

# Narcotics Law Bulletin

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## Probable Cause

Officers remove occupants from rental car smelling of marijuana, discover heroin during later search at police station

Citation: *United States v. Bettis*, 946 F.3d 1024 (8th Cir. 2020)

*The Eighth U.S. Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.*

In the summer of 2016, informants tipped off police that Bettis was selling heroin in the Minneapolis area. Bettis, who had two prior convictions involving trafficking heroin from Chicago, was married to Daniels. In a previous investigation, police had searched his home and found more than 80 grams of heroin and a fake ID. When law enforcement learned that Bettis was in Chicago and likely driving a Toyota rented by Daniels, they set up surveillance on his return route.

Shortly before 5:00 p.m., Trooper Hagen stopped the Toyota for speeding on I-94. When asked for identification, the driver presented an Illinois photo ID with the name “Vernon Silas.” Trooper Hagen recognized him as Bettis. A passport identified the passenger as Taha. Bettis did not have a valid license. The rental contract showed that Daniels, who was not in the car, was the only authorized driver.

Trooper Hagen smelled a strong odor of raw marijuana coming from

the vehicle. He separated Bettis and Taha and questioned both. Bettis claimed that he had traveled to Chicago with his son and attended a cousin’s birthday party with Taha. When the trooper said that he smelled marijuana, Bettis admitted that he and Taha had smoked in the car. Taha told a different story. She claimed that she had been at a funeral with Bettis, but she could not remember any details, including the decedent’s name. She admitted that she had smoked marijuana, but not, she said, in the rental car.

A second trooper arrived and secured Taha in his patrol car. Trooper Hagen then walked his drug-detection canine around the rental car. The dog alerted to the driver’s side of the vehicle, and then indicated that the center console had drugs. Law enforcement found marijuana remnants in the console. Officers conducted a roadside search using flashlights but did not find additional drugs. Based on everything they knew and because drug dealers sometimes used marijuana to mask the odor of other drugs, the officers suspected additional drugs were hidden in the Toyota. Shortly after 6:00 p.m., they towed the vehicle to a police garage for a more thorough search. Bettis and Taha were dropped off at a nearby gas station.

The next day, law enforcement performed another dog sniff on the rental vehicle. After the dog alerted, they obtained a state court warrant to search the Toyota. This time, officers discovered approximately 200 grams of heroin in the driver’s headrest. That same day Daniels called law enforcement about the vehicle, and the case agent said that it would be returned directly to the rental company.

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Bettis was ultimately convicted of drug crimes based on the drugs recovered from the search.

Bettis appealed, arguing that there was insufficient probable cause to support the search that led to the discovery of the heroin.

**DECISION: Affirmed.**

The search was lawful.

Although a warrantless search was usually unreasonable, probable cause justified the search of every part of the vehicle and its contents that could conceal the object of the search. Probable cause existed when, given the totality of the circumstances, a reasonable person could believe there was a fair probability that contraband or evidence of a crime would be found in a particular place. Armed with probable cause, law enforcement could conduct a warrantless search of the vehicle, even after it was impounded and was in police custody. This search did not need to be completed on the shoulder of the road.

As the encounter with Bettis unfolded, officers developed additional evidence indicating deception and criminal conduct. Bettis gave the officer a false name and photo ID. Although he admitted Daniels was the only authorized driver, he referred to his wife as “a friend of mine.” He initially lied about smoking marijuana. Finally, Bettis and his passenger gave inconsistent stories about where they smoked and what they had done in Chicago. The canine alert, the *modus operandi* resembling Bettis’s past crimes, and the knowledge that marijuana was used to mask other illegal drugs all indicated that Bettis was hiding more drugs.

As more facts came to light, law enforcement properly decided to conduct a more thorough search than flashlights on the shoulder of a busy highway allowed. It was also reasonable to perform a second dog sniff after the marijuana odor subsided. Bettis and Taha were not delayed beyond the traffic stop and no one demanded the immediate return of the vehicle. Moreover, after the second dog alerted, law enforcement obtained a valid search warrant.

Other practical concerns supported the reasonableness of the officers’

actions. Without a valid license, the police could not allow Bettis to drive. At the time of the stop, the rental contract in the vehicle showed that it was overdue by one day. Bettis had no proof that the contract had been extended, and his earlier deception justified maintaining control of the rental vehicle after normal business hours. Ultimately, law enforcement had probable cause to seize the vehicle and continue the search.

See also: *United States v. Murillo-Salgado*, 854 F.3d 407 (8th Cir. 2017).

See also: *U.S. v. Olivera-Mendez*, 484 F.3d 505 (8th Cir. 2007).

*Editor’s Note:*

*Probable cause to search does not dissipate simply because it takes a long time to complete a reasonable and thorough search of a car.*

## Search

Defendant argued there was no probable cause to search his car or hotel room

Citation: *United States v. Oliver*, 950 F.3d 556 (8th Cir. 2020)

*The Eighth U.S. Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.*

On November 25, 2014, police received information from a “confidential reliable informant” that Houston Oliver and his co-conspirators Desmond Williams and Jimmy Green would be mailing packages of cocaine to Minnesota from Maricopa, Arizona. As a result of this information, the police contacted a postal inspector who found two packages in the Minnesota post office sent from Arizona—one from Maricopa, Arizona and another with similar handwriting from Chandler, Arizona. After obtaining a search warrant, police officers opened the packages and found cocaine inside each package.

After the seizure of the packages, the informant told police that Oliver would be transporting cocaine in a

BMW that would arrive in Minneapolis on November 30, 2014. On the predicted date, police officers in Minneapolis stopped and impounded a BMW that belonged to Oliver and was being driven by Sharrod Rowe. A few days later, after obtaining a warrant, the police searched the vehicle and discovered six kilograms of cocaine in the trunk. That same day, police obtained and executed a number of warrants to search locations associated with Oliver, including a hotel room he rented. During the search of the hotel room, the police recovered certain personal items, including cell phones, but did not recover any drugs.

Oliver was first indicted in May 2015 for conspiracy to distribute cocaine, but the Government moved to dismiss the indictment without prejudice. The district court granted the Government's motion to dismiss the same day it was filed.

A grand jury indicted Oliver a second time for conspiracy to distribute cocaine on September 27, 2016. Oliver moved to dismiss the second indictment and filed pretrial motions seeking suppression of the roadside search of his BMW and the search of his hotel room. The district court denied these motions.

At trial, Oliver's co-conspirator Williams testified that he made multiple trips to Arizona at Oliver's request to transport cash for the purpose of buying drugs. Williams also testified that on November 24, 2014, he and another co-conspirator each mailed one package of cocaine from different towns in Arizona at Oliver's direction. At the conclusion of the Government's case, Oliver filed a motion for a judgment of acquittal, which was taken under advisement and later denied. The jury convicted Oliver of conspiracy to distribute cocaine.

Oliver appealed, asserting the district court erred in denying his pretrial motion to suppress the searches of his BMW and hotel room.

**DECISION: Affirmed.**

Oliver argued that the roadside search of his BMW was unlawful because the police had no warrant or probable cause at the time of the stop. Specifically, he asserted that a police dog unlawfully searched inside the

trunk of the BMW and alerted to drugs in a speaker.

When probable cause exists to believe that contraband is located inside the vehicle a police officer may search the passenger compartment and trunk under what is known as the "automobile exception." When the basis for a search is information supplied by an informant, such information may establish probable cause where the informant has a track record of providing accurate information or where the informant has accurately predicted certain events. The confidential informant relied on by police here had already provided accurate information about the shipments of cocaine that were sent on November 24, 2014. Furthermore, the informant's tip that a BMW belonging to Oliver and transporting cocaine would arrive in Minneapolis on November 30 was corroborated when the BMW registered to Oliver arrived in Minneapolis on the predicted date. In other words, the informant had a track record of providing accurate information and correctly predicting certain events. Thus, the information the informant provided furnished probable cause to search the BMW under the automobile exception.

There was probable cause to search the vehicle, and therefore the search was lawful under the automobile exception to the warrant requirement.

Oliver next challenged the search of his hotel room, arguing that there was no probable cause to search and that the warrant did not allow for the seizure of cell phones. Whether a search warrant is supported by probable cause is determined by the totality of the circumstances; resolution of the question by an issuing judge should be paid great deference by reviewing courts.

First, Oliver argued that the lack of information in the affidavit regarding the confidential informant's basis of knowledge of Oliver's drug trafficking undermined probable cause. When an affidavit is based on information from an informant, the informant's reliability, veracity, and basis of knowledge are relevant to whether the affidavit provided probable cause to support the search. But an informant's "reliability" and "basis of knowledge"

are not entirely separate and independent requirements to be rigidly exacted in every case. An informant's track record of providing trustworthy information establishes reliability. The affidavit here described the information provided by the confidential informant, the informant's track record of reliability, and the investigative efforts to corroborate the informant's information, including the interception of the packages of cocaine mailed from Arizona to Minneapolis and of the BMW transporting cocaine. Given this evidence of the confidential informant's reliability, the appeals court found that the district court did not err in finding that the affidavit's failure to set forth the informant's basis of knowledge was not a "fatal flaw," and there was probable cause to support a search.

Second, the warrant's reference to "other media" as items to be seized is broad enough to include cell phones. The warrant authorized the seizure of "other media that show standing for an address, vehicle, the location of narcotics proceeds, or a connection between people, addresses and vehicles or that a crime has been committed." The circuit court agreed with the district court that it was "self-evident" that a cell phone could constitute such media. Furthermore, the Eighth Circuit has held that cell phones may be seized when they may contain other items listed in a search warrant. Even if the cell phones did not constitute media, they could have contained other items specifically mentioned in the warrant, such as notes or photographs. Thus, the district court did not err in concluding that the police's seizure of Oliver's cell phones did not violate the Fourth Amendment.

See also: *U.S. v. Solomon*, 432 F.3d 824 (8th Cir. 2005).

See also: *U.S. v. Kattaria*, 553 F.3d 1171 (8th Cir. 2009).

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*Editor's Note:*

In *U.S. v. Gamboa*, 439 F.3d 796, 69 Fed. R. Evid. Serv. 675 (8th Cir. 2006), the court stated that "cell phones may well contain 'records of the use and purchase of controlled substances'" as stated in the search warrant.

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## In Brief

### Idaho

#### Search

At approximately 1:48 a.m., Officer Green was driving through the parking lot of the Super 8 hotel in Boise when he noticed what appeared to be a person sleeping in the driver's seat of a running four-door sedan. Earlier, around 11:00 p.m., Officer Green had noticed the same car pull into the parking lot and the occupant did not emerge from the car. At approximately 12:30 a.m., Officer Green returned to the parking lot and noticed the same car located in a different parking spot. Thus, when he returned again at 1:48 a.m. to see the car in yet another parking spot with the engine running, he decided to investigate. He had previously been informed by Super 8 management that they did not wish to have anyone sleeping in their parking lot. This was a known high crime area and a common location of illegal drug transactions. Officer Green called Officer Plaisted for assistance. They both approached the car on foot and, while standing at the door, Officer Green noticed the driver's seat was down and a male, later identified as Cox, lying asleep in the driver's seat. He also noticed that there was a small baseball bat with the hilt of the bat next to Cox's hand, as well as a large folding knife in between his legs in his lap. While standing there, Officer Green shined his flashlight inside of the vehicle and on Cox, who did not respond. Officer Johnson then arrived on scene to assist. Officer Johnson stood at the front passenger side door while Officer Plaisted stood at the rear driver's side door. Officer Green then knocked on the driver's side window with his flashlight. Cox startled awake and opened the driver's side door. Officer Green asked him to place his hands on the steering wheel. Cox was quite excitable, speaking quickly and acting agitated. Officer Green had to continually remind Cox to keep his hands on the steering wheel. Cox appeared to Officer Green as though he was under the influence of a stimulant. Officer Green reached into the vehicle to remove the knife from between

Cox's legs. Once Officer Green took the knife, he told Cox he was going to remove him from the vehicle by holding his left hand. Officer Green did so to prevent Cox from grabbing any additional weapons, such as the baseball bat. Cox stepped out. After Officer Green performed a pat search for weapons, he had Cox walk to the front bumper of his patrol car. Once at the patrol car, Officer Green obtained Cox's information verbally and ran it through dispatch. While Officer Green and Cox were standing next to his patrol vehicle, Officer Plaisted walked his certified narcotic detection canine, Geno, around the vehicle. Geno and Officer Plaisted worked together for four years, although Officer Plaisted was a certified canine handler for seven years. Officer Plaisted approached Cox's vehicle with Geno and saw that it was still running, with all the windows rolled up, the heater on, and the driver's door open. He walked Geno to the passenger side of the vehicle; Geno commenced an exterior sniff, moving in a counterclockwise direction while Officer Plaisted walked beside him. As Geno rounded the front of the car, Geno pulled hard on the leash towards the open door. Officer Plaisted noticed a change in Geno's behavior at this point. Based upon Geno's change in behavior and through his training and experience, Officer Plaisted knew this was an alert. Officer Plaisted then looked at the areas where Geno had alerted and, in the driver's door pocket, saw a pack of cigarettes. He opened the cigarette box and saw a small baggie that had a crystal-like substance in it that later tested positive for methamphetamine. At trial, Cox argued that the dog sniff was an unlawful search because officers had knocked on the car window and caused him to open the door.

#### **SEARCH: Lawful.**

Absent police misconduct, the instinctive actions of trained drug dogs did not expand the scope of an otherwise legal dog sniff to an impermissible search without a warrant or probable cause. Further, a drug dog following a scent into a vehicle's interior was not a search and a dog could follow the scent to its source without any indication it detected an odor before entering a vehicle. Because of

this, a drug dog's behavior before entering a vehicle was not constitutionally significant. Rather, the focus of the constitutional analysis of a dog sniff was whether the dog's acts were instinctual and whether police facilitated or encouraged the acts. "Instinctive" implied the dog entered the car without assistance, facilitation, or other intentional action by its handler. Here, Geno's sniff was an instinctual progression from its initiation at the passenger side of the vehicle to the eventual alert at the area between the open driver's side door and the interior compartment. Officer Plaisted did not encourage or facilitate Geno's advance to the open door. Further, Cox opened his door after Officer Green knocked on the window and Officer Green did not open the door. Finally, the officers were under no duty close the door once Cox opened it. Ultimately, the dog sniff and search were lawful.

Citation: *State v. Cox*, 2020 WL 238743 (Idaho Ct. App. 2020)

### Massachusetts

#### Search

Police received a tip from an undisclosed source that a green Volvo station wagon containing a "large" amount of narcotics would be located near a particular intersection in the Roxbury neighborhood of Boston. As a result, police set up surveillance near the intersection indicated by the tipster. Soon thereafter, officers saw a green Volvo station wagon approach the intersection, turn left without signaling, and park approximately 50 feet away.

Onaxis Barreto, the vehicle's driver and sole occupant, leaned down and appeared to reach toward the floor of the passenger side of the vehicle. An unidentified pedestrian approached the vehicle from a nearby apartment building. When the pedestrian reached the driver's window, the two men appeared to speak. The pedestrian then leaned toward the vehicle and moved his arms "in a manner consistent with the two men exchanging something"; however, officers did not see the hands of the two men come together. The interaction lasted about 30 seconds, after which the pedestrian returned to

the apartment building. Police did not observe anything in the pedestrian's hands at any time during or after the interaction.

Barreto resumed driving for a short distance until officers signaled for him to stop. At this point, at least four officers and three police vehicles had arrived. When engaged by two of the officers, Barreto avoided making eye contact. Officers saw that he was breathing heavily and looking in his rear and side view mirrors at the officers and vehicles behind him.

An officer issued an exit order to Barreto. As he got out of his vehicle, the officer saw what appeared to be a roll of United States currency inside a clear plastic bag in the storage compartment of the driver's side door. A subsequent patfrisk revealed no weapons or contraband. Officers then searched the interior of the vehicle, and a drug-sniffing dog alerted for narcotics on the front passenger's seat. Police towed the vehicle to a police station, where a search of a box hidden inside the front passenger's seat revealed a "large amount" of cocaine inside plastic bags and several large stacks of cash.

Barreto was charged with trafficking in cocaine. He filed a motion to suppress the evidence found in the vehicle, contending that the search took place after an unlawful exit order. The court denied the motion and Barreto appealed.

#### **SEARCH: Unlawful.**

Police may effect a motor vehicle stop based on reasonable suspicion of criminal activity, or based on an observed civil infraction of the traffic laws. The Commonwealth maintained that the informant's tip, together with the observations police made of the defendant's interactions with an unknown pedestrian, provided reasonable suspicion that the defendant had engaged in a drug transaction, thereby justifying the stop.

Here, the Commonwealth presented no information at all regarding the basis of knowledge or the reliability of the confidential informant. Barreto did not challenge the reliability of the tip, and the motion judge did not consider it in analyzing the justification for the stop, exit order, and search. Ac-

ordingly, the appeals court did not consider the tip in the reasonable suspicion analysis on appeal.

The Commonwealth also pointed to police observations of the defendant interacting with an unidentified pedestrian as providing reasonable suspicion of criminal activity and, thus, justification for the stop.

In this case, neither Barreto nor the pedestrian was known to the officers conducting surveillance. In addition, the area in which the men met was not known for drug activity.

Additionally, although the pedestrian faced Barreto and moved one or both of his arms in a manner consistent with an exchange, the officers did not see an object change hands and did not see anything in the pedestrian's hands either before or after meeting Barreto. As the Appeals Court rightly pointed out, the observed movements were just as consistent with any number of innocent activities, such as briefly greeting an acquaintance or asking for directions after looking at a map, as they were with an illegal drug transaction. In short, the observations made, without more, were insufficient for a stop on suspicion of criminal activity.

Although reasonable suspicion of criminal activity did not exist for the stop of Barreto's vehicle, the stop was nevertheless within the bounds of the law. Prior to pulling him over, police saw Barreto make a left turn without using the vehicle's directional signal. As police may effect a stop after observing a motor vehicle infraction regardless of the officer's underlying motivation, the stop here was valid.

Having determined that the stop was lawful, the court considered the exit order that followed.

An exit order is not constitutionally justified based solely on a traffic violation. Thus, to be lawful, the exit order can only be justified based on events or observations made by the officers after they stopped the defendant's vehicle.

Where a vehicle has been stopped for an observed traffic violation, an exit order issued to a driver or passenger of the vehicle is justified if (1) police are warranted in the belief that the safety of the officers or others is

threatened; (2) police have reasonable suspicion of criminal activity; or (3) police are conducting a search of the vehicle on other grounds.

When Barreto was pulled over, police noticed that he was breathing heavily, he avoided making eye contact when answering questions, and he appeared nervous. He also looked in his rear view and side view mirrors at the several police officers and vehicles that had arrived. At the same time, he responded to the officers' questions, complied with all requests, and made no movements consistent with reaching for a weapon after he was stopped.

The mere fact that an officer observes a driver's "nervousness and fidgeting," without more, does not warrant a belief that the safety of the officers or others is threatened. Indeed, many would likely be nervous in response to being stopped and approached by multiple police vehicles and officers. The exit order was not justifiable on the basis that police reasonably believed the defendant posed a safety threat.

Just as police did not have reasonable suspicion of criminal conduct prior to stopping the defendant, Barreto's behavior after the stop did not provide the requisite suspicion of unlawful activity to justify an exit order on that basis. The only additional information that police had after executing the stop that they did not have prior to the stop was the fact that Barreto appeared to be nervous and avoided eye contact while conversing with police. Given that police did not have reasonable suspicion prior to the stop, the sole additional fact that Barreto appeared nervous after the stop did not create reasonable suspicion.

Because the exit order was not lawfully issued, the evidence obtained from the subsequent search should have been suppressed as fruit of the poisonous tree.

Citation: *Commonwealth v. Barreto*, 483 Mass. 716, 136 N.E.3d 697 (2019)

## **New Mexico**

### **Investigative stop**

Officer Garrison had been with the New Mexico State Police for 20 years

and had significant training and experience in narcotics investigations. On the date he encountered Mikel Martinez, Officer Garrison was conducting surveillance of an Allsup's gas station and convenience store, a location at which he knew drugs were purchased and sold with frequency. He had personally purchased drugs at the Allsup's in an undercover capacity "probably 15 to 20 times," and used confidential informants to make "[a]n-other probably 20, 30" drug purchases there.

While watching the Allsup's, he saw two men—later identified as Martinez and Don Crespin—drive up to one of the gas pumps. Martinez was driving. Crespin exited the vehicle, started the gas pump, and then got back in. Martinez also exited and walked towards the convenience store. Before entering the store, he passed a large man. After passing Martinez, the large man walked to Martinez's vehicle; got in the left, rear seat; interacted with Crespin for about two to three minutes; and then exited the vehicle. Martinez left the store and returned to the vehicle. Officer Garrison believed he had just witnessed a "possible narcotics transaction."

Martinez then drove to the side of the Allsup's and parked. After "a few minutes," an SUV appeared and parked next to Martinez and Crespin. A woman exited the SUV; entered Martinez's vehicle again on the left, rear side; stayed in the vehicle for a few minutes; exited; and then reentered the SUV, which drove away. Officer Garrison suspected he had just witnessed a second "illegal narcotics transaction."

Officer Garrison decided to investigate to determine "exactly what was going on." He suspected that Martinez and Crespin were engaged in drug sales, but was "open-minded" and wanted to see if they had "a legitimate reason" for their activity. When asked why he suspected Martinez and Crespin were engaged in drug sales, Officer Garrison explained that "I've done them before, personally done [them], go in and sit inside [the] back of [the] vehicle, right front passenger side, somewhere inside a vehicle, do the drug transaction, and then exit the vehicle. It's just—it was consistent with what I've done and seen."

Officer Garrison pulled his car behind Martinez and Crespin's vehicle, activated his emergency equipment, and made contact with the men.

Crespin would not, despite Officer Garrison's request, keep his hands on the dashboard while they spoke, so Officer Garrison directed Crespin to exit the vehicle and then put him in handcuffs. After Crespin was handcuffed, Officer Garrison discovered a clear, plastic bag containing a white powdery substance he was sure was methamphetamine near the right, rear tire of the vehicle. Martinez was then also detained.

Martinez and Crespin denied throwing the methamphetamine on the ground. Officer Garrison then asked for their consent to search the vehicle. His request was denied, so Officer Garrison summoned a K-9 unit and the dog alerted on the right, rear side of the vehicle. Officer Garrison informed the men that he would obtain a warrant to search the vehicle and that they were free to leave but that the vehicle would remain with him. Once the search warrant was obtained, methamphetamine, marijuana, a scale, cash, and other drug paraphernalia were discovered inside the vehicle.

Martinez's charges included drug trafficking and possession. Prior to trial, he moved to suppress all evidence the State had to support these charges. In his suppression motion, Martinez argued that Officer Garrison did not have reasonable suspicion "at the inception of the seizure" and, therefore, the seizure was unlawful and any fruits of that seizure must be suppressed. Martinez specifically asserted that Officer Garrison's suspicion that he was engaged in drug transactions "did not amount to anything more than an inarticulate hunch that falls short of the reasonable, articulable, and particularized suspicion required to justify a seizure." The district court rejected Martinez's arguments and denied the motion.

Martinez proceeded to trial and was convicted and sentenced. He appealed and challenged the district court's denial of his suppression motion. The Court of Appeals reversed and held that Officer Garrison's knowledge and experience about drug sales at the Allsup's gave rise to nothing more

than an "unparticularized hunch" and, therefore, "it was not reasonable for Officer Garrison to conclude that [Martinez] was involved in drug transactions."

The State filed a petition for a writ of certiorari. The Supreme Court of New Mexico granted the petition.

#### **STOP: Lawful.**

Here, Officer Garrison's assessment that he had reasonable suspicion to temporarily stop and question Martinez was informed by (1) his training and experience with drug investigations; (2) the conduct in which Martinez engaged at the Allsup's which in turn caused Officer Garrison to infer that Martinez was involved in drug transactions; and (3) the fact that the Allsup's is a high-crime area where drug sales frequently occur.

Although the method to test the ultimate validity of a *Terry* stop is objective, officers must necessarily rely upon their subjective judgment to determine if observed conduct suggests criminality. When an officer relies upon training and experience to effectuate a stop, it is necessary that the officer explain *why* their knowledge of particular criminal practices gives special significance to the apparently innocent facts observed.

Officer Garrison's experience led him to anticipate that he might see drug transactions at the Allsup's. Indeed, the evidence suggests that he was engaged in surveillance at the Allsup's because there was a strong likelihood a drug transaction would be detected. His anticipation was not speculative. He knew drugs had been bought and sold at the Allsup's many times before.

Officer Garrison then saw Martinez partake in two instances of exactly the kind of drug activity Officer Garrison had previously observed at the Allsup's. Again, Officer Garrison was not speculating when he formed suspicion that Martinez might be selling drugs. His suspicion was grounded upon specific facts and rational inferences from those facts.

The district court paid appropriate deference to Officer Garrison, his training, and the judgments he formed given his background and training. The Court of Appeals erred in dis-

counting the gloss the district court gave the facts here. It was this error that prompted the Court of Appeals to determine, wrongly, that Officer Garrison provided no individualized or specific facts to justify his suspicion and his decision to perform the stop.

It cannot be, as a simple matter of logic, that an officer may stop and briefly investigate the possibility of criminal conduct only if the officer is certain of the existence of criminal conduct. If certainty of wrongdoing were the standard, there would never be reason for investigation. Unsupported intuition and inarticulate hunches are not sufficient.

Officer Garrison most certainly could infer that there was a substantial possibility Martinez was engaged in drug sales. Officer Garrison saw two instances of conduct consistent with drug transactions.

In sum, while it was possible Martinez's conduct was innocuous, Officer Garrison was not required to wait until he was certain Martinez's conduct was criminal before investigating. Officer Garrison was permitted to investigate to resolve whether in fact Martinez's conduct was innocent or criminal.

Generally speaking, arguments in the Fourth Amendment context predicated upon allegations that conduct was observed in a "high-crime area" should be received with "circumspection."

Here, there were not generic allegations concerning some crime-ridden location as justification for stopping an individual engaged in some undefined, suspicious activity. Rather, Officer Garrison's testimony was that the Allsup's is a location where a particular type of crime, drug transactions, is committed with frequency and he suspected Martinez of engaging in precisely that type of crime, i.e., drug sales. The fact that the Allsup's is a drug hot spot was essential to making sense of Officer Garrison's testimony and actions. It was not testimony to be dismissed or treated with undue circumspection.

Officer Garrison saw Martinez take part in what Officer Garrison believed—based on his training, experience, and familiarity with the Allsup's—were two drug sales. He

engaged in rational inferences to reach the conclusion that there was a substantial possibility that Martinez was engaged in criminal conduct. He performed a *Terry* stop to "inquire exactly what was going on" and resolve the reasonable suspicion he formed. All of this was appropriate. The brief stop enabled Officer Garrison to answer whether in fact wrongdoing was actually afoot. The totality of the circumstances adequately supports the conclusion that Officer Garrison had reasonable suspicion to perform the *Terry* stop.

Citation: *State v. Martinez*, 2020-NMSC-005, 457 P.3d 254 (N.M. 2020)

## Narc News

### New Jersey court says you can't be fired for failing drug test because of medical marijuana

New Jersey's top court has ruled that workers can't be fired for failing a drug test because of medical marijuana. As long as employees are not under the influence of the drug at work, the state Supreme Court said medical marijuana patients remain protected by the Law Against Discrimination, echoing an earlier appellate court decision.

While the case involved one former funeral home director who lost his job, the implications are broad. "This protects hundreds, if not thousands of employees" who've faced the "stigma of marijuana," said Jamison Mark, a lawyer for the former director. The ruling ensured that discrimination law and the state's Compassionate Use Act were not at odds, he said.

The drug should now be treated like any prescription opiate, said Maxine "Mickey" Neuhauser, an employment expert with the Newark office of the Epstein Becker and Green national law firm. You still need a prescription, she said, and you can't come to work high.

More than 70,000 residents are enrolled in New Jersey's medical marijuana program, according to the state's department of health.

The ruling also means Justin Wild may continue his lawsuit against Car-

riage Funeral Holdings, Inc. and the Feeny Funeral Home in Ridgewood.

Wild was diagnosed with cancer in 2015, according to court records, and his doctor prescribed marijuana. He told his bosses a year later, when he got into a car accident. The crash was not his fault, the lawsuit said, and one doctor said Wild was not under the influence. But the funeral home demanded a drug test, and fired him when it came back positive.

Wild sued, arguing that he had been discriminated against.

A Superior Court judge initially dismissed his case, but an appellate court sided with Wild. "It would be ironic indeed if the Compassionate Use Act limited the Law Against Discrimination to permit an employer's termination of a cancer patient's employment by discriminating without compassion," that court wrote a year ago.

The case now heads to Bergen County Superior Court. Wild is still looking for a job within the industry, his lawyer said, and dealing with the fallout of the car accident.

Lawyers for the funeral home had argued that the Compassionate Use Act did not include job protections, according to court records. Messages left with Steven Luckner and Michael Riccobono were not immediately returned.

In January, a state appeals court ruled that a construction company needed to cover a former employees' medical marijuana.

Source: [nj.com](http://nj.com)

### Alleged drug traffickers, identity thieves ask for jail release citing COVID-19 fears

At least 19 inmates who are awaiting trial on federal charges such as money laundering, international drug trafficking, identity theft and distributing fentanyl have asked judges in the past two weeks for release from jail over fear they will contract COVID-19.

The Butler County Jail houses most people charged with serious crimes who are awaiting hearings in U.S. District Court in Cincinnati. As of April 1, Butler County Sheriff Richard

Jones said no inmates had been diagnosed with COVID-19.

The pandemic raises a unique situation for federal judges who must balance the health risks of people who in some cases have been charged, but not convicted, of serious crimes with the dangers of releasing them back into society.

“We will continue to fight to keep those who are deemed a danger to the community detained and work with the U.S. Marshals Service to limit the risk of infection into the jails,” said U.S. Attorney David DeVillers.

In recent weeks a judge did allow the release of one inmate—a 53-year-old man who is wheelchair bound and suffers from diabetes, high blood pressure, heart problems and needs a catheter.

U.S. District Court Judge Douglas Cole ordered the release of Larry Collins on March 13. He is now under electronic monitoring while awaiting trial on charges that he distributed cocaine and fentanyl which caused the death of one person and seriously injured another.

Prosecutors did not oppose Collins’ request so long as he is subject to home detention, Cole wrote in his order.

But prosecutors are fighting the vast majority of motions for release that are now pending before federal judges. Some are filed by defendants who argue that old age or health problems place them at a higher risk of contracting COVID-19 while in prison.

To keep the Butler County Jail safe, Jones has restricted inmate visits, isolated sick inmates and placed new arrivals in a separate orientation area for three weeks.

Still the motions for release continue to be filed in federal court—almost daily.

“Counsel is certain that the Court has received and will continue to receive several emergency motions asking that the prior orders of incarceration be modified due to the novel circumstances involving the COVID-19 disease,” wrote attorney Ed McTigue, in a motion asking U.S. District Court Judge Timothy Black to release his client from jail on bond.

“This disease is real and it is affecting so many people in this world. It is particularly affecting elderly people,” McTigue wrote, about his client Fred Jones, 67, who is awaiting sentencing after pleading guilty for his role in a drug conspiracy.

Black has not yet ruled on this motion.

Meanwhile prosecutors are warning federal judges of the consequences of releasing potentially dangerous people into the community.

“Nothing about the COVID-19 pandemic reduces defendant’s danger to others,” assistant U.S. Attorney Christy Muncy wrote in a March 26 motion opposing the release of Scotty Shaffer Jr. He is awaiting trial for his alleged role in a large conspiracy to distribute kilos of crystal methamphetamine in the Cincinnati area. “Defendant presents exactly the same danger to the community that he did at the time of the court’s original detention order—if not more,” Muncy wrote.

If judges decide to release these inmates into the community, Muncy cautions them to do so carefully.

“Should the court consider granting the defendant’s motion, defendant should not be released into the community if he is exhibiting any signs of COVID-19. Instead, the United States Marshals should be granted the discretion to hold defendant if he exhibits symptoms,” Muncy wrote.

Source: [wcpo.com](http://wcpo.com)