



## Legal Update

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January 2019

***The SJC holds that a State trooper's observations of a stopped driver, including erratic operation, the odor of burnt and unburnt marijuana, the driver's red and glassy eyes, and his admission to smoking marijuana earlier that day, provided the trooper with probable cause to arrest the defendant for operating under the influence of marijuana. The SJC also held that impounding the motor vehicle was reasonable and that the subsequent search of the vehicle at the State police barracks was lawful pursuant to the automobile exception.***

***Commonwealth v. Davis***, 481 Mass. 210 (2019): On an afternoon in July 2015, a State trooper stopped the defendant after observing his gray Infiniti sedan speeding and driving erratically on the Massachusetts Turnpike. The sedan was traveling at speeds between seventy and eighty miles per hour and following "dangerously close" to two other vehicles. As the sedan approached toll booths at Exit 18, to Brighton or Cambridge, it failed to slow down and continued driving seventy miles per hour in a zone with a posted speed limit of thirty miles per hour. The State trooper stopped the vehicle immediately after it had passed through the toll booths. The defendant parked the sedan on the left hand side of the exit from the toll booths.

**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.**

When the trooper approached the driver's side door, he detected a strong odor of burnt and fresh marijuana coming from within the vehicle. The defendant smelled of burnt marijuana and apologized for "moving pretty fast." The trooper noticed that the defendant's eyes were "red," "glassy," and "droopy," and that he was "fighting with the eyebrows, trying to keep his eyes open." He had "dry spit" on the sides of his mouth, his tongue was dry, he was "licking his lips" in responding to questions, and "his speech was slow and lethargic." The defendant also admitted to smoking marijuana "a couple of hours ago. The two passengers within the car also appeared to have smoked marijuana and "looked high." The passengers smelled of marijuana and had difficulty staying awake during the interaction with the trooper. When the defendant stepped out of the vehicle, his coordination was slow, his head was bowing down, and he had a hard time focusing. According to the trooper, the defendant failed to follow simple instructions which included failing to take his hands out of his pockets after four requests to do so. The trooper did not administer road side assessments because he did not believe that standardized testing for alcohol intoxication as a reliable indicator of operating under the influence of marijuana. Instead, he "relied upon his thirty years of training and experience with the state police that included extensive specialized training in narcotics and sixteen years in a specialized unit."

The trooper arrested the defendant for operating a motor vehicle while under the influence of marijuana, G. L. c. 90, § 24 (1) (a) (1), and decided to impound the motor vehicle. Neither passenger was capable of driving the vehicle away because they were both impaired. Subsequently during an inventory search, the troopers found in the trunk a loaded handgun, ammunition, and three bags of marijuana in a sealed container.

The police towed the vehicle to the state police barracks because it was parked in a "precarious spot" on the highway. At the barracks, the trooper requested assistance of a canine. The canine alerted the handler to the glove compartment. The trooper used a key had to open the glove compartment and he found eleven oxycodone pills and two plastic bags of cocaine.

A jury acquitted the defendant for all charges except possession of drugs found in the glove compartment. The defendant raised three main issues on appeal:

- 1. Was there probable cause to arrest the defendant for OUI marijuana?**
- 2. Were police justified in impounding the motor vehicle and was the inventory search valid?**
- 3. Was the warrantless search of the automobile at the police barracks justified under the automobile exception?**

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### **1<sup>st</sup> issue: Was there probable cause to arrest the defendant for OUI marijuana?**

Based on his observations of the defendant's driving before and during the traffic stop, the trooper had probable cause to arrest the defendant for OUI marijuana. The defendant's demeanor, physical appearance and his driving suggest that the defendant's consumption of marijuana impaired his ability to safely drive a motor vehicle. Even though using marijuana in Massachusetts is no longer a crime, it is still a crime to operate a motor vehicle while under the influence of marijuana is a criminal offense. The SJC also acknowledged that detecting impairment of marijuana can be difficult based on the varying effects of consumption amongst individuals and the lack of validated field sobriety tests. Despite these challenges, there are other indicia that police can observe that would be relevant in determining whether a driver is impaired from marijuana. For example, "any erratic driving or moving violations that led to the initial stop; the driver's appearance and demeanor, the odor of fresh or burnt marijuana; and the driver's behavior on getting out of the vehicle," are all relevant. *Commonwealth v. Daniel*, 464 Mass. 746, 756 (2013). Although the trooper did not observe any erratic driving or any marked lanes violations, he did observe the defendant speeding and driving dangerously close to the bumper of other vehicles. These observations were sufficient basis to stop the motor vehicle. When the trooper approached the defendant's vehicle and smelled burnt and fresh marijuana, he suspected OUI marijuana. Some other factors the trooper noted were the defendant's red and glassy eyes, struggle to stay awake, slow coordination, and inability to focus or follow simple directions. All of these observations including the defendant's admission that he had smoked marijuana earlier in the day, provided probable cause to arrest the defendant.

### **2<sup>nd</sup> Issue: Were police justified in impounding the motor vehicle and was the inventory search valid?**

The SJC held that the police were authorized to conduct an inventory search pursuant to the State Police inventory policy. The impoundment of the motor vehicle was justified because the vehicle was located on the side of the road after the toll booth in a precarious spot. Additionally, there was no practical alternative for police to consider other than impoundment. Both passengers appeared to be under the influence and were unable to drive the vehicle. The police had reasonable grounds to impound the motor vehicle due to public safety hazard.

Although the impoundment of the motor vehicle was justified, the subsequent introduction of a drug-sniffing dog was not. The Commonwealth failed to establish that it was done for a non-investigatory purpose. Since there was no legitimate need to put a drug detection dog on the vehicle, the SJC found the search of the glove compartment at the barracks was not a lawful inventory procedure.

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### **3rd Issue: Was the warrantless search of the automobile justified under the automobile exception?**

The SJC held that police had probable cause to believe that they would find evidence pertaining to the crime within the vehicle. Authority to search under the automobile exception exists even when police have ample time to obtain a warrant. The SJC found that the troopers had adequate grounds to secure the vehicle and promptly to search the glove compartment for evidence related to the offense of operating a motor vehicle while under the influence of marijuana. Here, the trooper's interaction with the defendant and observations as well as the defendant's admission that he consumed marijuana earlier in the day suggest he had diminished his ability to safely operate a motor vehicle. Furthermore, the trooper observed marijuana leaves scattered on the rear passenger seat. The SJC concluded that the search extended to the locked glove compartment, because it was reasonable for the troopers to believe it contained marijuana or related paraphernalia. Based on all these factors, the SJC found that the troopers had probable cause to search the motor vehicle under the automobile exception.

**Commentary:** This is a tremendous case because the SJC is acknowledging the challenges police encounter when arresting a person for OUI marijuana. The SJC emphasized that an officer's detailed observations of how a person was driving or how the person responded when police were interacting with the defendant, including demeanor and smell of burnt fresh marijuana, are significant when determining if a person is impaired to operate a vehicle. While prior decisions had established that the smell of fresh or burnt marijuana ALONE is not enough to establish impairment, the SJC in this case, emphasizes that odor (fresh or burnt) is still a factor along with other observations in determining impairment for OUI marijuana.

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