



LEGAL UPDATE

PATFRISK OF CAR PASSENGER

Commonwealth v. Powell, 102 Mass.App.Ct. 755 (2023).

RELEVANT FACTS

At 2:22PM on July 22, 2019, officers responded to a report of a shooting in the Vine Street area of Roxbury. Officers found two spent shell casings from a nine-millimeter gun on scene. A witness provided a license plate number for a white sedan that was reportedly involved in the shooting.

Officers obtained video surveillance in the area which showed a white car turn onto Vine Street and then both victims running down the street. Officers put out a “be on the lookout” (BOLO) flyer which included information about the investigation and still shots from the video of the car and license plate. The flyer said:

"Detectives are seeking information on the above pictured MV [motor vehicle], a white 2017 Ford Fusion registered to Kayla Evans. The occupants were possibly involved in a shooting that occurred earlier today, 7/22/19, at approximately 2:22 PM. in the area of Mt. Pleasant Ave / Vine St. If encountered, please FIO the occupants and tow the MV to B2. Officers are advised to use caution, as this MV may have ties to Heath St.

The flyer then had the following language in red ink:

"A suspect is not wanted at this time. If this MV is located, please stop and hold and contact B2 Detectives."

Just after midnight on July 24, thirty-four hours after the shooting, an officer was driving home and recognized the car from the flyer pull up next to him. The driver was a female whom the

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detective did not know. There was also a passenger inside, but the officer could not tell whether they were male or female.

The officer called in the information to a detective and followed the car to a Chinese food restaurant. When the car pulled over, the male passenger got out of the car, went into the restaurant, picked up some food, and returned to the car. When backup officers arrived, police approached the car and ordered the two occupants out of the car. There was no evidence of any furtive movements or an attempt to evade the police by either occupant. A patfrisk of the passenger was conducted and a semiautomatic firearm was found.

The passenger was charged with various firearm offenses. A motion to suppress the evidence was denied. The defendant appealed arguing that the exit order and patfrisk were unconstitutional.

DISCUSSION

"An exit order is justified during a traffic stop where (1) police are warranted in the belief that the safety of the officers or others is threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds." Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020).

Based upon the facts of this case, the court did not find that the exit order was justifiable under either of the first two grounds. Whether the third ground would justify the exit order on the basis of probable cause was a closer question. The court found that an argument could be made that there was probable cause to believe that evidence of a crime, such as fingerprints, might still be in a car that was involved in a shooting thirty-four hours earlier. The court did not decide the validity of the exit order here because it found the patfrisk was unconstitutional.

To conduct a patfrisk, officers must have reasonable suspicion to believe that a suspect is armed and dangerous. In this case the crime under investigation was a shooting that had occurred thirty-four hours prior, there was no evidence linking the defendant to the shooting, and no behavior of the defendant during the stop that would create a reasonable suspicion that he was armed. The defendant was compliant with officer directives and made no suspicious movements.

"The fact that the car was used in a shooting did not provide reasonable suspicion that an armed shooter or shooters were still in the car thirty-four hours later."

At time of the patfrisk, there were no suspects to the shooting, no description of the suspects, and the officers who stopped the car did not know who the actual driver of the car was at the time of the stop. There was no explanation as to what the comment in the BOLO about "ties to Heath St." meant, and there was no connection between the registered owner of the car and any criminal activity.

The motion to suppress should have been allowed.

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