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MPTC IN-SERVICE: SPECIAL BULLETIN¹

Odor of marijuana

An odor of burnt marijuana, absent other evidence, is an insufficient basis to order an occupant to exit a motor vehicle or to search the vehicle without a warrant. *Comm. v. Cruz*, SJC-10738 (April 19, 2011):

- **Facts.** Boston plainclothes officers in an unmarked car saw a vehicle parked in front of a fire hydrant. The driver was observed lighting a small cigar known to mask the odor of marijuana. Both officers recognized Benjamin Cruz in the passenger seat, who lived nearby and did not pose a safety threat.

Pulling next to the car, one officer asked the driver to explain why he was parked in front of the hydrant. The driver replied that he was waiting for his uncle, who lived on the street. Both officers got out and approached, noticing a “faint odor” of burnt marijuana and observing the extreme nervousness of both occupants. The driver admitted to smoking marijuana “earlier in the day.” Cruz simply looked straight ahead.

Neither officer had seen the occupants make any furtive movements. No contraband or weapons were visible in the car. The officers did not issue a parking citation or ask the driver for his license or registration. The officers did not request that the driver perform sobriety tests to determine if he was under the influence of marijuana.

Backup arrived and both occupants were ordered out of the car. An officer asked Cruz if he had “anything on his person.” Cruz admitted to possessing crack cocaine, and four grams were retrieved from his pocket. He was charged with possession of Class B with intent to distribute and a school zone violation.

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- **Analysis.**
 - **Initial stop.** Officers validly stopped the car for a parking violation. However, once officers approached the car, they were required to complete the parking citation and let the occupants go.
 - **Civil marijuana citation.** When officers detected the odor of burnt marijuana, asking the driver whether he had been smoking marijuana was permissible because the officers could have potentially issued the driver a civil citation under the G.L. c. 94C, § 32L.

Because the stop in this case did not end with a citation and an instruction to the driver to move away from the hydrant, further investigation required a reasonable suspicion of crime.

- **Exit order.** The SJC recognized three reasons to order a passenger out of a vehicle: (1) police or public safety possibly at risk; (2) passenger possibly engaged in criminal activity; or (3) passenger might interfere with an independently permissible warrantless search (what the court referred to as “pragmatic reasons”).

In this case, the SJC felt that none of these reasons applied:

- The officers never claimed that their safety was at risk.
- The officers lacked a reasonable suspicion that defendant Cruz was engaged in criminal activity. The court was unconvinced that the high crime neighborhood, the defendant’s nervousness, the shared cigar, and the odor of marijuana amounted to a reasonable suspicion. As for the neighborhood, the officers knew that the defendant lived on this street. Spending time on one’s own street is hardly suspicious. Nervousness is a common reaction to police presence and did not supply the missing criminal ingredient either.

Sharing a cigar (a legal item) did not indicate that the occupants also shared marijuana (an illegal item). The driver’s admission that he had smoked earlier in the day did not implicate the defendant.

Finally, the odor of burnt marijuana provided evidence of a civil infraction, but not a reasonable suspicion of criminal conduct. It did not suggest that the defendant possessed more than an ounce of marijuana or was involved in distribution activity. In the words of the court: “[T]he odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity to justify an exit order.”

- The officers could not order the defendant out of the car to facilitate their search because the SJC decided that a warrantless vehicle search must be based on probable cause that “a criminal amount of contraband is present.” The SJC justified its view based on the intent of the decriminalization law: “It is unreasonable for the police to spend time conducting warrantless searches for contraband when no specific facts suggest criminality.”

Author's commentary: The reasoning of the SJC is not in the best interests of public health or safety. However, there are important steps that officers may take to lessen the impact of this case on their work in the street.

- **Any odor of marijuana in a vehicle should result in a threshold inquiry of the driver and passengers (as possible witnesses and/or accomplices) concerning OUI.** Officers should also conduct sobriety testing of the driver to see whether there is probable cause to arrest for impaired operation. [The *Cruz* court noted that officers never made any inquiry of the driver in this regard – suggesting that it might have changed the outcome.]
- **Any evidence in addition to the smell of burnt marijuana should be noted,** “such as a scale, plastic baggies, or any other drug paraphernalia traditionally associated with the sale of marijuana.” Any of these items makes the situation possibly criminal.
- **The smell of fresh or “raw” marijuana lends “credibility to the suspicion that more than one ounce of marijuana [is] present,”** and should support probable cause to search the entire vehicle, including the trunk.
- **Any evidence (including an admission from the driver or a passenger) that vehicle occupants were “sharing” marijuana creates a reasonable suspicion of drug distribution.** After all, sharing drugs that were not jointly and simultaneously obtained constitutes distribution in Massachusetts, which is beyond the coverage of the decriminalization law. [The *Cruz* court did not address this issue because it found that there was no evidence of shared drug use.]
- **Finally, the door is still open for officers to issue marijuana citations to the driver and passengers based on the odor of burnt marijuana in a vehicle.** Although officers may be tempted to reject this lesser sanction, it is still an available tool that should be utilized when the opportunity presents itself. If nothing else, the civil citation process allows officers to request identification from the offenders and run warrant checks.

Continue to do the best you can under the circumstances! Good luck on the street.

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