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CopLaw Update

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Search by private security assisted by off-duty police to enter a dance club violated Fourth Amendment

Nebraska Advance Sheets
State of Nebraska, appellee, v. William E. Smith, appellant.
___N.W.2d___
Filed May 28, 2010. No. S-09-375

A dance club in Omaha had contract security to pat down customers to keep drugs and weapons out of the club, and it used off-duty police officers to assist them. Defendant was subjected to a pat down but resisted the going into his pockets, and the ***off-duty police officer told him to keep his hands in the air***. This was a joint endeavor between the police and the club, and the search violated the Fourth Amendment. State v. Smith, 279 Neb. 918, 2010 Neb. LEXIS 62 (May 28, 2010):

The question whether a search is a private search or a government search is one that must be answered taking into consideration the totality of the circumstances. On the record before us, it is clear that the search of Smith was a joint endeavor ***involving a private person and a state or governmental official***. First, ***we conclude that Harper, although off duty at the time, was acting as a governmental official in his capacity as a police officer***. ***A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general. Police officers are considered to be under a duty to respond as police officers 24 hours a day. It has been widely held, based both on common law and statute, that a police officer is not relieved of his or her obligation to preserve the peace***

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Legal Issues and Use of Force

while off duty. In Nebraska, it has long been the case that a police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith. At the time of the search, Harper was in full police uniform and was carrying a firearm. Although Harper was off duty and employed by the Club, he was acting in his official capacity as a police officer, not as a private citizen.

Police Officers and Sheriffs: Public Health and Welfare. A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general, as police officers are considered to be under a duty to respond as police officers 24 hours a day

Police Officers and Sheriffs. A police officer may provide security to a commercial establishment while off duty and make arrests or take other authoritative action in connection therewith.

Probable Cause: Words and Phrases. ***Probable cause escapes precise definition or quantification into percentages*** because it deals with probabilities and depends on the totality of the circumstances.

Search and Seizure. Once given, consent to search may be withdrawn. Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.

Police Officers and Sheriffs: Search and Seizure. If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.

Police Officers and Sheriffs: Search and Seizure. An officer conducting a consensual search has no authority to command the person being searched to stop interfering with the search.

we conclude that Harper, although off duty at the time, was acting as a governmental official in his capacity as a police officer. A police officer on "off-duty" status is obligated to preserve the public peace and to protect the lives and property of the public in general.23 Police officers are considered to be under a duty to respond as police officers 24 hours a day.24 It has been widely held, based both on common law and statute, that ***a police officer is not relieved of his or her obligation to preserve the peace while off duty***.25 At the time of the search, ***Harper was in full police uniform and was carrying a firearm***. Although Harper was ***off duty and employed by the Club***, he was acting in his official capacity as a police officer, not as a private citizen.

Once given, consent to search may be withdrawn.52 Withdrawal of consent need not be effectuated through particular "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.53 If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.54 The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "'objective'" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?55 Accordingly, we must determine whether a reasonable person would have concluded that Smith's repeated attempts to thwart South's attempts to search his pocket amounted to a withdrawal of consent. Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.56 And because a consensual search by its very definition is circumscribed by the extent of the permission given, as determined by the totality of the circumstances,57 an officer conducting a consensual search has no authority to command the person being searched to stop interfering with the search.58 So, while a suspect's mere reluctance to facilitate a consensual search may not serve to withdraw consent,59 the suspect's deliberate interference with the search—actions designed to prevent law enforcement from searching further—are clearly sufficient to communicate a withdrawal of consent, because no reasonable observer could conclude that the suspect wanted the search to continue.60. Smith's actions made it apparent he did not intend to permit South or Harper to search his pockets. In fact, the only way South could complete the search was for Harper to physically restrain Smith. Nonetheless, ***the State argues that Smith could not withdraw his consent once the pat down had begun***. But as explained above, that is not the law. The case cited by the State in support of its argument stands for the proposition that while consent may be withdrawn or limited at any time before the completion of the search, it "cannot be withdrawn, however, after criminal activity has been detected."63 But that is simply another way of saying that law enforcement does not need consent to search once probable cause has been established, which we have already concluded did not happen in this case.64 And it is axiomatic that Smith's refusal to consent to the search of his pockets did not provide probable cause to continue. The Fourth Amendment's protections would be meaningless if refusal to consent to a

search could itself justify a nonconsensual search.

A 'consensual stop' is not a 'Terry Stop'
Commonwealth v. Martin, No. SJC-10420 (Mass. 05/27/2010)

Pushing officer's hands away to avoid a frisk was not independent assault; it was a fruit of the unjustified stop.
Defendant's stop and frisk was unjustified by any articulable suspicion. When the officer started the frisk the defendant pushed his hands away saying "Don't touch me." The act of pushing the officer's hands away was not a new crime of assault rending the exclusionary rule inapplicable. "Thus, whatever acts may have intervened, they did not influence the decision to seize the defendant, and accordingly the acts cannot have dissipated the taint of the original unlawful seizure. By the same reasoning, the renewed patfrisk was not an arrest for assault and battery on a police officer."
On October 8, 2006, at approximately 10:30 A. M., Boston police Officer Ismael Henriquez and his partner were patrolling the Woodrow Avenue area of the Dorchester section of Boston. Officer Henriquez considered the area a "high crime" area, explaining that he had previously participated in arrests for drugs and had knowledge of "numerous shootings" in the area. The officers, who were dressed in plain clothes and were driving in an unmarked vehicle, were looking for a particular juvenile who lived in the neighborhood so they could execute a warrant for his arrest. While driving, the officers observed a young man, the defendant, wearing a sweatshirt with the hood up around his face. The defendant was walking on Wollaston Terrace toward Woodrow Avenue in the opposite direction from which the police were traveling. The officers could not see the defendant's face, but thought he might be the youth for whom they were looking.
The officers turned around and drove alongside the defendant, who ignored them and continued walking with his head down. The officers rolled down a window, identified themselves as police officers, and asked the defendant his name. After some hesitation, the defendant responded, "Jamal Daly." This name was not the name of the juvenile for whom they were looking, and the defendant was taller and stockier than that juvenile. The officers asked the defendant for his date of birth; he replied, "September, 1987." When they asked him for his age, he stated, "Seventeen."*fn6 Because the officers believed the defendant was lying about either his birth date or age, Officer

Henriquez alighted from the vehicle and approached the defendant. Officer Henriquez's partner remained inside the vehicle. The defendant was nervous and took a few steps back. Officer Henriquez was able to see the defendant's face and knew he was not the juvenile for whom they had been looking.

Officer Henriquez asked the defendant if he had any weapons. When Officer Henriquez received no answer, he attempted to pat frisk the defendant, informing him that "for safety," he was going to conduct a patfrisk. The defendant pushed the officer's hands away, and stated, "You can't touch me." Officer Henriquez told the defendant to "calm down" and proceeded with the patfrisk, which revealed a loaded gun. The defendant was then placed in handcuffs and asked if he had a license to carry the firearm. He stated that he did not. The defendant was arrested and brought to a police station.

He was eventually charged for his possession of the firearm and for assault and battery on a police officer, the latter charge based on his ***brushing away of Officer Henriquez's hands***.

The motion judge first acknowledged that, prior to the defendant's pushing Officer Henriquez's hands away at the time of the initial attempted patfrisk, there was no constitutional basis to search the defendant. However, he reasoned that the defendant's actions of pushing Officer Henriquez's hands away "provided probable cause to arrest the defendant for the crime of assault and battery." Because probable cause to arrest existed, the judge determined that Officer Henriquez was permitted to search the defendant for weapons. The motion judge relied on the principles that the search may precede the formal arrest, Commonwealth v. Johnson, 413 Mass. 598, 602 (1992), and what constitutes an arrest is based on objective circumstances, Commonwealth v. Avery, 365 Mass. 59, 65 (1974). He also noted, "If suspects were legally permitted to resist searches or arrests they believed illegal, chaos and violence would supplant the rule of law." Based on these principles, the motion judge concluded that the officer's search and seizure of the defendant "objectively was an arrest and the seizure of the firearm [was] constitutional."

The four factors were as follows: (1) the area was considered to be a high crime area; (2) the defendant's conduct of initial hesitation and nervousness; (3) the defendant lied about when he was born or his age; and (4) the ambiguity created by the defendant's silence in response to Officer Henriquez's question concerning whether he had any weapons. Id. at 533-534. The dissent, however, did not find the combination of these factors

to be persuasive, and reasoned that, "even under the teachings of [Fraser and its progeny], there simply was not enough here to question the defendant further after the police realized he was not the person they were looking for. ***This is a case where 'the police ... turn[ed] a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion.' "*** Id. at 538 (Brown, J., dissenting), quoting Commonwealth v. Barros, 435 Mass. 171, 178 (2001).

...the defendant was seized when Officer Henriquez first attempted to pat frisk the defendant... Up until that time, the officers were engaged in a consensual interaction with the defendant for which they required no constitutional justification.*fn7 See Florida v. Bostick, 501 U.S. 429, 434 (1991), quoting Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) ("law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place"); Commonwealth v. Lyles, 453 Mass. 811, 814 (2009). However, the Appeals Court erred when it concluded that the seizure of the defendant was justified. See Commonwealth v. Martin, supra at 532.

The Appeals Court interpreted our decision in Fraser as holding that the only justification required for a police officer to escalate a consensual encounter with an individual to include a patfrisk is a reasonable belief that the individual is armed and dangerous. Commonwealth v. Martin, supra at 532-533. Today, in Commonwealth v. Narcisse, ante (2010), we acknowledge that Fraser 's holding could be interpreted in such a manner, but that proper fidelity to Terry requires additional constitutional justification.

When an individual is stopped and searched, the police conduct must satisfy two conditions. "First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, Terry determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, ***to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous."*** Arizona v. Johnson, 129 S.Ct. 781, 784 (2009). In Fraser, we noted that in "anomalous" circumstances, a patfrisk may be justified even when not "preceded by a forcible stop, the prototypical situation addressed in Terry." Fraser, supra at 544 n. 4. In Commonwealth v. Narcisse, supra at, we clarified that such circumstances do not permit an abandonment of Terry 's two-pronged analysis, even though the two prongs--the stop and the search--are merged into a

single act. Accordingly, we held that a police officer may escalate a consensual encounter with an individual to include a patfrisk only if the officer has both a reasonable suspicion that the individual is engaged in criminal activity and is armed and dangerous. Id. at. However, we also held that ***both elements may be satisfied during a consensual encounter if the officer reasonably comes to believe that the individual has a weapon and appears inclined to use it***.

United States v. McKoy, 428 F.3d 38, 40 (1st Cir.2005) ("Nervousness is a common and entirely natural reaction to police presence ...").

Commonwealth v. Barros, 435 Mass. 171, 178 (2001) (defendant had right to ignore officers and his activities of breaking eye contact with officers and refusing to answer questions did not establish reasonable suspicion

Last, we reject the Commonwealth's argument that the defendant's act of pushing Officer Henriquez's hands away when he initially attempted to patfrisk the defendant, constituted a "new" intervening crime (of assault and battery on a police officer) which "dissipated any causal link between the officer's conduct and the discovery of the firearm," thereby rendering the exclusionary rule inapplicable. See Commonwealth v. King, supra at 245. Reflecting the Commonwealth's logic, the motion judge found that the defendant's conduct gave Officer Henriquez probable cause to arrest him and that the completed patfrisk was, in fact, an arrest. We disagree with both positions.

It is true that the exclusionary rule will not insulate an individual from prosecution who, in response to or after being unlawfully seized, commits acts against the arresting officers that provide independent and sufficient grounds to arrest him. See id. However, the officers must act, at least in part, on the basis of the subsequent acts of the individual. Thus, in Commonwealth v. Borges, 395 Mass. 788, 797 (1985), we concluded that a defendant's attempted flight and subsequent struggle with police officers after being unlawfully seized were not sufficient "intervening acts" to dissipate the taint of the initial unlawful seizure. In that case, "[t]here [was] no indication ... that the police officers undertook the [second seizure] with consideration of the defendant's intervening acts; only one crime, possession of heroin [for which the defendant was initially seized], motivated the officers' actions throughout the incident." Id. The same is true in this case. There is nothing in the record to suggest that Officer Henriquez based his renewed attempt to pat frisk on the defendant's assault.

To the contrary, Officer Henriquez simply told the defendant to "calm down" and that he was going to pat frisk him to "make sure [he did not] have any weapons." Thus, whatever acts may have intervened, they did not influence the decision to seize the defendant, and accordingly the acts cannot have dissipated the taint of the original unlawful seizure.*fn9 By the same reasoning, the renewed patfrisk was not an arrest for assault and battery on a police officer.

*fn9 ***Had Officer Henriquez actually arrested the defendant for assault, the result in this case may have been different.*** An illegal seizure does not render the seized individual immune from arrest regardless of his ***post-seizure conduct; we do not condone or protect acts that constitute crimes against police officers.*** See Commonwealth v. Borges, 395 Mass. 788, 795-796 (1985); Commonwealth v. King, 389 Mass. 233, 238, 245 (1983) (driver in vehicle drew gun and fired at officers three times); Commonwealth v. Mock, 54 Mass.App.Ct. 276, 284 (2002) (defendant's act of throwing video cassette recorded at police officer broke causal chain); Commonwealth v. Holmes, 34 Mass.App.Ct. 916, 917-918 (1993) (defendant's act of suddenly "slamm[ing] open" door of automobile against officer and knocking him to ground broke causal chain).

Editor's Comment: ***The reader is encouraged to provide this information to their agency's Legal Advisor for clarification and understanding as it relates to their respective Constitutional and Statutory law as filtered through their respective agency Use of Force Policy.***

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