



Legal update provided by Attorney Justin M. Hanrahan for the **SWANSEA POLICE DEPARTMENT** for its exclusive use in relation to police department in-service training. It is intended for the use of the **SWANSEA POLICE DEPARTMENT** only. Attorney Hanrahan is a police lieutenant in Massachusetts who specializes in criminal law and procedure.

COMMONWEALTH v. CRUZ

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Decided April 15, 2011

POINT OF LAW:

The odor of burnt marijuana alone no longer justifies an **exit order** or a **search of a motor vehicle**.

FACTS:

On June 24, 2009, Boston Police Officers Christopher Morgan and Richard Diaz were patrolling in plain clothes and an unmarked Ford Crown Victoria automobile when the officers saw a vehicle parked in front of a fire hydrant. The vehicle's windows were rolled down and it was light outside. Inside, the officers could see a driver and the defendant, who was sitting in the front passenger seat. As the officers drove down the street, Officer Diaz saw the driver light a small, inexpensive cigar that is commonly known to mask the odor of marijuana smoke.

They approached the vehicle and detected a "faint odor" of marijuana. The driver appeared extremely nervous. When asked about the marijuana odor the driver stated that he had smoked earlier in the day. Both men were ordered out of the vehicle. Officer Diaz asked the defendant if he had anything on him and the defendant replied "a little rock for myself." A subsequent search revealed approximately four grams of crack cocaine.

DEFENDANT'S ARGUMENT

The defendant argued that the exit order was unlawful as the possession of small amounts of marijuana is no longer criminal.

COURT'S DECISION and REASONING

The Court ruled that the initiation of the stop was valid because the operator had committed a violation by parking in front of hydrant. However, the exit order was deemed unlawful. See the following analysis:

There are three scenarios in which an exit order issued to a passenger in a validly stopped vehicle is justified:

1. First, an exit order is justified if "a reasonably prudent man in the policeman's position would be warranted in the belief that the **safety** of the police or that of other persons was in danger."
2. Second, the officers could have developed reasonable suspicion (based on articulable facts) that the defendant was engaged in **criminal activity** separate from any offense of the driver.
3. Third, the officers could have ordered the defendant out of the car for **pragmatic reasons**, e.g., to facilitate an independently permissible warrantless search of the car under the automobile exception to the warrant requirement.

The Commonwealth did not argue that the exit order was the result of safety concerns, so the first justification does not apply.

In the second instance, there must be reasonable suspicion of *criminal activity*, separate from any offense of the driver. Since the passing of Question 2 (the decriminalization of marijuana) the possession of an ounce or less of marijuana is no longer a criminal offense. Absent reasonable suspicion that more than an ounce of marijuana is present the *criminal* justification does not apply.

In the third instance, the police would have been justified to order the occupants out of the vehicle to facilitate a search under the motor vehicle exception. However, although the automobile exception permits a warrantless search for

contraband (in addition to evidence), and marijuana is still contraband, the automobile exception is an exception to the search warrant requirement, therefore in order for the automobile exception to apply the officers would have to otherwise been able to apply for a search warrant. The Court ruled, citing a decision from 1859, that search warrants are “confined to cases of public prosecutions, *instituted and pursued for the suppression of crime or the detection and punishment of criminals.*” Therefore, a search would no longer permissible under the automobile exception as a search warrant could not be issued.

Evidence suppressed.

ATTORNEY HANRAHAN'S NOTE:

The impact on policing is obvious. As we all know many major drug cases began from a routine car stop with the odor of marijuana. However, there are still some avenues that police officers can take during similar incidents.

- **OUI Drugs:** seemingly the police could order the operator out of the vehicle to investigate an offense of OUI drugs. Recent court decisions have upheld further OUI inquiries based on the odor of alcohol alone. It would seem consistent with the law that the odor of burnt marijuana would justify a further inquiry into an offense of OUI drugs. If an investigation transforms into probable cause to arrest for OUI drugs a search of the vehicle for evidence of the crime may be justified; in addition to an inventory search, if the vehicle is going to be impounded.
- **Consent:** Although further detainment during a routine motor vehicle stop to conduct a consent search is generally not justified, absent any indication of criminal behavior, a consent search to uncover contraband (i.e. marijuana) will most likely be upheld by the Court. General law c. 94C §§ 32L-32N, although decriminalizing an ounce or less of marijuana, does call for the confiscation of the marijuana.
- **More than an Ounce:** If there is probable cause that the vehicle contains more than an ounce of marijuana (i.e. informant tip, drug courier profile, etc) the exit order and/or search would be lawfully justified.
- **Drugs Sales:** Only **possession** of an ounce or less is no longer criminal. Had the police had reasonable suspicion that a drug sale, or possession with the intent to sell, or some similar offense, was involved the exit order would have been justified, and if probable cause existed a subsequent search would have been lawfully justified as well.