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Ammunition charges

For ammunition loaded in a weapon, police may charge unlawful gun possession and either possession of a loaded gun or possession of ammunition. *Comm. v. Johnson*, LW 10-172-11 (December 2, 2011): At 5:30 p.m., Officers Patrick Rose and Charles Kelly of the Boston police department were sitting in an unmarked vehicle. They observed a Cadillac Escalade “blow through a red light.” Rose activated his blue lights, but the SUV did not stop. Instead, the operator made several turns before finally parking in a legal space. The operator got out of the vehicle and started to walk away.

Officer Rose maneuvered his vehicle in front of the operator. He “reeked” of alcohol, was slurring his words, was unsteady on his feet, and was agitated. Officer Rose believed that the operator was under the influence. Rose asked him for his license and registration. The operator responded that he did not have his wallet, that the vehicle belonged to his deceased twin brother, and that he was only trying to get home. The operator told Rose that his name was “Jacques Johnson” and provided a date of birth, which did not match the registered owner indicated on the MDT.

After further questioning, Officer Kelly told the operator that he was going to conduct a frisk. Kelly discovered a wallet in the operator’s back pocket containing a Massachusetts driver’s license for “Chevall Johnson.” The operator acknowledged that the license belonged to him. He also admitted that his license had been suspended -- a fact that Officer Rose confirmed on his computer. Rose also observed a half-empty bottle of cognac on the dashboard.

Officer Rose decided to arrest the defendant for operating with a suspended license. One of the officers asked the defendant whether he had anything in his SUV. The defendant responded by throwing his car keys and saying, “I don’t care, search, whatever.” Officer Stephen Doran made his way around to the driver’s side door and yelled, “gun.” At that moment, the defendant pushed Officer Charbonnier and began to run. After chasing the defendant for approximately one block, officers tackled him, subdued him with pepper spray, and placed him in handcuffs. Officer Doran recovered a loaded Smith and Wesson revolver from the open map pocket in the driver’s side door. Also recovered from the SUV were the bottle of cognac and some marijuana.

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1st issue: The validity of the stop and search.

- **Lawful stop based on traffic violation.** When the officers saw the defendant drive his SUV through a red light, they had a lawful basis to stop his vehicle.
- **Initial right of arrest based on failure to stop.** When the defendant did not pull over his SUV in response to the blue lights, and then walked away from the officers once he parked, the officers had probable cause to arrest him for failure to stop.
- **Suspended license next.** The fact that the defendant's license had been suspended was an additional arrestable offense.
- **OUI justified search.** Finally, the search of the defendant's SUV was lawful because the officers had probable cause to arrest him for OUI. According to the SJC: "The issue of paramount importance is whether the police, prior to the commencement of a warrantless search, had probable cause to believe that they would find . . . evidence pertaining to a crime" in the vehicle.

When the officers approached the defendant after he left the SUV, they immediately noticed that the defendant "reeked" of alcohol, was slurring his words, was unsteady on his feet, and was agitated. He also provided the officers with false information about his identity. *Comm. v. Riggins*, 366 Mass. 81 (1974) (providing implausible or false information to police, along with other facts, supports finding of probable cause to conduct warrantless search of automobile). As the officers were standing outside the SUV conversing with the defendant, they saw a half-empty bottle of cognac on the dashboard. There was ample probable cause to search further.

The fact that the defendant was not arrested for OUI did not affect the legitimacy of the search. "The police are not required to make an arrest every time they have probable cause to believe someone has committed a crime." *Comm. v. Skea*, 18 Mass. App. Ct. 685 (1984) (probable cause to search not always congruent with probable cause to arrest).

- **Gun in plain view.** Once Officer Doran lawfully entered the SUV, he saw the revolver in plain view in the open map pocket in the driver's side door. "[I]f police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Comm. v. Santana*, 420 Mass. 205 (1995). The incriminating character of the weapon, which was loaded, was immediately apparent and remained so when officers learned the defendant had no license to carry.

2nd issue: Gun and ammunition charges. The defendant contended that his conviction for unlawful possession of ammunition under G. L. c. 269, § 10(h) duplicated his conviction for unlawful possession of a loaded firearm under G. L. c. 269, § 10(n). This violated double jeopardy because it punished him twice for possessing the same ammunition. The SJC agreed.

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- **Gun, feeding device and/or ammunition may be separate charges.** A suspect may be convicted of unlawfully possessing a gun, the ammunition within the gun, and even the accompanying feeding device holding the ammunition. *Comm. v. Mazzantini*, 74 Mass. App. Ct. 915 (2009).
- **Or the suspect may be charged with an enhanced penalty for a loaded firearm.** G.L. c. 269, § 10(n) sets out an additional penalty of up to 2½ years in jail or prison for the unlawful possession of a *loaded* firearm, sawed-off shotgun or machine gun. “[The] sentence shall begin from and after the expiration of the sentence for the [underlying possession offense].” To be considered “loaded,” the ammunition must be “contained in the weapon or within a feeding device attached thereto.”
- **However, officers may *not* charge this offense and unlawful possession of ammunition if all the discovered ammunition is loaded in the particular gun.** In *Johnson*, the court mentioned that it might be possible to charge both offenses if the defendant had ammunition loaded in the firearm *and* possessed a separate amount of ammunition outside the weapon. Here, there was no evidence that the defendant possessed any ammunition apart from that found loaded in the revolver.

Question of the month

***Can you arrest a passenger under G.L. c. 90, § 25 who refuses to sign a citation or provide ID when you, as a cop, had a lawful right to ask?*¹**

- **Refusal to sign (under § 25) only applies to an investigative purpose, not to acknowledge citation service (under 90C).** The requirement to sign was placed into G.L. c. 90, § 25 before the Registry placed photographs on licenses. At that time, requesting a signature was the only way for an officer to determine whether the license provided had been, in fact, issued to that operator. By requiring the operator to sign a piece of paper, the officer could compare the witnessed signature with the one on the license. Thus, the § 25 signature obligation *relates only to an investigative purpose*.

In contrast, the request for a signature under 90C is simply designed to show that the citizen received the citation. This helps avoid a later claim for dismissal under G.L. c. 90C, § 2 for lack of service. The citizen is not required to sign, but officers are required to request their signature. In the event that a citizen refuses (which they often do), the sole remedy is to note their refusal on the signature line. Arresting a motorist who refuses to sign a citation would likely result in liability for “false arrest.”

¹ This question comes from Yarmouth Officer Phil Magnuson, who is an attorney and teaches inservice. Phil is also a member of the MPTC Legal Issues Steering Committee.

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- **Passengers may not be arrested or cited under G.L. c. 90, § 25.** Since passengers are not driving or viewed to be “in charge” of the vehicle, they are not covered by this law. No Massachusetts case has extended § 25 to cover a passenger’s noncompliance. Again, officers risk liability for “false arrest” by extending § 25 to a passenger’s failure to provide ID.
- **In fact, officers should not even ask passengers for ID during a “routine” traffic stop.** *Comm. v. Alvarez*, 44 Mass. App. Ct. 531 (1998) rejected an officer’s normal practice of asking passengers for identification during nighttime stops, saying that this sort of “dragnet . . . is uncomfortably associated with authoritarian societies and most commonly made of persons belonging to a racial or ethnic minority.”

Even though G.L. c. 85, § 16 requires that any vehicle occupant provide “his true name and address” to a police officer at night, the Appeals Court insisted, in *Alvarez*, that this statute could not override the commands of Article 14. The court said, at most, 85, § 16 allows officers to ask an occupant of a vehicle for his name and address, but a request for identification is forbidden without sufficient justification.

- **Officers may legitimately ask for ID when they reasonably believe a passenger is:**
 - **A safety risk** (i.e., possibly armed and dangerous), or
 - **Involved in a vehicle violation** (e.g., not wearing a seat belt), or
 - **Necessary to resolve the vehicle violation** (e.g., sitting next to a Learner’s Permit Operator), or
 - **Involved with criminal conduct**, or
 - **Involved in unsafe/improper conduct** (e.g., underage and impaired by alcohol, truant or a runaway), or
 - **A witness to crime** (e.g., driver under arrest for OUI or operating to endanger).
- **However, the passenger’s failure to produce an ID -- even in cases where the officer had the right to ask for it -- may not be the basis for an arrest under G.L. c. 90, § 25.²**

Hope this bulletin helps you on the street . . . *John Sofis Scheft*

² Again, G.L. c. 85, § 16 does not change this analysis. *See discussion above.*