



Legal Update

September 2020

THE SJC HOLDS THAT AGE AND RACE ARE FACTORS TO BE CONSIDERED WHEN ASSESSING REASONABLE SUSPICION TO STOP A SUSPECT.

The Court announced a prospective rule that the age of a juvenile suspect, if known to the office or if objectively apparent to a reasonable officer, will be part of the totality of the circumstances relevant to determine whether the juvenile was seized under article 14 of the Massachusetts Declaration of Rights.

The Court further held that race is pertinent to the reasonable suspicion calculus when examining nervous and evasive behavior, as well as flight of a suspect.

Commonwealth v. Evelyn, SJC No. 12808 (2020): On January 9, 2017, Officer Joseph Abasicano and Officer Brian Garney were on patrol when they received a notification from “ShotSpotter” around 7:30 P.M. Upon receiving the alert that a firearm had been discharged near Dearborn Street in Roxbury, they also learned that a person was severely injured. A report indicated that three men had run from the area and were headed to Eustis Street. Within thirteen minutes, the officers saw the defendant walking on the sidewalk about one-half of a mile from the shooting. There were few pedestrians in the area since it was a cold evening. Additionally, there is on ongoing gang violence in the area.

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The officers drove alongside the defendant who appeared to be holding an object in his right jacketed pocket that was consistent with a firearm. The defendant was African American and looked younger than twenty-one years of age. Officer Abasciano yelled, “**Hey man, can I holler at you?**” The defendant mumbled when Officer Abasciano relayed that something had happened in the area and he wanted to know if the defendant knew anything about it. As the exchange continued, the defendant increased his pace and turned the right side of his body away from the officers. According to the officers, the movement was unnatural and the defendant began looking around in various directions.

Officer Garney stepped out of the cruiser and the defendant ran away. A foot pursuit ensued and the officers noticed that the defendant was running with his hands inside of his pockets. At one point, the defendant started to take an object out of his pocket. Officer Abasciano drew his weapon and ordered the defendant to stop. A firearm was recovered on the sidewalk where the defendant was running.

The defendant was indicted on the charge of first-degree murder and he filed a motion to suppress arguing that the police lacked reasonable suspicion at the moment he was seized. Further, the defendant contended that his age and his race should form part of the totality of the circumstances relevant to the determination of when he was seized. The motion was denied and an interlocutory appeal was filed. The SJC transferred the matter on its own motion.

Conclusion: The SJC held that the police had reasonable, articulable suspicion to believe the defendant was involved in criminal activity.

1st Issue: When was the defendant seized?

The SJC held that pursuant to Article 14, the defendant was seized when the police, despite the defendant's demonstrated desire to terminate the encounter, continued to converse with him and opened the cruiser door to speak with him.

A. Age: As part of its analysis, the SJC considered how the defendant's age was relevant in determining when the defendant was seized. In *JDB vs. North Carolina*, 564 U.S. 261 (2011), the United States Supreme Court addressed whether age is relevant to the custody inquiry under *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court found that as long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in that custody analysis is consistent with the objective nature of that test. *Id.* at 277.

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The SJC differentiated that custody and seizure inquiries are separate, but that both inquiries consider the totality of the circumstances when evaluating whether an individual has been compelled to interact with the police. Both inquiries also examine whether an officer has objectively communicated through words or conduct that person must stay. However, when an encounter involves a juvenile, the analysis must consider whether the officer objectively communicated to a person of the juvenile's apparent age that the officer would use his or her police power to coerce the juvenile to stay.

Here, there was insufficient evidence to establish that the officers should have known the defendant was under eighteen years old. The defendant was six feet tall and was wearing a jacket and hat. Although the police suspected the defendant was under the age of twenty-one and did not ask him if he had license to carry, that single factor alone is insufficient to establish the inference that officers should have known he was seventeen. As a result, age was not a factor considered in the reasonable suspicion analysis.

New Rule: "A child's age, when known to the officer or objectively apparent to a reasonable officer, is relevant to the question of seizure under art. 14. **The question will be whether the officer objectively communicated to a person of the juvenile's apparent age that the officer would use his or her police power to coerce the juvenile to stay.**"

B. Race: The SJC next considered whether race should be a factor in the seizure analysis. While there are serious concerns to policing and race, the SJC wrote that the analysis in determining whether a person was seized must arise from the actions of the police officer and not from the individual's state of mind. *Commonwealth v Matta*, 483 Mass. 357, 363 (2019). The SJC maintains an objective standard so that police can determine in advance whether their conduct would violate the Fourth Amendment or Article 14. There was no dispute in the present case that the defendant was seized when Officer Garney opened his cruiser door. While the SJC attempts to focus attention on it race, it does not intend to establish a bright line rule which could potentially create more harm than good.

An officer does not objectively communicate that he or she would coerce an individual to stay merely by asking questions. **In the underlying case, when the officers asked to speak with the defendant, there was no seizure. However, the defendant's reaction to the officers altered the encounter.** The defendant's increased speed, his mumbled response and looking in other directions suggested his desire to terminate the encounter with police. The officers' persistence to converse with the defendant and opening the cruiser door, contrary to the defendant's action changed the encounter into a seizure.

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2nd Issue: Did police have reasonable suspicion to seize the defendant?

The SJC considered a number of factors and held that the police had reasonable suspicion to stop the defendant. Below are the factors the SJC analyzed in reaching its conclusion:

1. Proximity to a shooting: The geographic and temporally proximity to a recent crime are significant. The police encountered the defendant thirteen minutes away and a half mile away from the shooting. On this particular evening, it was cold and there were no pedestrians walking around. The defendant was walking away with the hands in his jacket pockets. The time and location are consistent with the theory that the defendant was at the shooting. Contrasting this case to *Commonwealth v. Warren*, 475 Mass. 530 (2016), where the defendant was stopped a half hour later and about a mile away from the incident. Lastly, the shooting left a person in critical condition which enhances the concern for public safety. While the defendant's proximity to a shooting does not alone establish reasonable suspicion, it is a significant factor.

2. Evidence of a firearm: The officers' testimony and their training and experience are relevant in identifying that the defendant was likely carrying a firearm. According to the officers, the defendant was holding in his pocket an item that was consistent with the size of a firearm. The defendant kept his hands pressed against his body which suggests that the officer may be trying to conceal a weapon. Further, the defendant's action of turning his body away from the officers in a manner that blocked them from seeing an object implies he was concealing a weapon. *Commonwealth v. DePeiza*, 449 Mass. 367 (2007).

3. Nervous and Evasive Behavior: Although the defendant did not make eye contact, increased his pace and looked in various directions as police approached, the SJC did not find this factor relevant in the reasonable suspicion calculus. **Relying on the reasoning in *Warren*, *supra* at 540, the SJC held that nervous and evasive behavior, including flight, can indicate the behavior of an innocent African-American male trying to avoid the danger and indignity of a police stop.** Here, the SJC significantly discounted the weight of the defendant's nervous behavior.

4. High Crime Area: The SJC considers the factor of a high crime area only if the nature of the area has a "direct connection with the specific location and activity being investigated." *Commonwealth v. Torres-Pagan*, 484 Mass. 34 (2020). The officers in this case testified that there had been an ongoing feud between gangs in the area. The police report listed incidents of other alleged gang-related crimes in the vicinity in the months before the shooting. The dates, precise locations, and names of the alleged perpetrators involved in those crimes were not provided. Without additional details, the SJC held that there was no evidence of a direct connection with the defendant or the shooting at issue and therefore it gave little weight to the high crime nature of the area in the reasonable suspicion analysis. Although this was a close call, the SJC found that the defendant's proximity to the shooting and evidence that he may be carrying a firearm provided police with reasonable suspicion. The high crime area and the evasive nature of the defendant were not given weight.

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