

SJC rejects 'pretext' test for traffic stops

Violation justifies encounter regardless of officer's motive



A passenger in a vehicle stopped for speeding could not challenge evidence obtained in a subsequent search on grounds that the stop was pretextual, the Supreme Judicial Court has ruled.

The defendant was convicted of cocaine possession after police found a bag of crack cocaine while searching the vehicle. He asserted that the officers' true motivation for the stop was that they suspected drug activity but lacked the reasonable suspicion or probable cause necessary to justify an investigatory stop.

The defendant argued that all pretextual stops violate art. 14 of the Massachusetts Declaration of Rights, which protects against unreasonable seizures. As such, the defendant argued that the SJC should overturn its 1995 decision in *Commonwealth v. Santana*, which created the "authorization test" under which an observed traffic violation automatically makes a traffic stop justifiable regardless of the officer's underlying motive.

The SJC disagreed.

"Outside of the racial profiling context — as this case is — the reasonableness of a traffic stop does not depend upon the particular motivations underlying the stop," Justice Elspeth B. Cypher wrote for the court.

Cypher noted that the defendant, who is black, did not allege profiling, and that, in any event, the remedy for racial profiling, as articulated in the SJC's 2008 *Commonwealth v. Lora* decision, is to challenge a search on equal protection grounds by producing sufficient evidence to infer that a traffic stop was the result of race-based selective enforcement.

Justice Kimberly S. Budd, in a concurring opinion, expressed concern over the effectiveness of *Lora*, which suggested that defendants use profiling statistics to make the required evidentiary showing.

"We are not aware of [state-mandated data collection] ever being used to mount a challenge under *Lora*, and it is now woefully outdated," Budd wrote. "The time has come for the Legislature to address the problem once more."

The 35-page decision is *Commonwealth v. Buckley*, Lawyers Weekly No. 10-029-18. The [full text of the ruling can be found here](#).

Promoting fair procedures?

Plymouth County District Attorney Timothy J. Cruz, whose office prosecuted the case, said in a written statement that he was pleased with the decision.

"The decision seems to be a departure from [Commonwealth v. Warren] where the SJC was persuaded by evidence of racial disparities in police treatment of civilians."

— *Rahsaan D. Hall, ACLU*



Pretextual stop?

On Jan. 25, 2013, Whitman police detectives were staking out an apartment building where they suspected drug activity was taking place. That evening they saw a vehicle park nearby and its occupants quickly enter the building, leave a few minutes later, and drive off without turning on the headlights.

One of the detectives, Joseph Bombardier, instructed patrolman Gary Nelson to stop the vehicle for suspected drug activity. Nelson pulled the car over a few minutes later when he observed it driving 42 miles per hour in a 30 mph zone. He radioed Bombardier to let him know he had done so.

When Bombardier arrived at the scene, he smelled marijuana and asked driver Courtney McGovern if she had any. She said she did not think so, but he could check.

Bombardier ultimately ordered McGovern and passenger Rogelio Buckley, the defendant, to exit the vehicle as he and fellow detective Eric Campbell conducted a search.

The detectives found a firearm and a package of crack cocaine, and Buckley was subsequently indicted in Superior Court. Before trial, he moved to suppress the evidence as the product of a pretextual stop.

Judge Cornelius J. Moriarty II denied the motion, and Buckley was ultimately convicted of cocaine possession and sentenced to a year in jail.

Buckley appealed, and the SJC granted an application for direct review.

Objective standard

The SJC rejected the defendant's argument that it should abandon *Santana's* authorization test and replace it with an art. 14 standard that requires trial judges to examine whether a particular stop was a pretext for an officer's ulterior motive of investigating suspected criminal conduct despite lacking the evidentiary basis for an investigatory stop.

"Both judges and legal commentators have questioned the ability of courts — venues of limited insight — to reach accurate and satisfactory answers to ... questions [of an officer's motive] which may be more appropriately handled by psychologists or philosophers than lawyers," Cypher wrote. "The authorization test avoids this often-speculative probing of the police's 'true' motives, while at the same time providing an administrable rule to be applied by both law enforcement in the field as well as reviewing courts."

Besides, the justice added, allowing police to make traffic stops serves the "significant government interest" of ensuring safe roadways, which is a legally sufficient basis to justify a stop regardless of any additional suspicions of the officer.

Regarding the defendant's argument that *Santana* enables racial profiling, Cypher pointed out that he did not raise it as an issue in the case and that *Lora* provides the appropriate avenue to raise such a challenge in the first place.

Accordingly, the SJC affirmed the lower court's decision but went on to express concerns about whether *Lora* is working and encouraged lawyers to make more *Lora* challenges to give the court a better sense of its efficacy.

"This case affirms the law on traffic stops while at the same time recognizing the importance of the prevention of racial profiling in our state and nation," Cruz stated.

Defense counsel Matthew Malm of Boston declined to comment.

But Rahsaan D. Hall, director of the American Civil Liberties Union of Massachusetts' Racial Justice Program and co-author of the ACLU's amicus brief in *Buckley*, called the case a "setback" for police accountability.

"The decision seems to be a departure from [*Commonwealth v. Warren*] where the SJC was persuaded by evidence of racial disparities in police treatment of civilians," said Hall, a former prosecutor.

In that 2016 case, the SJC held that Boston police who approached a black man on the street based on vague descriptions of a breaking-and-entering suspect in "dark clothing" lacked reasonable suspicion to chase and seize him after he fled on foot.

The SJC stated in *Warren* that an African-American male fleeing from the police might be as motivated by the desire to avoid the "recurring indignity" of racial profiling as by the desire to hide criminal activity.

Hall also pointed out that the SJC said *Buckley* could not be treated as a racial profiling case because the defendant did not raise it as an issue, but still found enough evidence of profiling for the court to take general notice of how such practices impact policing.

"The court points defense attorneys to the *Lora* case, but in its own opinion — and particularly in Justice Budd's concurrence — points out the insufficiency of *Lora* to address these issues," Hall said. "So basically we can't address the issue with this case."

In the meantime, Hall said, defense attorneys seeking to make a *Lora* challenge should consult with racial justice organizations and academic institutions to identify and provide statistical information on such disparities.

Murat Erkan, a criminal defense lawyer in Andover, said the SJC made a "grave mistake" in walking away from an opportunity to overrule *Santana* and do away with what he described as the "pernicious practice" of pretextual stops, which create serious constitutional issues even in the absence of profiling.

Police can easily abuse *Santana* given their "nearly limitless hive" of minor vehicle laws and regulations that can give rise to a stop that invariably leads to an unusually nervous occupant, an alleged furtive gesture, or a suspicious answer to a roadside interrogation, Erkan said. That in turn leads to an exit order, "consent" to search, or the not-so-coincidental presence of a drug-sniffing dog nearby.

"Criminal practitioners are familiar with the script," he said. "The result is arrest, though the subject was initially detained in the complete absence of reasonable suspicion."

Meanwhile, Erkan continued, the SJC claims *Santana*'s bright-line rule is critical because no trial court can reliably unravel an officer's subjective motivation for a traffic stop. But as *Buckley* shows, there is often a "trove of evidence" to do so.

For example, he said, the officer in *Buckley* stopped the car only after a drug detective instructed him to do so. Then, immediately after the stop, plainclothes drug detectives appeared on the scene.

"Under such circumstances, the motivation for the stop was far from mysterious," Erkan said.

Boston criminal defense attorney Vikas S. Dhar, however, said the decision is still helpful in that it "sounds an alarm that racial profiling is alive and well in Massachusetts" and encourages the Legislature to collect current data while encouraging defense lawyers to lay the proper foundation for *Lora* challenges.