



Legal Update

April 10, 2013

Smell of Freshly Burnt Marijuana in a Motor Vehicle

Smell of freshly burned marijuana and observing a traffic violation does not validate the officers' search of vehicle.

Commonwealth v Daniel, SJC -11214 (April 2013)

Background:

On December 13, 2009, in the early morning hours, a Boston Police officer was on patrol in Dorchester when he observed a vehicle with its headlight out. As the officer passed the vehicle, the car made an abrupt left turn in front of the officer's cruiser without using a directional signal. The officer activated his lights and the vehicle came to an abrupt stop in the middle of the travel lane. The officer smelled marijuana as he approached the vehicle and observed the passenger rocking back and forth. At this point the officer asked the driver Alyson Tayetto (hereinafter referred to as "Tayetto") and the passenger, Clint Daniel (hereinafter referred to as "Daniel") whether they were smoking anything. Tayetto produced two (2) bags of marijuana and Daniel, emptied the contents of his pockets which included a passport, keys and a folding knife onto the dashboard. Daniel told the officer that "this is all I got." The officer found Daniel's behavior extremely unusual and he asked Tayetto to move her vehicle to the side of road. Tayetto complied and the officer asked Tayetto and Daniel to step out of the car while he conducted a patfrisk of both of them. The officer did not find anything on Tayetto and Daniel but searched the interior of the vehicle including the glove box. The officer recovered a firearm when he

searched the inside of the glove box. Daniel was charged with unlawful possession of a firearm and filed a motion to suppress, which the Boston Municipal Court allowed. The Appeals Court held that the warrantless search was valid because the officer did not search the vehicle based on the odor of marijuana alone.

Conclusion: The **Massachusetts SJC reversed** the prior Appeals Court decision which held that the officer's warrantless search was unlawful because there was no evidence to suggest that Tayetto was impaired while driving or that the officer was in fear for his safety. The Court noted that because the officer did not administer field tests or make any observations of Tayetto's appearance, he did not have probable cause to believe Tayetto was under the influence of alcohol or drugs. Additionally, the Court determined that the officer's actions and testimony failed to demonstrate that he was concerned for his safety. While the Commonwealth argued that the late hour; the fact that the officer was outnumbered by the vehicle's occupants; Daniel's hunched shoulders and movement as the officer approached the vehicle; Daniel's emptying his pockets when not specifically requested to do so; and the presence of a noncriminal amount of marijuana justify the warrantless search, the Court did not agree. Specifically, the Court stated that Tayetto and Daniel were cooperative and the officer was not familiar with either of them. The Court acknowledged that the seasoned officer made some unusual observations of Daniel's behavior but it still concluded that the officer's decision to allow Tayetto and Daniel to remain in the vehicle after Daniel produced a folding knife, "did not create a "heightened awareness of danger." "Although we are mindful that officers must have latitude to ensure their safety, see *Commonwealth v. Silva*, supra at 407, here the search far exceeded what was necessary."

Commentary: The Massachusetts SJC decision regarding *Daniel* implies that an officer would not be able to search the vehicle on the odor of marijuana and erratic operation alone. The Court highlighted that the officer made no observations that the driver was impaired. The Court also emphasized that the officer did not appear to believe that Tayetto was impaired because he allowed her to move her own vehicle to the side of the road out of the way of traffic and he did not administer field sobriety tests. If the officer had evidence that Tayetto was impaired, the Court may have reached a different conclusion.

Further, the Court did not credit the Commonwealth's argument that the officer was justified in the warrantless search because his safety was at issue. Although the Court acknowledged that the seasoned officer made some unusual observations of Daniel's behavior, it still concluded that the officer's decision to allow Tayetto and Daniel to remain in the vehicle after Daniel produced a folding knife implied he was not in fear.

Commonwealth v Pacheco, SJC 11216, (April 2013)

Smell of freshly burned marijuana that was believed to be “socially shared” does not authorize the police to search the trunk of a vehicle.

Background: A state trooper was patrolling a state park when he observed a vehicle parked in a handicapped parking space without a handicapped placard. The trooper approached the driver's side window and smelled the strong odor of freshly burnt marijuana emanating from the vehicle. The trooper asked the occupants whether they were smoking marijuana and they all admitted they were. The trooper ordered the occupants to step out of the vehicle, one at a time, so that he could conduct a search of each "for weapons and contraband." The trooper did not find any weapons on any of the occupants. During this search, one of the occupants informed the trooper that there was a bag of marijuana on the floor of the vehicle which the trooper observed with his flashlight. The trooper continued his search of the interior of the vehicle for contraband and found nothing. The trooper searched the vehicle, including the trunk, where he recovered a firearm inside a backpack. The defendant identified as Antonio Pacheco (hereinafter referred to as “Pacheco”) was charged with unlawful possession of a firearm and filed a motion to suppress challenging the warrantless search. The lower court denied the motion to suppress and the Massachusetts Supreme Judicial Court granted direct appellate review.

Conclusion: The SJC held that the warrantless search was unlawful because the trooper lacked probable cause to search the trunk. The Commonwealth argued that the trooper was justified in searching for additional contraband after the trooper smelled freshly burned marijuana, the occupants admitted to smoking marijuana and the trooper recovered a bag of marijuana on the floor of the vehicle. The Court determined that this case is similar to the Daniel case where the smell of freshly burnt marijuana that appears to weigh less than ounce does not give the trooper probable cause to search the rest of the vehicle including the trunk. The Court further held that sharing marijuana socially does not amount to distribution and therefore the trooper lacked probable cause to search the trunk.

Commentary: Based on the Court’s decision in *Pacheco*, the *Commonwealth v DeGray* case may no longer be good law. 71 Mass. App. Ct. 122 (2010). The facts in *Degrays* are similar to *Pacheco* since the officer smells freshly burnt marijuana in both situations and the occupants disclose that they were smoking marijuana and remnants of marijuana were recovered from the vehicle. In *Degrays*, the Court emphasized that the freshly burnt marijuana along with the driver’s admissions enabled the officer to search the trunk. However, after *Pacheco*, it is clear smelling freshly burnt marijuana, recovering less than an ounce of marijuana and admissions that occupants were smoking marijuana did not give the trooper probable cause to search the trunk.

