

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
No. 1001 JC 00494-2
No. 1001 JC000495-2

COMMONWEALTH

v.
EDSON SILVA
&
NELSON M. ANDRADE

BMC CRIMINAL MAY 6 '11

**COURT'S FINDINGS ON THE DEFENDANTS' MOTION TO
SUPPRESS EVIDENCE AND STATEMENTS**

The defendants, Edson Silva and Nelson M. Andrade, have filed separate motions to suppress all evidence and statements made by them as a result of their arrest on June 13, 2010. After a full evidentiary hearing in court on November 23, 2010, both the defendant and the Commonwealth were given the opportunity to submit memoranda to the court.

Based on the evidence presented at the evidentiary hearing and considering the memoranda of the Commonwealth and the defendants, the court finds the following facts:

On June 13, 2010, Boston Police Officers responded to a radio call for a fight with no weapons at 35 Humphries Street. Police Officers Dodd, Fay and Golden responded to the radio call. Officer Dodd has made more than fifty arrests involving marijuana or cocaine and twenty or more firearm arrests. Officer Dodd knew Humphries Street to be a location where he has responded to calls for shots fired, stabbings and motor vehicle thefts. When police arrived at 35 Humphries Street they observed a car parked outside this address. This car was later identified as a BMW. An individual was observed leaning into the side of the BMW with his head inside the vehicle for approximately five to ten seconds. The individual appeared to be speaking to

someone inside the vehicle.

The individual removed his head from inside the vehicle and began to walk towards the police officers. Officer Dodd recognized the individual as the defendant, Edson Silva. Officer Dodd believed that Mr. Silva had been arrested for carrying a firearm previously.

Mr. Silva was carrying a bottle of Corona beer in one hand and a bottle of Grand Mariner in the other hand. Mr. Silva was walking at a brisk pace. Officer Dodd asked Mr. Silva to stop. Mr. Silva did not stop. Officer Dodd then tugged at Mr. Silva to get him to stop. Mr. Silva then stopped. Believing that Mr. Silva may have been carrying a weapon as Officer Dodd saw a metal clip in Silva's pocket, Officer Dodd conducted a protective pat-frisk of Mr. Silva. Officer Dodd found a pocket knife in Mr. Silva's pocket. At this time, Mr. Silva was approximately twenty-five feet from the BMW.

While Officer Dodd was pat-frisking the defendant, Officers Fay and Golden arrived. At this point in time, several police cruisers surrounded the BMW. The police officers did not observe any fighting when they arrived at the scene. As the officers approached the BMW, the driver exited the vehicle and began to walk away. Officer Fay attempted to stop the driver by stating "Hey, wait up." However, the driver entered 37 Humphries Street and did not exit.

At the same time the driver exited the vehicle, Nelson Andrade exited the vehicle. Officer Fay ordered Mr. Andrade back to the car. Mr. Andrade sat back in the passenger side of the vehicle.

Officer Fay then walked over to the driver's side of the vehicle and found a bag on the ground with a green leafy substance. Officer Fay believed this to be marijuana. This substance appeared to be less than one ounce. Officers Fay and Golden smelled burnt marijuana in the

vehicle. The police officers ordered Mr. Andrade out of the car and pat-frisked him. The police officers did not find any drugs on Mr. Andrade's person.

Following the pat-frisk of Mr. Andrade and while Mr. Silva was engaged with Officer Dodd twenty-five feet away from the BMW, the officers searched the vehicle without a warrant. During this search, the police officers did not find any marijuana. The police officers did find a firearm hidden inside the car dashboard where the radio would be. Officer Fay testified in court that he could not see the firearm before he put his head inside the BMW's interior.

Officer Dodd arrested Mr. Silva and put him in the police cruiser. Officer Dodd read Mr. Silva Miranda warnings from a card. Mr. Andrade was arrested and also read Miranda warnings from the same card. The BMW was towed.

ANALYSIS

The defendants challenge two separate actions by police: (1) their seizure and arrest and statements that followed their arrest; (2) the warrantless investigatory search of the BMW automobile.

1. Seizure and Arrest and Statements Following the Arrest of the Defendants

Seizure

1(A) Mr. Andrade

Mr. Andrade was stopped by police prior to their search of the BMW, when the police ordered Mr. Andrade out of the BMW and pat-frisked him. Mr. Andrade was ordered out of the BMW when Officer Fay saw the plastic bag containing a substance believed to be marijuana and Officer Fay and Officer Golden smelled what they believed to be burnt marijuana.

1(B) Mr. Silva

Mr. Silva was seized by police when the police ordered him to stop outside of 35 Humphreys Street and grabbed his person when he did not obey their orders. The police seizure was escalated when they placed Mr. Silva in handcuffs, formally placing him under arrest.

Analysis - Seizure and Arrest

Under the Fourth Amendment to the United States Constitution and Article XIV of the Massachusetts Declaration of Rights, a lawful arrest requires that the arrest be made upon probable cause. Commonwealth v. Hernandez, 448 Mass. 711, 715 (2007); Commonwealth v. Bottari, 395 Mass. 777, 783 (1995). Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. Commonwealth v. Lites, 67 Mass. App. Ct. 815, 819 (2006), *review denied*, 448 Mass. 1106 (2007). "Probable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual was committing an offense." Commonwealth v. Storey, 378 Mass. 312, 321 (1979) quoted in Commonwealth v. Lites, *supra*; Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992), Commonwealth v. Levy, 76 Mass. App. Ct. 617, 621 (2010), *review granted*, 457 Mass. 1107 (2010). "The officers must have entertained rationally more than a suspicion of criminal involvement, something definite and substantial, but not a *prima facie* case of the commission of a crime, let alone a case beyond a reasonable doubt. *Id.*

1(A) Mr. Andrade

The court finds that the police officers had probable cause to seize Mr. Andrade due to their observation of a plastic bag containing what they believed in their professional training and

experience to be individually wrapped pieces of marijuana on the ground. Officer Fay believed this marijuana to be packaged for sale, although the total quantity within the larger bag appeared to him to be under an ounce. There was a sufficient nexus between Mr. Andrade and the suspected marijuana to establish probable cause that Mr. Andrade was committing a crime or had committed a crime.

1(B) Mr. Silva

Officer Dodd saw Edson Silva leaning into the BMW and leaving the car window with a bottle of Corona beer and Grand Mariner in his hands. Officer Dodd knew Mr. Silva from prior police encounters and knew him to carry firearms. At this point, the police had probable cause to stop, search and arrest Mr. Silva because he had possession of an open container of alcohol in violation of Boston Municipal Ordinance 16.12-28. Officer Dodd saw a metal clip on the defendant's pocket and began a pat-frisk of Mr. Silva. Officer Dodd's actions of pat-frisking the defendant were necessary to secure the safety of the police officers and other persons at the scene.

(2) The Warrantless Investigatory Search of the BMW

When a search is conducted without a search warrant, the Commonwealth has the burden of proving that the search and seizure falls within the narrow class of exceptions to the warrant requirement. Commonwealth v. Phillips, 413 Mass. 50, 55 (1992). If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits the police to search the vehicle without a search warrant. Commonwealth v. Motta, 424 Mass. 117, 123 (1997).

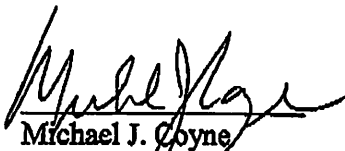
The finding of a substance believed to be marijuana by the police combined with an odor

of burnt marijuana coming from the BMW did not give the police probable cause to search the BMW without a search warrant. There is an insufficient nexus between the suspected marijuana and the BMW to justify a warrantless search of the BMW. The search of the BMW was not incident to the arrest of the defendants. For these reasons, the motions of the defendant to suppress evidence seized from the BMW must be allowed.

ORDER

For the preceding reasons, the motions of the defendants to suppress evidence seized from the BMW and statements made as a result of the seizure of the BMW is allowed.

By the Court,


Michael J. Coyne
Associate Justice

DATE: 5/5/11