



## Legal Update

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May 2019

***The SJC holds that where a plastic bag has penetrated the anus or where the police officers have not ascertained through a visual body cavity search whether it has, they may determine whether the bag can be safely removed without any touching, probing, or manipulation of the rectum.***

***If it can be safely removed and if there is no touching, probing, or manipulation of the rectum, the removal of the bag is not a manual body cavity search requiring a search warrant.***

***Commonwealth v. Stanley Jeannis*** SJC No. 12510 (2019): After the defendant was arrested, Lieutenant David Callahan of the Revere Police Department brought the defendant to the Revere police station for booking. During booking, the defendant complained that he had swallowed "fifties," which Lt. Callahan understood to mean small bags worth approximately fifty dollars of heroin or cocaine, and that he did not feel well. Lt. Callahan did not believe that the defendant was under the influence of narcotics but followed protocol and requested medical assistance. Lt. Callahan noticed that the defendant "sat oddly, leaning to one side." When the defendant said that he might vomit, the police escorted him to a nearby cell with a sink and toilet. While walking towards the holding cell, the defendant was not walking normally even though he was not restrained in shackles or handcuffs, his movement was slow, rigid, and tense.

The defendant was "clenching his buttocks area." Lt. Callahan believed that the defendant might have "something secreted in his lower half," which he recognized could pose a safety risk to the defendant, the police officers, and other prisoners. Once inside the holding cell, Lt. Callahan ordered the defendant to remove his clothing. The defendant stripped down to his underwear and became argumentative when asked to remove it. While still wearing his underwear, he continued to clench his buttocks area and attempted to shield his backside from the view of the police. Since the police were concerned the defendant could be hiding a weapon, they handcuffed one of the defendant's arms, and restrained the other. The defendant pulled down the waistband of his underwear and told the officers, in substance, "See, I don't have anything."

The police, however, observed a plastic bag protruding from the defendant's buttocks. Officer Singer ordered the defendant to remove the bag, and told the defendant that he would remove it himself if the defendant refused to do so. The defendant complied and, while one of the officers placed his hand on the defendant's hand, removed the bag from his buttocks area. It contained fifteen individually wrapped bags of cocaine and thirteen individually wrapped bags of heroin.

The defendant charged with possession of cocaine and heroin with intent to distribute, as subsequent offenses. He moved to suppress the drugs that were found in the plastic bag that was removed during the strip search. A Superior Court judge denied the motion because he found that the police had probable cause to believe that the defendant was attempting to conceal contraband "in a private area of his body," so a strip search was proper. The judge also concluded that "[t]he strip search did not cross over to a cavity search," noting that the defendant removed the bag himself after Officer Singer ordered him to do so. The defendant was convicted of simple possession of cocaine and heroin and appealed.

The Appeals Court held that the police should have applied for a search warrant because the bag was seized from within a body cavity. The Appeals Court concluded that the search qualified as a manual body cavity search because the police had failed to determine whether "no portion of the bag was within the defendant's rectum." The Appeals Court reversed the motion judge's findings and the Commonwealth applied for further appellate review in the Supreme Judicial Court.

**Conclusion:** The SJC held that the police had probable cause to believe that the defendant had concealed drugs or contraband on his person. The bag was not lodged or embedded in the defendant's rectum, but was easily removed. Because the police did not manipulate the defendant's rectum to retrieve the bag, this action constituted a strip search that did not require a search warrant issued by a judge.

**1st Issue: Was the removal of the plastic bag from the defendant's buttocks part of a strip search or did it qualify as a manual body cavity search?**

The SJC held that a search warrant for a manual body cavity search is always required to remove a plastic bag where the police did not or could not ascertain that the bag is located completely outside of the rectum -- that is, where it did not to any degree penetrate the anus. When there is "no touching or probing or otherwise opening or manipulating of the defendant's anal cavity, and the bag of drugs was easily removed without in any way endangering the defendant's health or safety", a strip search or visual body cavity search has occurred, not a manual body cavity search." *Commonwealth v. Vick*, 90 Mass. App. Ct. 622, 629 (2016).

**This means that where police officers are uncertain whether the bag has penetrated the defendant's anus, they have two alternatives.**

**First**, where police have probable cause to do so, they may conduct a visual body cavity search to determine whether the bag has penetrated the defendant's anus. If it has not, they may remove the bag without a search warrant.

**Second**, where the bag has penetrated the anus or where the police officers have not ascertained through a visual body cavity search whether it has, they may determine whether the bag can be safely removed without any touching, probing, or manipulation of the rectum. If it can be safely removed and if there is no touching, probing, or manipulation of the rectum, the removal of the bag is not a manual body cavity search.

**However**, if the bag cannot be safely removed without any touching, probing, or manipulation of the rectum or if there is uncertainty whether it can be, the officers must apply for a search warrant for a manual body cavity search, unless exigent circumstances justify proceeding without a warrant.

A police officer may often determine whether the bag can be safely removed without any touching, probing, or manipulation of the rectum by gently flicking the bag with his or her fingers, applying no significant pulling force on the bag. A gentle flick may be less intrusive than a visual inspection because a police officer attempting to conduct the inspection might need to place his or her fingers so close to the anus that he or she might come close to a touching or probing that would constitute a manual body cavity search. If that suffices to remove the bag **without any resistance**, the SJC does not find the search to be a manual body cavity search.

If there is **any** resistance to the gentle flick, police must release the bag and apply for a search warrant for a manual body cavity search, unless there are exigent circumstances. The SJC emphasized that a health risk that may arise if a police officer were to continue to pull on the bag where there is any resistance. The requirement of a search warrant for a manual body cavity search is intended not only to ensure that a judge determines whether there is a strong showing of particularized need supported by a high degree of probable cause, but also to ensure that any such search is conducted in a safe, reasonable manner under sanitary conditions by a trained medical professional. See *United States v. Fowlkes*, 804 F.3d 954, 967 (9th Cir. 2015) (warrantless forcible seizure of plastic bag protruding from defendant's rectum was unreasonable under Fourth Amendment where item of unknown size was removed from rectum by nonmedical personnel who "did nothing to assure that the removal was safe and performed under sanitary conditions").

Here, the motion judge found that the plastic bag that contained the drugs protruded from the defendant's "buttocks," but he did not determine whether any part of the plastic bag was in the defendant's rectum. The Commonwealth did not prove that the plastic bag did not to some degree penetrate the defendant's anus, so the SJC assumed for the sake of this appeal that the plastic bag did penetrate into the rectum. Therefore, the SJC had to determine whether the removal of the bag was conducted in a manner permissible for a strip search -- that is, whether the removal of the bag met with any resistance that suggested that it was lodged or embedded in the defendants rectum.

## **2nd Issue: Did the police encounter any resistance when the bag was removed?**

There was nothing in the motion judge's findings to suggest that the bag required more than minimal force to remove, and therefore the bag was safely removed without any touching, probing, or manipulation of the rectum. Additionally, even though one of the officer's hands was on top of the defendant's hand while the defendant pulled out the bag, the facts did not indicate that more than minimal force was used to remove the bag. The defendant testified that "with my free hand I just retrieved it," when asked how the bag was removed from his buttocks. The size of the 275 pound defendant compared to the small plastic bag at issue -- a photograph of which was admitted in evidence -- supported the finding that the bag, which was apparently visible outside the intergluteal cleft as soon as the defendant pulled down his waistband, did not extend so far down as to be lodged or embedded in his rectum.

The SJC concluded that based on the facts, it was likely the bag was not lodged or embedded in the defendant's rectum, but was easily removed, and therefore the defendant's rectum did not need to be "manipulated" in order to remove the bag.