

## Office Memorandum

**To:** Frank Smith

**From:** Bill Jones

**Date:** 27 October 2009

**Re:** Pennsylvania v. Marcus

### Question Presented

Whether an experienced police officer has probable cause to arrest a person when she observes him engaging in a hand-to-hand exchange of currency for small unidentified objects in an area known to be used by drug dealers.

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## **Brief Answer**

No; a general suspicion of guilt is insufficient to sustain probable cause for arrest. Rather, the law requires evidence that would lead an objective, reasonable person to believe that a crime has been committed. Failing to demonstrate such a pattern, the arrest here is invalid.

## **Facts**

On 4 May 2006, Philadelphia Police Officer Yolanda Bello was patrolling undercover in the residential Kensington neighborhood in north Philadelphia, as part of her recent assignment to the Narcotics Strike Force. At 11:00 AM on that day, Bello observed Ike Marcus from a distance of approximately one city block. She had not seen Marcus before, and Marcus had no prior record or known interaction with police. Marcus was walking, alone, towards Bello on the opposite side of the road. He stopped in front of an apartment building to speak with an unidentified man standing on the street. Marcus handed the man a single bill of currency. The man handed Marcus several small, unidentified objects, which he placed in his shirt pocket. The two men parted. Marcus turned and walked in the other direction, while the man entered the apartment building.

These actions by Marcus and the unidentified male formed the entirety of the direct evidence leading to arrest. Bello testifies that she immediately suspected that she had witnessed a drug transaction. She followed Marcus and performed an arrest; during the subsequent search, she found two vials containing crack cocaine. She reported that Marcus performed no actions between the transaction and arrest to further increase suspicion, nor did she fear for her own safety.

## **Discussion**

**The Constitutional Standard.** This court has specified that ability for law enforcement to perform an arrest without a warrant is “restricted to offenses committed in their presence, or where they have ‘reasonable grounds’ to believe that the person

to be arrested has committed or is committing a felony.” *Henry v. United States*, 361 U.S. 98, 100 (1959). Expounding upon the concept of “reasonable grounds,” the court clarified that “common rumor or report, suspicion, or even strong reason to suspect was not adequate to support an arrest.” *Id.* at 101.

While the level of evidence required to establish guilt at trial is not necessary, good faith on the part of the arresting officers is insufficient. Rather, “[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.” *Id.* at 102. This implies an objective standard for evaluation of probable cause. However, as the Court has stated, this standard “is incapable of precise definition or quantification into percentages” and therefore “depends on the totality of the circumstances”. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

**Dispositive Factors for Probable Cause.** In applying the standard to the sort of transaction in question, courts have first looked for clear evidence that, standing on its own, is dispositive of the question of reasonable grounds. Upon finding examples of such factors, the inquiry is complete. *See, e.g., State v. Castro*, 891 A.2d 848 (R.I. 2006) (observation of cocaine during a traffic stop was sufficient to arrest both parties to the immediately preceding transaction); *United States v. Davis*, 561 F.2d 1014 (D.C. Cir. 1977) (multiple suspicious transactions and visible pink pills consistent with illicit substances provided probable cause for arrest); *Darling v. State*, 768 A.2d 463 (Del. 2001) (multiple transactions and the use of masks to conceal the sellers’ identities provided probable cause).

In a case where an arrest was invalidated, the Pennsylvania Supreme Court specifically listed the absence of such potential dispositive factors as: observation of drugs or containers commonly known to hold drugs, observation of “multiple, complex, suspicious transactions,” and “a citizen’s or informant’s tip.” *Commonwealth v. Banks*, 658 A.2d 752, 455 (Pa. 1995). Rather, in *Banks*, the grounds for arrest were a rapid, on-street transaction similar to that in *Marcus*, as well as the suspect’s flight to avoid arrest. The court pointed out that neither the transaction, nor flight, standing by

themselves would be dispositive of criminal activity. Further, the fact of the on-street transaction “cannot be added to, or melded with the fact of flight” to form probable cause. *Id.* at 456.

**Probable Cause Inferred from the Totality of Circumstances.** In contrast, *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981), provides an example where probable cause was established, not from individual factors that alone were dispositive, but with guilt inferred through the totality of the circumstances. Appellant Green contested his conviction for possession of heroin with intent to distribute. An officer watching from a concealed location observed an unidentified man perform a purchase of an unknown object through the use of a third-party intermediary. The intermediary received the money from the buyer, delivered the money to Green in exchange for the unknown merchandise, and returned to the buyer with the merchandise.

The officer described this as consistent with a “two-party drug transaction,” in which two individuals sell the drugs to give themselves some protection from robbery. *See id.* 1151 n.1. Green made attempts to conceal the large paper bag in which the object was kept, by stuffing it into a pants pocket. When approached by police officers in an unmarked car, Green made efforts to evade the officers, as well as to dispose of the bag in a nearby building. Green was then arrested; the bag was found to contain heroin.

In its analysis, the court recognizes that (as in *Banks*) the individual factors are insufficient by themselves to establish probable cause. However, unlike in *Banks*, the overall situation warranted the arrest, explaining:

[a]lthough none of these four factors is adequate by itself to establish probable cause, it is their combination in the particular circumstances confronting [the officers] that is the proper subject of consideration. Probable cause is not determined by observing some single factor which this court has deemed relevant, or even by observing any certain number of them. Rather, probable cause exists if the totality of the circumstances as viewed by a

reasonable and prudent police officer in light of his training and experience, would lead that police officer to believe that criminal offense has been or is being committed.

*Id.* at 1152 (footnote omitted). The court recognized that this series of suspicious actions, viewed by an officer with the experience to recognize the nature of the actions, could only be viewed in the context of a drug transaction. “No plausible, innocent explanations for this sequence of behavior readily spring to mind. . . .” *Id.* at 1153. Note the qualification of the *Henry* standard (that of the “prudent man”) with the more specific “prudent police officer.” This does not claim to relieve the police officer of the *Henry* requirement to meet an objective standard of probable cause; rather it provides that when assessing reasonableness, the unique knowledge available to the officer is. to be considered. However, even when invoking “experience,” the officer must demonstrate that the conclusions following from her experience were objectively reasonable.

**Example Applications of the Standard.** Consequently, courts have routinely invalidated arrests when the arresting officers are unable to provide clear reason to assume criminal behavior, despite the fact of significant field experience of the arresting officer. In *People v. Ratcliff*, 778 P.2d 1371 (Colo. 1989), officers observed an exchange between the defendant and a known drug dealer outside a bar. The defendant was arrested and searched, revealing cocaine. The court invalidated the arrest, stating that an objective view of the transaction consisted of nothing more than “a brief exchange of some object or objects outside a bar.” *Id.* at 1377. Despite the officers’ familiarity with the area as one known for drug transactions, “it was nonetheless a public way and people obviously had many reasons for being there other than drug dealing.” *Id.* at 1378. *See also Cunha v. Superior Court*, 466 P.2d 704, 708 (Cal. 1970) (“Transactions conducted by pedestrians are not per se illegal, and the participants’ apparent concern with privacy does not imply guilt.”); *People v. Oden*, 329 N.E.2d 188 (N.Y. 1975) (holding on-street exchange of an envelope insufficient for probable cause).

The courts have upheld arrest on a totality-of-circumstances standard with less evidence than that of *Green*. While they relied heavily on officer experience to interpret a pattern of behavior, they do not endorse the sole dependence on the officer's judgment, as Petitioners seek to allow. In *Commonwealth v. Kennedy*, 690 N.E.2d 436 (Mass. 1998), the officer witnessed a known drug-dealer approach a car to speak briefly with the occupant, run away, and return shortly to the vehicle to make an exchange. The officer interpreted the short interlude as an opportunity for the dealer to retrieve drugs from his "stash. . . . warrant[ing] the officer to conclude that he was observing a classic street level drug transaction." *Id.* 439 n.2. In *State v. Moore*, 853 A.2d 903 (N.J. 1998), a similar pattern of leaving and returning, followed by a transaction for unidentified objects, also provided probable cause for arrest.

**Applying the Standard to *Marcus*.** It seems clear that *Commonwealth v. Marcus* is absent factors that are clearly dispositive of probable cause. Thus probable cause, if it exists, must be inferred from the totality of the circumstances. In the cases with valid arrests that result from such an analysis (e.g. *Green*, *Kennedy*, and *Moore*), interpretations of the pattern of behavior were provided that could allow a reasonable person to believe that a crime was committed—the *Henry* standard. No such rationale has been provided in *Marcus*, which would have allowed an evaluation of the reasonableness of that inference. Attempting to find an inference from the limited evidence available, it would seem that an objective analysis could at most support a finding of "a brief exchange of some object or objects," 778 P.2d at 1377, as the *Ratcliff* court characterized. Therefore, without evidence indicative of a crime, I conclude that probable cause did not exist.

## Conclusion

In this memorandum, I have evaluated a claim of probable cause for arrest in a suspected drug sale, in which the evidence consisted only of a rapid, on-street transaction for unidentified objects. After first identifying the constitutional standard for warrantless arrest as provided in *Henry v. United States*, which requires evidence that would lead an objective observer to conclude that a crime was committed, I

examined applications of this standard by lower courts. The courts have expected a criminal explanation for an observed pattern of behavior; one which may be elucidated by the benefit of an officer's experience, but may not rest upon confidence alone. Such an on-street transaction, without further evidence, would not objectively lead to the inference of criminal behavior. Therefore, I conclude that the arrest in this case was invalid.