Legal Update

January 2019

The Appeals Court holds that police cannot rely upon the doctrine of search incident to arrest where the search occurred well-prior to the defendant's arrest and that the frisk of the defendant's motor vehicle for officer safety failed because the officers did not possess reasonable suspicion that the defendant was armed and dangerous.

Commonwealth v. Darosa, 94 Mass. App. Ct. 635 (2019):

Brockton police were driving on Main Street around 10AM in Brockton when they observed a minivan pull in front of a Mercedes sports utility vehicle on the side of the road. The police observed an arm extend from the minivan and hand a plastic grocery bag to someone in the Mercedes. The police did not find that this behavior was suspicious nor did they believe a drug transaction had occurred. Since the minivan was blocking traffic, the detectives sounded the vehicle's horn. The minivan began moving again, and police were following it when they observed the driver abruptly change lanes without signaling. The police stopped the vehicle without incident.

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

The defendant, Augustus Darosa, was the driver and only occupant of the minivan. The defendant gave the police his registration, but could not produce a license. Even though he told police he did not have his license on him, he continued looking around the inside of the vehicle. After receiving the defendant's name and date of birth, the police confirmed that the defendant's license was revoked and that he had a criminal record for narcotics. The police did not have any perceive that the defendant was armed and dangerous. The defendant cooperated with the police and there was "nothing the defendant's manner, mood, gestures, or anything else" to suggest that he was posed a "problem." The police testified that they did not believe the defendant had a weapon within the minivan. However, the defendant's lack of a valid license warranted an exit order and patfrisk.

While outside of the vehicle, the defendant sat on the curb near the minivan. The defendant was not handcuffed nor restrained. Three officers stood in close proximity to the defendant while another officer searched the driver and passenger compartments of the vehicle. During the search, police smelled fresh marijuana and saw and smelled fabric softener sheets, which they knew from experience are often used to mask the odor of drugs. A large package of money was found under the front passenger seat. Based on these discoveries, police requested that a K-9 unit respond to the scene. The canine alerted its handler to a bag in the rear compartment of the minivan. Inside the bag was a large amount of marijuana. The police arrested the defendant "for the license being revoked."

The defendant filed an appeal after he was convicted of Possession of Marijuana with Intent to Distribute. The defendant had filed a motion to suppress the search of his vehicle, which the motion judge denied. The judge found that the search was lawful because the police were permitted to conduct a "protective sweep prior to allowing the defendant to return to his vehicle." The issue on appeal was whether the police were justified searching the vehicle before the defendant was arrested pursuant to search incident to arrest or whether the police had reasonable suspicion that the defendant was armed and dangerous.

Conclusion: The Appeals Court held that the police were not justified in searching the defendant's motor vehicle and that no exceptions to the warrant requirement applied based on the facts of this case.

1st Issue: Search incident to arrest:

The Appeals Court held the search did not qualify as a search incident to arrest because at the time of the search, the defendant was not arrested. While it is true that a search can qualify as incident to arrest even where it precedes a formal arrest, the search and the arrest still must be "substantially contemporaneous." ***New York v. Belton***, 453 U.S. 454, 465, (1981). The contemporaneity requirement is consistent with "[t]he purpose, long established, of a search incident to an arrest," which "is to prevent an individual from

destroying or concealing evidence of the crime for which the police have probable cause to arrest, or to prevent an individual from acquiring a weapon to resist arrest or to facilitate an escape." ***Commonwealth v. Santiago***, 410 Mass. 737, 743 (1991). See ***Chimel v. California***, 395 U.S. 752, 762-763 (1969). "To permit a search incident to arrest where the suspect is not arrested until much later, or is never arrested, would sever this exception completely from its justifications." ***Commonwealth v. Washington***, 449 Mass. 476, 482 (2007) . The defendant was not arrested until after the K-9 unit arrived, conducted a more thorough search, and discovered the marijuana in the rear of the minivan. There was no evidence establishing within a reasonable degree of certainty how much time elapsed between the initial search and the arrival of the K-9 unit, or how much additional time elapsed until the discovery of the marijuana. Here the facts to establish that the search and arrest were substantially contemporaneous and therefore the search incident to arrest does not apply.

Further, the search of the vehicle was not lawful as a search incident to arrest either under ***Arizona v. Gant***, 556 U.S. 332 (2009), or M.G.L. c. 276, § 1. According to ***Gant***, police can search a vehicle incident to an occupant's arrest, "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" such that he might gain access to a weapon, or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." ***Gant***, 556 U.S. at 343. Here, the defendant was arrested for <u>operating without a license.</u> Since it was unlikely that police would find evidence related to that crime in the minivan, the only justification for a search would be if the defendant was within reaching distance of the passenger compartment of the minivan.

Based on the facts of this case, the defendant was not within reaching distance of the minivan. The police testified that the defendant was sitting on the curb near the rear bumper of the minivan and there were police guarding him. Even though the defendant was not handcuffed nor restrained inside a police vehicle, it has no legal significance. The defendant was outnumbered three to one and the police were guarding him. The defendant was still secured in a practical sense and not reasonably within reaching distance of any weapons that might have been in the minivan. The Appeals Court found that the police were not justified in searching the motor vehicle pursuant to a search incident to arrest.

2nd Issue: Search incident to probable cause to arrest:

The Appeals Court also considered whether the search was justified since there was a possibility that the defendant may have to return to the vehicle. Although the facts did not fit within the search incident to arrest exception and are void of any *Terry* prerequisites, there was a question about safety. The Appeals Court found that allowing the police to search the vehicle for the <u>mere possibility</u> that the defendant may return to the vehicle

would "eviscerate the limitations imposed by ***Gant***. The ***Gant*** decision sought to rein in the previously unbridled discretion of officers to rummage at will among a person's private effects based on the person's commission of an arrestable traffic offense." See ***Commonwealth v. George***, 35 Mass. App. Ct. 551, 555 (1993) ("Given the plenary power that the police have to arrest for traffic offenses, [G. L.] c. 276, § 1, requires us to be on guard for pretext searches not based on a genuine and reasonable concern about a concealed weapon or destruction of evidence").

The Appeals Court further emphasized that if there is no police entitlement to search incident to formal arrest, then there certainly can be no entitlement to search incident to probable cause to arrest. See ***Washington,*** 449 Mass. at 482, (there is no "search incident to probable cause to arrest" exception to warrant requirement). There are other exceptions to the warrant requirement that permit police to search a vehicle when there are genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search." ***Gant,*** 556 U.S. at 347. In ***Michigan v. Long***, 463 U.S. 1032, 1049, (1983), the Supreme Court authorizes a Terry-type search of the passenger compartment of a vehicle when the officer has reasonable suspicion that a recent occupant is "dangerous" and might access the vehicle to "gain immediate control of weapons." The Appeals Court was not persuaded by the argument that the defendant may possibly return his vehicle and could create a genuine safety concern.

3rd Issue: Search based on reasonable suspicion that defendant was armed and dangerous:

The Appeals Court determined that the police were not justified searching the vehicle as a valid *Terry*-type search for weapons because there was no indication that defendant was armed or that he posed a threat to police. In order for this exception to apply, the facts would have to show that the officers "possessed a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officers in believing that the defendant was dangerous and could gain immediate control of weapons." ***Terry v. Ohio***, 392 U.S. 1, 21. There was no evidence that showed that police had reasonable suspicion the vehicle contained a weapon.

Additionally, there were no findings that the defendant was dangerous based on the observations prior to the stop and the subsequent interactions with the police. The initial observation of the defendant handing a grocery bag to the person in the Mercedes presented as odd, but was not an "apparent street-level drug deal according to the officers' testimony.

Although one of the officers testified that the transfer was odd and it perked his interested, but it did not signal that person has engaged in a drug transaction.

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Lastly, there was a question whether the defendant made furtive movements when the police asked the defendant to produce a license. According to the record, the facts indicate that the defendant continued to search the driver's compartment after he told the police that he did not have his license with him. The detective testified that the defendant was rummaging through his car. However, the Court found that his testimony "cannot reasonably be viewed as a furtive gesture suggesting that the defendant was reaching for or hiding a weapon." See ***Commonwealth v. Daniel***, 464 Mass. 746, 752-753 (2013) ("officer's actions in allowing the occupants to move the vehicle without first removing the knife from the dashboard suggest[ed] that the defendants' movements and actions, viewed by a trained officer on the scene, did not create a heightened awareness of danger").

The defendant's criminal history also lacked any firearms or violent offenses. The remaining factors also did not raise concerns that the defendant was armed or dangerous. Unlike the defendant in ***Commonwealth v. Gomes***, 453 Mass. 506 (2009), the defendant here was not an impact player and the incident occurred at 10AM during the daylight. Nonetheless, the Appeals Court concluded that the officer lacked reasonable suspicion to conduct a *Terry*-type patfrisk because he was not alone or outnumbered, and the defendant had no criminal history of weapons-related offenses, made no gestures suggesting that he was carrying a weapon, and did not attempt to flee.

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