances.

In DeJesus, however, the court went on to address the issue of whether officers could conduct a limited search to secure the home to prevent the destruction of evidence while the officers went and sought a search warrant. In analyzing this question, the court stressed that there was a "fundamental difference between securing or controlling the perimeter of a dwelling from the outside and the entry and physical surveillance of a dwelling from the inside." The court therefore concluded that "police officers who secure a dwelling while a warrant is being sought in order to prevent destruction or removal of evidence may not enter that dwelling, in the absence of specific information supporting an objectively reasonable belief that evidence will indeed be removed or destroyed unless preventative measures are taken."

The court then held that, while the officers in that case "clearly had a right to control the premises from the outside until a search warrant was obtained, they had no basis for believing that immediate entry was necessary to prevent the destruction of evidence." however, the defendant was arrested on the street, not outside the door of his apartment, and when the officers went to the apartment, there was apparently no one inside it. The court therefore excised the information obtained from the entry into the apartment from the affidavit. It did, however, conclude that there was sufficient evidence in the affidavit, even after it was excised of improperly obtained information, to provide probable cause for a search, and thus the search was independently supported and exclusion of the evidence was unwarranted. The Appeals Court adopted same step-by-step approach in the instant case.

From theCourts: Commonwealth v. Streeter

Continued from Page 4

The Appeals Court first considered whether the officers had probable cause to believe that there was evidence of illegal narcotics in the apartment, and then whether they had specific information to support an objectively reasonable belief that evidence of the illegal activity would be removed or destroyed unless the police entered and secured the apartment prior to seeking a warrant.

The officers were legally in the hallway of the apartment building investigating a report of an unrelated crime when they first smelled the marijuana emanating from the defendant's apartment. When they returned to the apartment, they smelled an even "stronger order of the marijuana coming from inside." The odor was described by a trained narcotics officer as the smell of fresh, and not burned marijuana. As was their right, the officers knocked on the door and announced their office.

Officer Brown heard what he thought to be "running around" in the apartment. After the officer knocked again, the defendant came out the rear door and locked himself outside of the apartment without a key. He was wearing only jeans, and appeared nervous and shaky. He admitted to smoking marijuana earlier in the day. He was also evasive -- he initially told the officers that only his daughter was inside but, when pressed, admitted that his friend was in the apartment with his daughter.

Here, the strong odor of marijuana emanating from the inside of the apartment, the admission by the defendant that he had smoked marijuana, and his nervous, evasive behavior in the hallway provided probable cause to believe that there was marijuana in the apartment. See, e.g., Commonwealth v. Cohen, 359 Mass. 140, 145 (1971) (odor of marijuana detected from outside apartment combined with statements about narcotics overheard from within apartment were sufficient probable cause to believe that a felony was being committed within).

The question then becomes whether the officers had "specific information supporting an objectively reasonable belief that evidence" of the illegal activity in the apartment would be "removed or destroyed" unless the officers took "preventative measures" beyond securing the perimeter of the apartment.

The officers instructed the defendant to have the locked door opened and then conducted a limited search of the apartment in the course of what they called a "protective sweep."

A prerequisite for securing a dwelling from within requires "an objectively reasonable belief that someone is inside." Here, the prerequisite is satisfied by the defendant's admission that Bryant was inside the apartment.

Because the prerequisite was met, the Court next decided whether, prior to entry of the dwelling, the officers had "specific information supporting an objectively reasonable belief that evidence [would] indeed be removed or destroyed unless preventative measures [were] taken."

There was sufficient "specific information" to support the objectively reasonable belief that the marijuana would be removed or destroyed unless the police entered the apartment. After knocking on the defendant's door and announcing their office, the officers heard running sounds within the apartment. The defendant initially stated that only his daughter was in the apartment, but eventually admitted that Bryant was inside as well. The defendant also locked himself and the officers out of the apartment during their conversation. From this information, we conclude that the officers had specific information to support an objectively reasonable belief that the marijuana could be destroyed by Bryant if they did not enter the apartment. Therefore, the entry into the defendant's apartment was reasonable as a means of securing it from within.

Once Bryant opened the door and stepped into the hallway, the officers standing in the doorway noticed two bags of marijuana and two cigar boxes that contained loose marijuana and seeds on the kitchen table in plain view. The officers observed the marijuana without seizing it, and then used this legitimate plain view observation in the affidavit to obtain a search warrant. Their actions thus far were permissible.

Download the full text of the case.

Step out of the Car Please: Motor Vehicle Exit Orders in Massachusetts

Excepts from Motor Vehicle Search & Seizure by Attorney Patrick M. Rogers (Part 7)

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

***Delayed Detention Of MV For K-9 Sniff AOK—Expansion of the Threshold Inquiry**
In **Commonwealth v. Feyenord,** 445 Mass. 72 (2005), the SJC held that it was permissible to detain an operator and his passenger subsequent to a routine motor vehicle stop for upwards to 20 minutes to await the arrival of a drug detection dog where the operator could not produce evidence of license and where further inquiry of both the driver and passenger demonstrated a number of inconsistencies concerning identity and destination. The dog displayed a heightened interest in an area near the left rear of the vehicle's trunk. The officers proceeded to open the trunk and place the dog inside. The dog again became excited in the area of the trunk near the left taillight. Troopers then searched the trunk, discovering an access panel in the area that had caused the dog's agitation. Once the this panel was removed at the scene, a gray plastic bag was discovered and, within, a digital scale and small black plastic bags each containing a quantity of a substance that appeared to be crack cocaine.

THE DAYLIGHT STOP: The defendant first argued that the police had no justification to stop him for driving a vehicle with one inoperable headlight in daylight. The SJC disagreed. General Laws c. 90, § 7, provides that "[e]very motor vehicle operated in or upon any way . . . shall be provided with . . . suitable lamps." The Court this language to mean that a motor vehicle's headlamps must be suitable at all times so that they are capable of being illuminated whenever road conditions might warrant. Neither the time of day nor the weather conditions during the operation of the motor vehicle has any bearing on this requirement.

THE DELAYED DETENTION ARGUMENT: The defendant next argued that his motion to suppress should have been granted because he was unreasonably detained while the police, without reasonable suspicion of drug-related activity, summoned a canine officer with a drug-sniffing dog to the scene, thereby impermissibly broadening the scope of the inquiry under art. 14 and the Fourth Amendment.

EDITOR'S IMPORTANT NOTE: What type of suspicion must police officers have to escalate a general inquiry of a motorist in connection with a violation of traffic laws to an investigation that utilizes a drug-sniffing dog and justifies the pre-arrest detention of a motorist for such purpose? In order to expand a threshold inquiry of a motorist and prolong his detention ***under these circumstances,*** an officer must reasonably believe that there is further criminal conduct afoot, and that belief must be based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience. in the course of questioning the defendant and the passenger about their identities and destination, the trooper uncovered significant inconsistencies. Given the operator's inability to produce a valid driver's license, that he produced a registration in another person's name, failed to identify himself, and appeared nervous, and these unsettling inconsistencies, the troopers could reasonably have concluded, ***based on specific and articulable facts and the specific reasonable inferences which follow from such facts,*** that the operator and the passenger were engaged in criminal activity beyond the operator's non-possession of a license and the vehicle's malfunctioning headlight. The trooper was thus justified in further detaining the suspects and expanding the scope of his investigation beyond mere motor vehicle violations.

SIMPLE MV STOP: It is important to distinguish this case from cases in which the driver of a vehicle stopped for a traffic violation produces a valid driver's license and registration. See, e.g., **Commonwealth v. Loughlin,** 385 Mass. 60, 61-62 (1982); **Commonwealth v. Ferrara,** 376 Mass. 502, 505 (1978). Where an officer conducts an uneventful threshold inquiry giving rise to no further suspicion of criminal activity, *he may not prolong the detention or expand the inquiry.*

PRECISE TYPE OF CRIMINAL ACTIVITY UNCERTAIN: The specific type of criminal activity that might be "afoot" in this case was decidedly uncertain. The facts were consistent with a number of possibilities, including automobile theft, fugitive flight, and the transportation of contraband, to list just a few. An officer, faced with facts such as those presented here, must make judgments about what resources are readily available to him that might quickly dispel or confirm his suspicion that the driver is involved in some form of criminal activity. The test is one of reasonableness, and the decision to call a canine officer and drug-sniffing dog stationed nearby to confirm or dispel the possibility of drug transportation was far from unreasonable in this case.

THE LENGTH OF THE DETENTION: The detention here was not overly prolonged or onerous in duration. As with all investigative stops of this nature, the police had a responsibility to proceed expeditiously with their investigation. In this case, the trooper followed his inquiry of the occupants of the vehicle by promptly summoning the canine unit, and the total detention lasted no longer than thirty minutes.

THE DOG SNIFF UNDER THE 4TH AMD: In **Illinois v. Caballes,** 125 S. Ct. 834 (2005), the USSC stated that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has a right to possess does not violate the Fourth Amendment. Additionally, in **Indianapolis v. Edmond,** 531 U.S. 32, 40 (2000) the USSC held that while a vehicle stop effectuates a Fourth Amendment seizure, the use of a narcotics-detection dog around vehicle's exterior does not transform seizure into search.

THE DOG SNIFF UNDER ART. 14: The Court concluded that a dog sniff of a ***properly stopped*** vehicle is not a search under art. 14. After "the dog indicated the presence of narcotics in the rear of the car, the police had probable cause to search the car."

[…to be continued in the May, 2008 issue of Police Legal News]

COMMONWEALTH POLICE SERVICE, INC.

Post Office Box 58
Assonet, MA 02702

PHONE:
(508) 644-2116

FAX:
(708) 555-0102

E-MAIL:
ROGERS.PATRICK@VERIZON.NET

WEBSITE:
COMMONWEALTHPOLICE.NET

ATTORNEY BRIAN E. SIMONEAU

The Meadows
161 Worcester Road
Framingham, MA 01701

PHONE:
(508) 881-1119

FAX:
(508) 302-0212

E-MAIL:
BRIAN@POLICELABORLAW.COM

WEBSITE:
WWW.POLICELABORLAW.COM

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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.