THIRD CIRCUIT FINDS FOR OFFICERS IN VEHICLE SEARCH LAWSUIT

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On March 1, 2017, the Third Circuit Court of Appeals decided *Morgan v. Borough of Fanwood et al.*[i], in which the court discussed whether officers were liable for Fourth Amendment violations for actions during a vehicle stop and search. The relevant facts of *Morgan*, taken directly from the case, are as follows:

> On the afternoon of January 2, 2010, Sergeant Thomas Jedic of the Borough of Fanwood Police Department pulled over Morgan's vehicle, a Jeep Grand Cherokee. Jedic noted prior to the stop that the driver's side tail light cover was partially missing and that the front driver's door was not completely closed. Jedic spoke to Morgan, who was the driver and sole occupant of the car. Morgan explained to Jedic that his vehicle had been stolen but then found, and that it had been in an accident recently. Morgan's vehicle had North Carolina license plates, but he had a Pennsylvania license.
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> During the stop, Jedic noticed that the carpeting in Morgan's vehicle was covered by carpet freshening powder. There was also an air freshener on the front console. According to his report, Jedic smelled "a strong odor of what my experience and training concluded was raw marijuana." Joint Appendix ("J.A.") 40. Jedic returned to his patrol vehicle and told a back-up officer, "He's got one of those Renuzit air fresheners in there, and I'm getting old, but I smell something." Dashcam Video 15:17:03-15:17:14. Jedic later added, "But like you said it's that, that air, that Renuzit thing is so overpowering." Id. at 15:29:39-15:29:51.[1]
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> Jedic ran a warrant and license check on Morgan, which revealed an open 2009 warrant for a Robert Morgan with the same Social Security number but a different birthdate. The warrant was issued in Paterson. Morgan stated that his vehicle had been stolen in March 2010 and that he had a previous drug arrest in Newark, but never had a warrant in Paterson.
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> Jedic issued Morgan a summons for violating Section 39:3-66 of the New Jersey Motor Vehicle and Traffic statute, which provides:

All lamps, reflectors and other illuminating devices required by this article shall be kept clean and in good working order and, as far as practicable, shall be mounted in such a manner as to reduce the likelihood of their being obscured by mud or dust thrown up by the wheels. N.J. Stat. Ann. § 39:3-66 Jedic explained to Morgan that he had a responsibility to maintain the cover on the tail light and that the white light emitted without the cover is "blinding." Dashcam Video 15:30:18-15:30:50; 15:31:00-15:31:40. Although Jedic noted the vehicle door problem to Morgan and in his investigative report, he did not ultimately issue a summons for unsafe driving.

After issuing the summons, Jedic told Morgan, "I smell something in that vehicle . . . I smell something a little strong in there," Dashcam Video 15:32:58-15:33:12, and asked if Morgan would consent to a search of the vehicle. Morgan at first agreed, but then withdrew his consent.

Jedic radioed for a K-9 unit from the Union County Sheriff's Department. He stated to the dispatcher, "Listen, I gave this guy a summons, but I smell something in the car . . . See if a county drug dog may be available." Id. at 15:32:58-15:33:12. While waiting for the K-9 unit to arrive, Jedic commented to a back-up officer, "Did you see the amount of carpet freshener?" The other officer replied by agreeing that it was "everywhere." Id. at 15:52:03-18.

Officer Glen Trescott arrived about 20 minutes later with a K-9 named Onyx. Before Onyx was deployed, Jedic told Trescott that he could smell something in the vehicle — namely, "raw marijuana." Id. at 15:52:40-15:53:59. Jedic informed Morgan that the K-9 unit arrived. At this point, Morgan again reversed course and told Jedic that he would consent to a search of his car.

Trescott then brought Onyx around the perimeter of Morgan's vehicle. Although Onyx's movements near the driver's door were partially obscured on the dashcam video, the video does show him lifting his left front paw to the driver's side of the vehicle. Id. at 15:57:39-15:57:42. At this time, two scratch sounds are audible. Id. at 15:57:40-15:57:42. Trescott told Jedic that there was a positive indication for the presence of a controlled substance but that the "odor was not the strongest." Id. at 15:58:16-15:58:21. Jedic then spoke to Morgan again, asking him to verify that he gave the officers permission to search the car. Morgan withdrew his prior authorization and demanded a warrant.

Trescott and Jedic applied for a search warrant before the Honorable Robert Mega of the Superior Court of Union County. Jedic testified before Judge Mega that he smelled "an odor of, what I believe to be raw marijuana" and that he believed the carpet powder and air freshener are often used to obscure the smell of marijuana. J.A. 48-49. He added that the smell of the marijuana was a "very sweet pungent odor" and that "[i]t smelled a bit more vegetative to me than it did burnt. And again, it was strong enough to where it in my opinion, overpowered even the air freshener that was in the car." J.A. 49.

Next, Trescott testified that he conducted the dog sniff of Morgan's vehicle by running Onyx around the car, and that the dog showed interest "towards the driver's door." J.A.

> 50. Trescott then "presented the bottom door seam, driver's door, and the dog gave me a positive indication by scratching." J.A. 50. Trescott testified that through his training and experience, this was an indication of "a smell of narcotics coming from th[e] vehicle." J.A. 51. Jedic then confirmed with the judge that based on his observations and the results of the dog sniff, that there was probable cause to believe that controlled substances were within Morgan's vehicle.
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> Judge Mega issued a search warrant to search the vehicle. A search — including another dog sniff where Onyx gave a positive indication through repeated scratching — revealed no contraband. Morgan was then released.[ii]

Morgan sued the city and officers in federal court for violating his Fourth and Fourteenth Amendment rights. The district court granted summary judgment in favor of all defendants. Morgan appealed the summary judgment to the Third Circuit Court of Appeals.

There were three issues on appeal. The first issue was whether the traffic stop for the missing taillight lens was lawful under New Jersey law. The second issue was whether Officer Jedic lacked reasonable suspicion of criminal activity to detain him for the canine sniff; Morgan argued that the officer did not really smell marijuana. The third issue was whether the canine handler, Officer Trescott, and Officer Jedic fabricated testimony regarding the smell of marijuana and the canine alert when obtaining a search warrant. The issues on appeal are all founded in the Fourth Amendment.

Regarding the first issue of whether Officer Jedic made a lawful traffic stop for the taillight lens being missing, the court first examined applicable legal principles. The court stated

> A traffic stop is a 'seizure' within the meaning of the Fourth Amendment, 'even though the purpose of the stop is limited and the resulting detention quite brief.'" United States v. Delfin-Colina, 464 F.3d 392, 396 (3d Cir. 2006) (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979)). **The legality of routine traffic stops are assessed under the reasonable suspicion standard, where "a police officer . . . [has] the initial burden of providing the 'specific, articulable facts' . . . to believe that an individual has violated the traffic laws**." Id. (quoting United States v. Cortez, 449 U.S. 411, 416 (1981)); see also Terry v. Ohio, 392 U.S. 1, 21-22 (1968). "**Reasonable suspicion . . . can be established with information that is different in quantity or content than that required to establish probable cause," and "reasonable suspicion can arise from information that is less reliable than that required to show probable cause**." United States v. Valentine, 232 F.3d 350, 353 (3d Cir. 2000) (quoting Alabama v. White, 496 U.S. 325, 330 (1990)). **Courts consider the totality of the circumstances**, United States v. Lewis, 672 F.3d 232, 237 (3d Cir. 2012), **and "whether the facts and circumstances within the officer's knowledge at the time of an investigative stop or arrest objectively justify that action," keeping in mind that the "arresting officer need not have contemplated the specific offense for which the defendant ultimately will be charged**," United States v. Laville, 480 F.3d 187, 194 (3d Cir. 2007).[iii] [emphasis added]

The court of appeals also looked at the New Jersey statute for which Officer Jedic stopped Morgan. N.J. Stat. Ann. Sec. 39:3-66 reads in part “lamps, reflectors and illuminating devices” must be kept “in

good working order." Further, N.J. Stat. Ann. Sec 39:3-44 the operation of a vehicle in a condition that could endanger persons or property; this could apply to the door that wasn't fully shut. The court noted there is no legal authority that supports Morgan's argument that the two listed code sections do not apply to him. Further, the court noted that N.J. Stat. Ann. Sec. 39:3-50 requires that taillights emit a red light and the missing lens caused his to emit a white light from the bulb. This could be another basis for the stop.

Morgan also argued that Officer Jedic's intent mattered on which specific traffic charge was the basis for the stop. However, the court noted that the Fourth Amendment standard is objective reasonableness and the subjective intent of the officer does not factor into the analysis. The court stated that the objective standard would ask if "the facts available to the officer at the time of the stop warrant a man of reasonable caution" to believe the stop was valid.[iv]

The court then held that in this case, the stop was reasonable under the Fourth Amendment for the listed violations.

The court then set out to examine the second issue, particularly whether Officer Jedic lacked reasonable suspicion of criminal activity to detain him for the canine sniff. The court first stated

> **An officer "may conduct certain unrelated checks during an otherwise lawful traffic stop . . . [but] he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual**." Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2015).[v] [emphasis added]

Thus, as long as Officer Jedic had reasonable suspicion to believe that Morgan was involved in drug activity, the prolonged detention for the canine would be reasonable under the Fourth Amendment. The officer testified, and it is verified by another officer, and on his video, that he saw an excessive amount of carpet freshener all over the carpet and a hanging air freshener. He also testified (and it was heard on video) that he smelled something else. Further, he told the dispatcher he smelled something and requested canine, which supports his court testimony when he applied for the search warrant that he smelled marijuana. Lastly, he told the canine officer that he smelled raw marijuana when he arrived. The court of appeals held that Officer Jedic's testimony and the corroboration from his video support the district court's ruling that reasonable suspicion of drug activity was present thus the prolonged detention was justified under the Fourth Amendment.

The final issue on appeal was whether the canine handler, Officer Trescott, and Officer Jedic fabricated testimony regarding the smell of marijuana and the canine alert when obtaining a search warrant. The court then discussed what a plaintiff must show in order to prevail on false testimony claim, also called a *Franks* violation. The court stated

> To successfully challenge the validity of the warrant, Morgan must satisfy the test set forth in Franks v. Delaware, 438 U.S. 154, 155-56 (1978). The Franks test requires that Morgan prove
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> > by a preponderance of the evidence, **(1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and (2) that**

> **such statements or omissions are material, or necessary, to the finding of probable cause.**
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> Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir. 1997) (citing Franks, 438 U.S. at 171-72).[vi] [emphasis added]

Although Morgan argued on appeal that the canine did not alert and the canine officer was not truthful, the video shows the canine reacting in the manner in which the canine officer testified the dog demonstrated a positive alert, particularly scratching and pawing. This is seen and heard on the video.

Morgan also argued that the officer should have told the magistrate that the canine's alert was "not the strongest" type of alert. However, the court stated that this omission is not material to finding probable cause. This is because, as the court stated

> any such omission would not be material to the finding of probable cause; an indication of the presence of narcotics need not be the strongest signal possible for there to be probable cause, which requires "only the probability, and not a prima facie showing, of criminal activity . . . ." Illinois v. Gates, 462 U.S. 213, 235 (1983) (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).[vii]

Morgan also argued that Officer Jedic was not truthful when he testified to the magistrate that he smelled marijuana. However, the court noted that his testimony was not material because the canine alert alone was sufficient to establish probable cause for the search warrant. Additionally, the court noted that the evidence in the record clearly supports the premise that Officer Jedic truthfully did smell marijuana, as discussed regarding the first issue.

The court then affirmed summary judgment for all defendants and held that the officers did not violate the Fourth Amendment in this case.

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[i] No. 16-3113 (3rd Cir. Decided March 1, 2017 Unpublished)
[ii] Id. at 2-5
[iii] Id. at 7-8
[iv] Id. at 10
[v] Id.
[vi] Id. at 13
[vii] Id. at 14