Legal Update

October 2019

The SJC holds that an officer's request to speak with a suspect does not automatically qualify as a seizure.

Commonwealth vs. Raul Matta, 483 Mass. 357 (2019): On November 5, 2015, Holyoke police received a tip from a caller who relayed that there was a person who placed a firearm under the front seat of a black car. The caller reported that there were two females in the vehicle and that the vehicle was parked in an area known for violent crime, drug sales and shootings. After receiving this information, police arrived and noticed a dark green Honda parked on the street with two people inside. The police parked behind the Honda without activating emergency lights.

The defendant stepped out of the passenger seat and reached with both of his hands to the right side of his body to adjust his waistband and began walking. One of the officers said, **"Hey, come here for a second."** The defendant immediately began to run away and the officer yelled "**stop.**" A foot pursuit ensued and the defendant threw two plastic bags over a chain length fence onto a pedestrian walkway. When the defendant attempted to scale the

fence, officers were able to apprehend him. The police arrested the defendant and found 129 baggies of heroin on his person.

The defendant was charged with possession of heroin with intent to distribute (second offense) in violation of G. L. c. 94C, § 32(b); and with committing the crime within one hundred feet of a public park in violation of G. L. c. 94C, § 32J. The defendant filed a motion to suppress and it was denied. After he was convicted of both charges, the defendant appealed and the SJC transferred the appeal on its own motion.

Conclusion: The SJC held that the police had reasonable suspicion to conduct an investigatory stop based on the information they had received from an anonymous tip and the observations of the police.

1st Issue: When was the defendant seized?

The primary issue in the present case was whether the officer, through words or conduct, objectively communicated that he would use his or her police power to coerce the defendant to stay. The SJC found that the seizure did not occur when the police officer called out: "**Hey, come here for a second"** as the defendant began walking away from the officer, but rather when the defendant began to flee, and the officer ordered the defendant to stop running away. A direct command from a police officer to submit to his or her authority does not automatically effect a seizure. **The relevant inquiry is whether an officer has "communicated what a reasonable person would understand as a command that would be enforced by the police power."** ***Commonwealth v. Barros***, 435 Mass. 171, 176 (2001). The courts in Massachusetts have looked at the totality of the circumstances to determine whether a police officer has "engaged in some show of authority" that a reasonable person would consider coercive; that is, behavior "which could be expected to command compliance, beyond simply identifying [him-or herself] as police." ***Commonwealth v. Sanchez***, 403 Mass. 640, 644 (1988).

The question whether a person believes he or she is free to walk away from a police encounter, as compared to whether one believes he or she would be coerced to stay, is not a distinction without a difference. Police officers are free to make noncoercive inquiries of anyone they wish. See ***Commonwealth v. Murdough***, 428 Mass. 760, 763 (1999). Although in most situations a reasonable person would not believe that he or she was free to leave during a police encounter, using that standard does not produce the information necessary to determine whether a seizure has occurred. Rather, the inquiry must be whether a reasonable person would believe that an officer would compel him or her to stay.

Whether an encounter between a law enforcement official and a member of the public constitutes a noncoercive inquiry or a constitutional seizure depends upon the facts of the

particular case. ***Commonwealth v. Thinh Van Cao***, 419 Mass. 383, 387 (1995) ("The nature of an encounter between a citizen and a law enforcement official is necessarily fact specific and requires careful examination of the attending circumstances"). The difference is one of emphasis — that is, even though most people would reasonably feel that they were not "free to leave" in any police encounter, the coercion must be objectively communicated through the officer's words and actions for there to be a seizure. See ***Barros***, 435 Mass. at 175-176. For example, the SJC has held that no seizure took place when an officer got out of his marked cruiser and said to defendant, "Hold on a second, I want to talk to you." ***Commonwealth v. Martin***, 467 Mass. 291, (2014).) In contrast, a seizure occurred after the officers persisted to speak with the defendant by issuing a subsequent order. See ***Commonwealth v. Jones-Pannell***, 472 Mass. 429, 431 (2015) (after defendant failed to respond to police requests, officer called out "Wait a minute").

The record in this shows that, at this point, the officer had made only one request, to speak with the defendant, had not activated his lights or sirens and therefore had not seized the defendant. Although the officer began walking toward the defendant, the officer did not "impede or restrict the defendant's freedom of movement." ***Barros***, *supra* at 174. For all the factors highlighted, the SJC held that the defendant was not seized at the point at which the officer first called out to him. The defendant was seized when the officer ordered him to stop, and then chased him.

2nd Issue: Did police have reasonable suspicion?

A number of collective factors support the SJC's finding that the police had reasonable suspicion to stop the defendant. The factors are listed below:

Officer's observations: At the time of the stop, the officer was aware of the anonymous tip regarding a concealed firearm in a motor vehicle in an area "known for violent crime, drug sales, and shootings." The officer observed the defendant get out of a vehicle, adjust the right front area of his waistband with both hands, and walk toward some bushes "not on the sidewalk, where one would expect a person to walk." When the officer called out to the defendant, the two looked at one another, and then the defendant began to run. Although the question is a close one, the circumstances existing at the time of the stop provided reasonable suspicion for that stop.

Adjustment of Waistband: Similarly, the defendant's adjustment of his waistband alone did not create reasonable suspicion for a seizure. It is not uncommon for anyone to adjust his or her clothing upon getting out of a motor vehicle. See generally ***United States v. Gray***, 213 F.3d 998, 1001 (8th Cir. 2000) ("Too many people fit this description for it to justify a reasonable suspicion of criminal activity"). However, the officer was credible when he testified that in his experience, people who carry unlicensed firearms often carry them inside a waistband, and that the officer became concerned that the defendant was carrying

an unlicensed firearm when the defendant adjusted the right side of his waistband using both hands. In addition, the officer's concern was heightened when the defendant "began walking towards bushes, not on the sidewalk where one would expect a person to walk," and, when the officer called out to the defendant, the defendant began to run away, holding his waistband as he ran. "Nervous or furtive movements do not supply reasonable suspicion when considered in isolation," ***Commonwealth v. DePeiza***, 449 Mass. 367, 372 (2007); nor does seeking to avoid contact with police. However, those details could be combined with the other circumstances present in this case in the reasonable suspicion calculus. ***Commonwealth v. Warren***, 475 Mass. 530, 538-539 (2016).

High Crime Area: The officer could consider the fact that the encounter took place in a high crime neighborhood. Although a designation of a high crime area alone is insufficient to justify a stop, if a particular area is known for "violent crime, drug sales, and shootings," that fact can be considered in the reasonable suspicion analysis. See ***Commonwealth v. Johnson***, 454 Mass. 159 (2009).

Flight: Finally, the defendant's flight from the officer is a factor that may be considered in the reasonable suspicion calculus. See ***Commonwealth v. Sykes***, 449 Mass. 308, 314 (2007). Considered in isolation, none of the above factors would have been enough to create reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime. However, taken together, the circumstances presented added up

3rd Issue: Did the pedestrian walkway in this case qualify as a park as defined in G.L. c. 94C, § 32J?

After review, the SJC concluded that with respect to the "public park or playground" provision of **§ 32J,** the intent to commit the underlying drug crime is sufficient, without additional proof of knowledge of park or playground boundaries required. However, whether an area of land is a public park under **§ 32J** is a question of fact for the jury to determine. The Commonwealth must prove not only that the land was used by the public for recreation, but also that it was dedicated or set apart for such use.

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.