



# LEGAL UPDATE

## PUBLIC STRIP SEARCH WAS UNLAWFUL

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*Commonwealth v. Rivera*, Appeals Court (August 5, 2024).

### RELEVANT FACTS

At 2:40 PM on January 15, 2021, officers on patrol stopped a car for equipment violations. The defendant was the operator of the vehicle. He provided a learner's permit; however, there was no properly licensed passenger in the car. Based upon the violation of MGL c 90 § 8B, the defendant was ordered out of the car and frisked. During the frisk, the officer felt a hard object that was larger than a golf ball in the defendant's groin area. The officer did not believe what he felt was part of the defendant's body, but also did not suspect that it was a weapon. Based upon his training and experience, the officer believed the item was narcotics.

The officer asked the defendant about the object, but the defendant claimed it was his genitals. Another officer arrived on scene and joined the initial officer in frisking the defendant. There was a steady stream of traffic going by during the frisk.

The defendant was brought behind the sedan where the frisk continued. The defendant was put in handcuffs and moved so that he was against the side of the police cruiser, facing the sidewalk. While in this position, the officer pulled aside the waistband of the defendant's clothing to inspect his genitals. The officer could not identify the object and continued the frisk for another 10 seconds while asking the defendant what was underneath his genitals. The officer ultimately placed his hand in the underwear and retrieved a plastic bag containing suspected narcotics.

The body worn camera footage showed that the defendant was largely blocked from view of traffic by the cruiser, but that the front of his body was fully visible to people passing by on the

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sidewalk and anyone looking out windows of nearby residential buildings and a daycare. The footage also showed two people walk by during the frisk and another person who looked toward the officer as he pulled the waistbands aside to view the defendant's genitals.

The defendant was charged with trafficking in cocaine and fentanyl. The defendant filed a motion to suppress arguing that he was subjected to an unlawful strip search.

## DISCUSSION

A strip search occurs whenever the last layer of clothing is moved in such a way that an intimate area of the body is viewed, exposed, or displayed. The last layer of clothing does not necessarily need to be removed for a strip search to occur. A strip search occurred in this case.

The officers here had probable cause to arrest the defendant for operating the vehicle without having a licensed driver with him. The officer also had lawful authority to search the defendant incident to that lawful arrest. A strip search; however, requires more, especially if it is done in public.

To conduct a strip search, the officer must have "probable cause to believe that the defendant has concealed drugs on his person or his clothing that would not otherwise be discoverable by the usual search incident to arrest." quoting *Commonwealth v. Morales*, 462 Mass. 334, 339 (2012) quoting *Commonwealth v. Prophete*, 443 Mass. 548, 554 (2005). The court assumed, but did not specifically find, that the officers had probable cause to conduct a strip search based on the facts of this case.

To be lawful, a strip search must be done in a reasonable manner.

"A strip search is unreasonable where, absent exigent circumstances, it is conducted in public."

The location of the search is what is relevant, not whether a member of the public actually witnessed the strip search. The proper inquiry is whether there was a possibility that the public could witness the search.

The search in this case was conducted in public. Despite officer's attempts to shield the defendant from view with the cruiser, the search occurred on a busy street adjacent to a sidewalk where passers-by and people in multiple nearby residences and in a daycare could still observe what was happening. The court noted that a pedestrian could be seen walking within a car's width of the search.

The court found there were no exigent circumstances that would justify conducting the search in public. The officer had no safety concerns as they did not believe the object was a weapon. There was also no reason to believe the defendant could not have been brought to the station or otherwise searched out of the public eye.

For all these reasons, the court found that the strip search in this case was unreasonable. The motion to suppress should have been allowed.

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