



Legal Update

A Reliable Alert by a Narcotics Canine can Establish Probable Cause for a Strip Search

Commonwealth v. Elijah Judge, Appeals Court 20-P-1293 (April 7, 2022)

Relevant facts

A Barnstable police officer on patrol at 1:45 AM on June 25, 2018 passed a hotel that was considered a “problem property” by the Barnstable police. This officer had personally participated in narcotics investigations at the hotel in the past. On this day, the officer noted a group of five or six individuals in the parking lot of the hotel. The officer parked his cruiser across the street and, with the aid of binoculars, conducted surveillance of the group.

Over the next hour the officer watched members of the group occasionally enter two vehicles to retrieve an object or to sit inside. At 3AM the officer observed a woman exit the passenger seat of one of the cars, an Impala. She walked to the trunk where she was met by the defendant. As the woman retrieved what appeared to be a small handbag from the trunk, she and the defendant conducted counter surveillance by looking around. The woman handed the item to the defendant who then got into the driver’s seat while the woman stood outside the door. The defendant and the woman then exchanged places. The officer believed that he observed a drug transaction and radioed for backup.

Before backup arrived, the group began to disperse. The officer drove his marked cruiser into the lot, parking near the Impala and illuminating the area with the cruiser’s white lights. The officer approached the Impala on foot and saw a white powdery substance on the center console. The officer ordered everyone to stop and those who were standing outside of the cars, including the defendant, to put their hands on the hood.

Shortly thereafter, back up arrived and everyone was cuffed and frisked. A canine officer was called to the scene and the dog alerted to the defendant’s backside. The defendant was brought back to the station where he was asked to remove all his clothing. Officers saw what “looked like drug packaging material” and what officers believed to be cocaine “protruding from the area between the defendant’s buttocks.”

For specific guidance on the application of these cases or any law, please consult your supervisor or your department’s legal advisor or prosecutor.

The defendant was charged with possession with intent to distribute a class B substance. The defendant moved to suppress the evidence arguing that the police did not have reasonable suspicion of criminal activity to stop him and that the strip search was not supported by probable cause.

Discussion

An officer must have reasonable suspicion of criminal activity to stop someone. In this case, the defendant was seized when he was ordered to place his hands on the hood of the Impala. At that point in time, the officer knew the hotel was “a common location for suspected drug transactions” and had seen the defendant and the woman engaging in counter surveillance while they retrieved something from the trunk. They then each took turns sitting in the driver’s seat with the item they had retrieved from the trunk. “Based on this unusual sequence of events, it was reasonable for the officer to believe that he had just witnessed a drug transaction.”

These same facts, together with the observation of the white powder on the center console of the Impala, were enough to “establish probable cause to believe that the defendant had engaged in a street-level drug transaction.”

The officer, having probable cause to arrest the defendant on drug charges, was justified in searching the defendant incident to that arrest; however, more is needed to conduct a strip search.

A strip search is a “substantial intrusion” into a person’s personal privacy right.

“Thus, art. 14 requires the police to possess probable cause to believe that the defendant is concealing contraband that the police ‘could not reasonably expect to discover without forcing the arrested person to discard all of his or her clothing.’” *quoting Commonwealth v. Agogo*, 481 Mass. 633, 637 (2019).

Officer must have an “affirmative indication” that the contraband is concealed in private areas such as the crotch or groin. The question for the court in this case was whether the alert by the canine to the defendant’s buttocks area established probable cause. The U.S. Supreme Court has found that an alert by a well-trained canine can establish probable cause to believe that drugs or other evidence of a drug crime will be found.

“Whether a drug-detecting dog’s alert to an individual’s private area establishes probable case for a strip search necessarily depends on the reliability of the alert.”

In this case the reliability of the dog was established by the testimony of its handler, Officer Fullam. The officer testified that he and his canine partner had completed over 480 hours of training at the Alpha Canis program which certified that the canine could detect drugs and that Officer Fullam could recognize the dog’s indications. The duo worked together for three years before the search in this case. During that time, they attended bimonthly trainings and trained daily through a food reward system in which the canine did not eat unless participating in a search for narcotics.

Based upon these facts the court found the canine’s alert was reliable. The defendant’s motion to suppress was properly denied.

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