

Prosecution Drops Gun Cases *Judge Faults Conduct Of Street Crimes Unit* By JAMES KINSELLA

In the wake of a judge's ruling that faulted police conduct, the Cape & Islands District Attorney's Office has dropped firearm cases against two defendants.

Last Friday, the prosecution decided not to pursue the prosecution of Christopher M. Newell, 22, and Julianne E. Kusy, 24 of Hyannis on firearms and other charges, including a charge of armed career criminal against Mr. Newell.

On November 6, Barnstable Superior Judge Gary A. Nickerson granted a defense motion to suppress evidence in the cases, which stemmed from a traffic stop on Route 28 near Hiram Road in Hyannis that was conducted by the Barnstable Street Crimes Unit on December 7, 2011.

"The search warrant that issued the evening of the 7th is hopelessly tainted by the conduct of the police at the roadside," Judge Nickerson wrote in his decision.

In a series of motions last Friday in superior court, the district attorney's office dropped the charges against Mr. Newell and Ms. Kusy, citing insufficient evidence to proceed.

Both defendants have been released from jail, where they had been held on bail.

On July 2, William E. Gens, the defense attorney representing Mr. Newell, filed a written motion challenging the search warrant for the car in which Mr. Newell and Ms. Kusy were traveling. An oral motion by Peter J. Aspesi, the defense attorney representing Ms. Kusy, to join in the motion challenging the search warrant was granted on July 26.

Wednesday afternoon, Mr. Gens said, "This isn't the first time the street crimes unit has crossed the line, and it's healthy that the courts are policing it."

On Wednesday evening, Barnstable Police Detective Lieutenant John F. Murphy Jr., who heads the street crimes unit, declined to comment on Judge Nickerson's findings.

The Street Crimes Unit, Barnstable Police Chief Paul P. MacDonald has said, operates independently of police department dispatching to target frequent perpetrators of crime.

The unit, an interdepartmental entity, was created to address the rising tide of violent and drug-related crime in the Hyannis area. Unit members wear plain clothes and drive unmarked cars. The unit was designed to cross town lines to pursue criminals. As such, all unit members are deputized, allowing them to arrest anywhere in Barnstable and Bristol counties. Members are drawn from a number of law enforcement organizations, including Barnstable and Yarmouth police departments, Massachusetts state police and Barnstable County Sheriff's department.

Judge Nickerson, in his decision, reviewed the traffic stop and the subsequent execution of a search warrant on the vehicle.

The judge wrote that at about 1:15 PM December 7, state trooper John Hanafin, a member of the street crimes unit, stopped the Toyota Avalon being operated by Ms. Kusy in Hyannis for erratic operation.

Upon walking up behind the vehicle, Trooper Hanafin reported seeing the arms of the passenger, Mr. Newell, in motion in the area of the car's glove box.

The trooper called for backup. Two more members of the street crime unit, Barnstable Police Patrolman Edward Cronin and Barnstable County Sheriff's Deputy Michael Huse, arrived.

Officer Cronin recognized Mr. Newell and told Trooper Hanafin that Mr. Newell had recently been incarcerated and was known to carry firearms. The trooper ordered the pair to exit the vehicle. It was cold and pouring rain.

A pat frisk of Mr. Newell for weapons revealed none. A radio call went out for a female officer to frisk Ms. Kusy.

The police, over the objections of Ms. Kusy and Mr. Newell, proceeded to search the car without a warrant. The police found the glove box locked. Both Ms. Kusy and Mr. Newell denied having the key.

A female police officer arrived sometime after 2 PM and, Judge Nickerson wrote, probably closer to 3 PM to pat frisk Ms. Kusy.

"There is a recording of the radio transmissions that suggests Cronin called off nearby female officer, perhaps in favor of having a female attached to the Street Crimes Unit pat frisk Kusy," the judge wrote. "What is clear is that considerable time elapsed before [Barnstable Police Patrolman Jennifer] Ellis arrived to assist her male counterparts."

The pat frisk of Ms. Kusy turned up nothing.

At 2:30 PM, the police called for a drug-sniffing dog. The dog detected no drugs on Ms. Kusy. Mr. Newell agreed to be searched, but before the dog approached, threw a small plastic bag of marijuana to the ground.

Ms. Kusy, who remained standing in the rain, became increasingly agitated and was arrested for disorderly conduct.

The police at the scene decided to impound the Avalon, despite the appearance of Ms. Kusy's mother, who asked if she could take the car, but was not allowed to do so.

The car was towed to the Barnstable police station, where the drug-sniffing dog was allowed into the passenger compartment and alerted to the glove box.

Trooper Hanafin drafted an application for a search warrant to examine the Avalon for drugs. The warrant was granted.

"No drugs were found but two handguns and ammunition were recovered from the glove box," Judge Nickerson wrote. "Plastic baggies, a digital scale, and \$3,210 were found in the vehicle."

A police report at the time stated that the handguns were loaded.

Following execution of the search warrant, the police subsequently charged the pair with illegal firearms and other charges. A grand jury returned indictments against both defendants in March.

In his November 6 decision, Judge Nickerson does not fault Trooper Hanafin's stop of the Avalon or the immediate pat frisk of Mr. Newell.

“The difficulty comes with the detention of Kusy in the cold pouring rain for over two hours,” the judge wrote.

He proceeded to quote from *Commonwealth v. Feynord*: “It goes without saying that the driver cannot be held indefinitely until all avenues of possible inquiry have been tried and exhausted.”

In the December 7 investigation, the judge wrote, “the police failed to conduct a prompt investigation proportional to their suspicions.

“...The notion that Kusy was still being pat frisked at the roadside at 3:07 PM from a 1:20 PM motor vehicle stop is intolerable, but that’s what happened,” Judge Nickerson wrote.

“...This court draws the inference that the officers sought, by their actions, to force Kusy or Newell to open the glove box against their will,” the judge wrote. “The conduct of the officers exceeded the scope of a protective search and amounted to an investigative search.”

He further notes that “no one requested a dog trained to detect firearms or ammunition and yet that was the legitimate concern at 1:20 PM. Even if the request was appropriate, the delay from 1:20 PM to 2:30 PM was not.”

“...In short, the police lacked probable cause to search the Toyota at the roadside,” Judge Nickerson wrote. “This court infers that the car was towed to the stationhouse because the officers were determined to search the glove box.”

In his decision, Judge Nickerson allowed the defense attorney’s motion to suppress evidence discovered through the search warrant, including the handguns. The district attorney’s office then dropped the cases against the two defendants.