

DELINQUENCY CASE LAW UPDATE AND OTHER CASES OF NOTE FROM 2003

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In 2003, both the Supreme Judicial Court and the Massachusetts Appeals Court released a number of decisions specifically pertaining to the rights and responsibilities of juveniles and to juvenile court practice generally. This series of opinions included several decisions addressing the acceptable parameters for eliciting statements from juveniles, a pair of cases parsing the relationship between school officials and police departments, and a few cases addressing various aspects of the youthful offender statute, and the implication of juvenile adjudications. The following section offers a brief summary of these cases. At the end of this section you will also find a list of criminal cases from 2003 worth taking a further look at. Please note, the Appeals Court cases have been Shepardized. Only one of the cases listed has been accepted by the Supreme Judicial Court for further appellate review.

I. A “genuine opportunity” to consult with an “interested adult”

Recent cases addressing the admissibility of juvenile statements

A. Commonwealth v. Alfonso A., 438 Mass. 372 (2003)

In Alfonso A., the 15 year old juvenile was arrested and charged with possession of a firearm based on his presence at an apartment where the Boston Police seized several firearms pursuant to the execution of a search warrant. Before receiving authorization for the warrant, members of the Boston Police went to the apartment to secure the premises. Several persons, including the juvenile were detained at the apartment at this time. After the police received word that the warrant had been approved, the officers decided to interrogate the juvenile and an 18 year old, “Ricky.” When Ricky was brought to a bedroom, his mother asked if she could be present during the interview. The police stated that Ricky was an adult and that it was up to him. Ricky responded that he did not want his mother to accompany him. This exchange took place in front of the juvenile.

When the police finished with Ricky, the officers brought the juvenile into the bedroom and began to interrogate him. In response to specific questions, the juvenile told officers his age, that he had been arrested before and that he was aware of his rights. The officer then asked the juvenile if he wanted the police to contact or get his mother and have her present for the interview, or in the alternative, if he wished to consult with some other adult, such as the ones present at the apartment. The juvenile declined both offers, twice. The juvenile then waived his rights and made incriminatory statements. Five shotguns and a pellet gun were found in the apartment when the warrant was executed.

The juvenile’s motion to suppress his statements was denied and the juvenile was adjudicated delinquent on the possession of a firearm complaint. The Appeals court reversed the trial court, finding that the motion to suppress statements should have been allowed. It was the Appeals Court’s position that the juvenile had not been provided with a genuine opportunity to consult an interested adult, and that this invalidated any waiver of his constitutional rights.

The Supreme Judicial Court granted the Commonwealth's application for further appellate review. The Court agreed with the Appeals Court's assessment that the juvenile had not been provided with a genuine opportunity to consult with an interested adult and remanded the case for further findings with respect to whether the Commonwealth had made the alternative showing that is necessary when the interested adult rule is not complied with, that the juvenile possessed a high degree of intelligence, experience, knowledge, or sophistication.

In reaching this conclusion, the Court specifically addressed what is meant by a "genuine opportunity" for consultation. In discussing prior cases on the subject the Court noted that it had not previously held that the adult must be physically present, but then added that in all of the cases where the requirement had been met, an adult was present. The Court then held that an adult must be immediately and evidently available to the juvenile in order for there to be a genuine opportunity for consultation. In doing so, the Court found that the officers' repeated offers to get the juvenile's mother did not make her immediately and evidently available, since a juvenile may be too embarrassed to ask for help. The Court opined that were his mother present, the juvenile might still from bravado or embarrassment decline to consult with her, but at least there would be no practical barrier to such consultation.

In addition to establishing this definition of a "genuine opportunity" for consultation, the Court reiterated its prior holding that genuine consultation requires that the adult be informed of and understand the juvenile's constitutional rights. Finally, the Court concluded that it cannot be just any adult; rather the adult must stand in the type of relationship with the juvenile to be sufficiently interested in his welfare to afford him appropriate protection.

B. Commonwealth v. Mark M., 59 Mass. App. Ct. 86 (2003)

In Mark M., the 13 year old juvenile was the subject of a sexual assault investigation by the East Bridgewater Police. The detective assigned to the investigation made an appointment with the juvenile and his grandmother, who was his legal guardian, and all three met at the detective's office. At the outset of the meeting, the detective informed both that he was conducting a criminal investigation and then recited the Miranda warnings to them. After the oral recitation, the detective provided the juvenile and his grandmother with a written set of warnings which they each read, signed, and orally acknowledged that they understood. The juvenile then, without consulting with his grandmother, but with her consent, agreed to speak with the detective.

During this initial interview, the detective outlined allegations that had been made against the juvenile, specifically that he had been accused of touching a young girl in an indecent manner while they watched television together. The juvenile denied any inappropriate touching, but admitted that he and the girl had watched television together and started to speak about a commercial for a Playboy video. At that point the grandmother asked the juvenile if he would feel more comfortable speaking with the detective alone; the juvenile

agreed. While the two sat together in a conference room, the detective sought permission from a superior officer to question the juvenile without his grandmother present. After receiving permission to proceed in this fashion, the detective escorted the grandmother to another room and returned to his questioning of the juvenile. In the subsequent session, the juvenile made incriminating statements and was charged with indecent assault and battery on a child under fourteen and accosting or annoying a person of the opposite sex.

The trial court judge allowed the motion to suppress statements, finding that the juvenile did not have the opportunity to consult with his grandmother due to the timing of the Miranda warnings and the immediate onset of questioning. In addition, the judge found that the detective had not advised the two that they had the right to consult before waiver of the juvenile's rights. The Commonwealth sought an interlocutory appeal of the judge's decision which was allowed, and the single justice reported the matter to the Appeals Court.

The Appeals Court concluded that it was improper for the initial interview to commence without the juvenile having an opportunity to consult with his grandmother, but found the trial judge's subsidiary findings lacking with respect to whether the juvenile made incriminating statements during the initial interview and/or whether there was a break in the chain of events sufficient to insulate the admissions made during the second interview. Additionally, the Appeals Court took issue with the trial court's finding that the police were required to let the juvenile and his grandmother know that they had the right to consult. The Appeals Court found that while the Supreme Judicial Court has recommended that the better practice is for investigating officials to explicitly inform a juvenile's parent or other interested adult of the opportunity to consult, no case has held that the police are required to inform the juvenile of the right to consult. The Appeals Court then held that in order for there to be an "actual opportunity" to consult, the interested adult must understand that there is an opportunity and what his/her role is with respect to that consultation.

The Appeals Court ultimately vacated the order allowing the motion to suppress and remanded the case for further findings with respect to several issues: 1) whether the juvenile's original statement was incriminating, and if so, whether there was a sufficient break in events such that his later statements were insulated from the initial illegality; 2) whether the juvenile and his grandmother understood the Miranda warnings; 3) whether the grandmother understood her role as an interested adult; and 4) whether the Commonwealth has demonstrated, beyond a reasonable doubt, that the juvenile made a knowing, intelligent and voluntary waiver of his rights.

C. Commonwealth v. Clark C., 59 Mass. App. Ct. 542 (2003)

In Clark C., the juvenile came to the attention of the Springfield Police during an interview of a victim of a home invasion. At the conclusion of this interview, a lieutenant went to the juvenile's home. He was not home, but the lieutenant spoke with his grandmother. Approximately five days later, the lieutenant received a phone call at the

station from someone identifying himself as “Clark.” After some initial confusion regarding his identity, the lieutenant realized that this was the juvenile he had been trying to speak with and informed him that he had spoken with the juvenile’s grandmother. The juvenile then made an inculpatory statement about his involvement in the home invasion and asked the lieutenant if he should confess. The lieutenant declined to advise the juvenile, but did ask him if he would turn himself in. The juvenile responded that he would call the next morning to be picked up or would come in on his own.

The next day, after the juvenile failed to call or appear, the lieutenant went to his house with an arrest warrant obtained some days earlier. When the lieutenant arrived at the house he was admitted by a woman who directed him to the juvenile’s bedroom where he found the juvenile, asleep. When the lieutenant woke him up and told him about the warrant and asked him to get dressed, the juvenile asked if his grandmother had turned him in. The lieutenant responded that she had not, but then confronted the juvenile about his promise to turn himself in. The juvenile replied that he had not done so because of fear stemming from a previous bad experience with police.

The juvenile moved to suppress all of his statements. The trial judge allowed the motion and suppressed all of the statements, but made limited findings as to her rationale for suppressing the initial telephone statements and the statement made when the lieutenant woke the juvenile up. The Commonwealth’s application for interlocutory review was allowed and the matter was reported to the Appeals Court. The Appeals Court determined that the trial judge should not have suppressed the juvenile’s first two statements, but that the third, in response to the lieutenant’s statement about their telephone conversation, was properly suppressed.

In parsing out the statements, the Appeals Court found that the juvenile was not in custody when he telephoned the lieutenant, and as such Miranda was not applicable. The Appeals Court then found that the juvenile’s question about whether or not his grandmother had turned him in, made when the lieutenant woke him up to arrest him, was spontaneous and not the product of interrogation or its functional equivalent. The Appeals Court ultimately found, however that the lieutenant’s response about the juvenile’s promise to turn himself in, was the functional equivalent of interrogation and that as a result, Miranda warnings were required. The Appeals Court concluded that the lieutenant’s statement was an attempt to confirm the juvenile’s identity as the caller from the previous day and to elicit from him a potentially inculpatory response about his failure to turn himself in. As such, the lieutenant’s remark constituted the functional equivalent of interrogation, requiring the safeguards of Miranda.

II. School Action vs. Police Action

Recent cases addressing the line between school and police investigations

A. Commonwealth v. Ira I., 439 Mass. 805 (2003)

In Ira I., the juvenile and three other middle school students were each charged with two

counts of assault and battery by means of a dangerous weapon and a single count of assault and battery in conjunction with the beating of a classmate while he was on his way home from his bus stop after school. On the date of the alleged beating the victim's mother alerted the police as well as the school's assistant principal about this incident.

The assistant principal, believing it was his responsibility to investigate any matter that occurs from the moment children leave their homes in the morning until they return at night (so-called "portal to portal jurisdiction"), proceeded over the next two days to interrogate the individuals named by the victim's mother. These interrogations were conducted in the assistant principal's office and lasted approximately 15 to 20 minutes each. The assistant principal warned each individual that there would be consequences for his actions, and obtained written statements from five students. After conducting these interrogations, the assistant principal spoke to the parents of the children questioned and then to the victim's mother. During his conversation with the victim's mother he provided her with the names of the juveniles he'd spoken with and advised her that she could seek delinquency complaints if she wanted. Approximately a week later, the assistant principal gave a statement to the Springfield Police about his investigation and complaints were issued against the juveniles.

Three days before trial, the juvenile filed a motion to suppress the statements made to the assistant principal. The trial judge allowed the motion to suppress as well as a motion to dismiss made on the grounds that the Commonwealth had failed to provide the juveniles with the written statements taken by the assistant principal. The Commonwealth was granted interlocutory relief and the Supreme Judicial Court granted an application for direct appellate review.

With respect to the motions to dismiss, the Court found that the motions should have been denied, holding that the Commonwealth had no duty to provide the juveniles with the statements taken by the assistant principal because those statements were not within its custody or control. In reaching this conclusion, the Court found that there was no evidence that the assistant principal was acting as an agent of the police when he took these statements, or that he in any way participated in the investigation or evaluation of the case and reported to the prosecutor's office about his investigation. The Court noted that there was no evidence that the assistant principal had provided the police with the statements or that either the police or the prosecutor had any knowledge or possession of the written statements until the date of trial when the juvenile's attorney informed the prosecutor of their existence.

The Court used largely the same rationale to reverse the trial judge's allowance of the motions to suppress. The Court found that the assistant principal's investigation of the alleged beating was within the scope of his employment and reiterated its holding in Commonwealth v. Snyder, 413 Mass. 521, 532 (1992), that school officials are not required to give Miranda warnings prior to questioning a student in conjunction with a school investigation. Absent evidence that the police directed, controlled or otherwise initiated or influenced the assistant principal's investigation, there was no basis for the

trial judge to find that the assistant principal was acting as an agent of the police. The Court added, citing Commonwealth v. Lawrence L., 439 Mass. 817 (2003) (see below) that the fact that a school's policy to turn over the information gained from such an investigation to the police does not alter this assessment, nor does the fact that a school official stands in a position of authority transform the assistant principal's questioning into custodial interrogation. According to the Court, the assistant principal did nothing other than what an assistant principal is expected to do as part of his obligation to protect pupils from mistreatment by other children.

As a final note, the Court addressed the issue of voluntariness, which the juvenile raised in his memorandum in support of his motion to suppress, but was not addressed at the evidentiary hearing of the motion or in the judge's findings. The Court held that it was the juvenile's burden to present evidence to rebut the presumption that his statement was voluntary and that the record, though replete with information about the juvenile's age, lack of parental presence during questioning, lack of Miranda warnings, and threat of "consequences," was devoid of any evidence that the statements were made under duress. The Court refused to find that a statement is involuntary just because it is taken by a school official in a position of authority, finding that such a stance would invalidate all questioning of juveniles at school and thus, wreak havoc on the schools.

B. Commonwealth v. Lawrence L., 439 Mass. 817 (2003)

In Lawrence L., the juvenile was charged with unlawful possession of marijuana stemming from a search of his person conducted by a school vice principal. The school vice principal had called the juvenile out of class to speak with him about an unrelated matter and while speaking with him, reportedly smelled a strong odor of marijuana emanating from the juvenile. The vice principal first asked the juvenile if he had been smoking, which the juvenile denied. The vice principal then decided to search the juvenile and asked him to empty his pockets. When the juvenile removed a folded up piece of paper from his back pocket containing marijuana, the vice principal contacted the juvenile's parents, and, pursuant to a memorandum of understanding between the Lynn Public Schools, the Lynn Police Department and the Essex County District Attorney's Office, also called the police. The juvenile was taken into custody and charged with possession of marijuana.

The juvenile filed a motion to suppress challenging the search of his person. At the hearing he introduced a copy of the memorandum of understanding between the Lynn Public Schools, the Lynn Police and the Essex County District Attorney's Office. This memorandum, in part, outlined a partnership between the three entities, forged for the purpose of coordinating a response to criminal/delinquent behavior. The memorandum also specifically contained an acknowledgement by the parties that school officials are not agents of the police and the police and Commonwealth are not agents of the school. The memorandum then concluded with a definition of mandatory and discretionary reportable acts, requiring that any contraband recovered from a student pursuant to a school search be turned over to the police.

The trial judge denied the juvenile's motion, finding that the school official was not acting as an agent of the police because the police had no input into the decision to search the juvenile and the memorandum simply memorialized the school's decision to enforce a zero tolerance policy with respect to criminal behavior. The judge also found that there was not probable cause to search the juvenile, but that the search was supported by reasonable suspicion based on the odor of marijuana. He concluded that since school searches need only be premised on reasonable suspicion, the search was lawful.

The juvenile's application for interlocutory relief was allowed and the matter was reported to the Appeals Court. The Supreme Judicial Court then transferred the matter on its own initiative from the Appeals Court. The Supreme Judicial Court found the juvenile's argument that the memorandum of understanding created an agency relationship between the school and police unpersuasive. The juvenile had likened the vice principal's action to those of a hospital in Ferguson v. Charleston, 532 U.S. 67 (2001), where the United States Supreme Court held that suspicionless drug tests performed on pregnant women to obtain evidence of a patient's criminal conduct for law enforcement purposes are unlawful, absent consent. The Court noted that the drug tests in Ferguson were not premised on probable cause or reasonable suspicion, and were conducted for the purpose of coercing the patients into drug treatment. In addition, the Court noted that there was police input at all levels of development and implementation of the plan, and the purpose was indistinguishable from a general interest in crime control.

The Court, relying on New Jersey v. T.L.O., 469 U.S. 325 (1985), concluded that the memorandum at issue in Lawrence L. only advises schools that principals have the discretion to search students if there is a reasonable basis for believing that the student is concealing contraband. This, according to the Court, is precisely what T.L.O. allows, and that a memorandum correctly describing the principal's authority to conduct searches does not transform the principal into an agent of the police, or the search to one undertaken at the instigation of the police. The Court echoed the Supreme Court's conclusion from T.L.O. that school officials have a particular interest in maintaining a safe learning environment and taking swift disciplinary action and found that unlike the drug tests in Ferguson, the terms of the memorandum were consistent with the school's unique responsibilities toward its students. The Court then held that there was no evidence that the police directed, controlled, or otherwise initiated or influenced the vice principal's search of the juvenile, or that the memorandum in any way elevated the vice principal's status to an agent of the police.

In assessing the reasonableness of the search, the Court pointed to several factors that when combined, provided probable cause to search. According to the Court, the facts that the juvenile reeked of marijuana at 1:00 p.m., that the vice principal knew the juvenile had been found with marijuana the month before, and that the juvenile, when asked, had replied that he doesn't smoke "here" anymore, when combined provided the vice principal with probable cause to believe that the juvenile had marijuana on his

person. The Court then concluded that since the search was justified by probable cause, there was no need to address the juvenile's claim that art. 14 requires more than mere reasonableness to justify a school search.

III. Fine Tuning Youthful Offender Practice Recent developments

A. Commonwealth v. Lamont L., 438 Mass. 842 (2003)

In Lamont L., the Supreme Judicial Court addressed the appropriate practice to be followed when a juvenile is either indicted inappropriately for a misdemeanor or is adjudicated a youthful offender on a misdemeanor. The juvenile had been indicted as a youthful offender on a charge of assault and battery by means of a dangerous weapon and on a separate charge of simple assault and battery. Counsel did not file a motion to dismiss prior to trial, but did, at the close of the Commonwealth's case, move for a required finding of not a youthful offender on both charges. The motion was denied and the juvenile was eventually adjudicated as a youthful offender on two counts of assault and battery, one as the lesser included of the assault and battery by means of a dangerous weapon. When the matter reached the Appeals Court, the Appeals Court held that the juvenile could not be convicted as a youthful offender on the assault and battery charges because they were misdemeanors, and not a crime for which if an adult, would be punished by imprisonment in the state prison as is required by the youthful offender statute. The Appeals Court then reversed the judgment on the assault and battery charge, set the verdict aside, and directed that an order enter dismissing the indictment. The Commonwealth then sought further appellate review regarding the specific issue of whether the order to dismiss the indictment was proper.

In reviewing the matter, the Supreme Judicial Court concluded that the proper remedy when a juvenile is adjudicated a youthful offender on a misdemeanor charge is for a delinquency finding to enter, rather than for the court to dismiss the indictment. The Court agreed that the juvenile should not have been indicted on the misdemeanor in the first place, but found that because the indictment properly stated an offense, and the juvenile had full notice of the offense against him, the inclusion of an additional, improperly brought indictment did not prejudice him. The Court noted that had the juvenile raised the issue by means of a motion to dismiss, the indictment would have been dismissed and the Commonwealth could have proceeded by way of delinquency complaint and simply joined that with the indictment for trial. The Court then analogized the situation to Quincy Q., 434 Mass. 859 (2001) and stated that since the jury found that the juvenile had committed an offense that would adjudicate him delinquent and not a youthful offender, a finding of delinquency should enter and he should be sentenced accordingly.

B. Commonwealth v. Lucret, 58 Mass. App. Ct. 624 (2003)

In Lucret, the Appeals Court addressed ramifications and potential range of sentencing

options available in the combination sentence provision of the youthful offender statute. The defendant, who after tendering a plea of guilty was adjudicated as a youthful offender, and had been committed to the Department of Youth Services (DYS) until his 21st birthday, with a two year house of correction sentence suspended for two years to run from and after the commitment to DHS. The defendant challenged the legality of his sentence after stipulating to a violation of probation when the judge committed him to DHS and ordered that he thereafter serve two years in the house of correction. The defendant's main arguments were 1) that the youthful offender statute is ambiguous and unconstitutionally vague; and 2) that the sentence he received was unlawful. The Appeals Court found that the legislative intent and statutory language underlying the sentencing scheme allowed for concurrent and/or consecutive sentencing, but did not specifically address the defendant's claim that the statute is ambiguous or unconstitutionally vague since it had not been raised below. The Appeals Court added that had it been compelled to do so the defendant's argument would have been defeated because the statute is "readily decipherable."

In reaching the conclusion that the combination sentence can run concurrently or consecutively to the DHS commitment, the Appeals Court interpreted the combination sentence provision as requiring an adult sentence to be suspended pending the successful completion of a term that includes the DHS commitment, but is not limited to the DHS commitment. The Appeals Court found that implicit in this sentencing scheme is the consequence that if the youthful offender fails to complete the DHS commitment successfully, as well as any additional probationary period, a court may impose the adult sentence. Alternatively, if the youthful offender completes the DHS commitment successfully, as well as any other suspended portion of the sentence, then the adult sentence is averted. The Appeals Court then determined that a combination sentence, though a single sentence, is really comprised of two distinct parts, and noted that the decision to impose concurrent or consecutive sentences is firmly rooted within the discretion of sentencing judges. The Appeals Court also drew support from canons of statutory interpretation, noting that had the legislature intended to limit the judge's authority with respect to whether a suspended adult sentence could run consecutive to the DHS commitment of the combination sentence or must run concurrent, the legislature would have specifically said so, as it has in other statutes.

IV. Collateral "Consequences" of Adjudications

A. Commonwealth v. Furr, 58 Mass. App. Ct. 155 (2003)

In Furr, the defendant was adjudicated a youthful offender in October of 2000 on indictments charging him with unlawful possession of a firearm, receiving a firearm with an altered serial number, attempted intimidation of a witness, and obstruction of justice. The defendant had previously been adjudicated a youthful offender on armed carjacking,

kidnapping and assault and battery charges in 1998, at the age of 14. In conjunction with the adjudications on the 2000 indictments, the Commonwealth sought the imposition of the enhanced penalties available where persons violate certain firearm laws and have previously been convicted of a violent crime or serious drug offense as defined in M.G.L. c. 269, §10G. The Appeals Court concluded that a prior adjudication as a youthful offender is a basis for invoking the enhanced penalties provision of G.L. c. 269, §10G, despite the fact that §10G specifically requires a person to have been *convicted of a violent crime* because the definition of a violent crime as defined in G.L. c. 140, §121 includes *acts of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for a term exceeding one year if committed by an adult*. The Appeals Court found that analysis of the italicized language in context communicated the legislature's unmistakable intent that adjudication of a juvenile as youthful offender is to be considered a conviction. The Appeals Court then drew further support from Commonwealth v. Connor C., 432 Mass. 635 (2000), which held that a prior adjudication of delinquency for possession of a firearm could be used as a predicate offense for purposes of invoking the repeat offender provision of that statute, and Commonwealth v. Valiton, 432 Mass. 647 (2000) which dealt with an adjudication for operating a motor vehicle under the influence of alcohol.

B. Commonwealth v. Olaf O., 57 Mass. App. Ct. 918 (2003)

In Olaf O., the fifteen year old juvenile was adjudicated delinquent of one count of statutory rape and two counts of indecent assault and battery. On appeal, the juvenile argued, among other things, that he was entitled to a jury of twelve, rather than six, due to the fact that he faced the possibility of "infamous punishment," because the adjudication will cause his name to be listed on the sex offender registry. The Appeals Court concluded that apart from the risk of registration, the prosecution did not involve the risk of infamous (capital or a state prison sentence) punishment, because it was tried as a juvenile case, with no authorized outcome more onerous than commitment to the Department of Youth Services until the age of eighteen. The Appeals Court further noted that the possibility of sex offender registration and community notification did not create exposure to infamous punishment because such notice is not punishment, but rather a collateral, regulatory measure.

V. The Near Death of Pre-Trial Probation

Commonwealth v. Cheney, 440 Mass. 568 (2003)

In Cheney, the Supreme Judicial Court considered the issue left open in Commonwealth v. Brandano, 359 Mass. 332, (1971), whether art. 30 permits a judge to impose a period of pre-trial probation without entering a finding or accepting a plea over the objection of the Commonwealth where it would serve the "interests of justice" to do so. The defendant, who had been indicted on four counts of statutory rape, had moved under G.L. c. 276, sec. 87 for

the trial court to place him on pre-trial probation for a period of six months. The Commonwealth objected to this disposition and requested that the indictments proceed to trial; or in the alternative, that the judge hold a hearing pursuant to Brandano prior to any dismissal of the matter. At the conclusion of the six months, the judge (Maria Lopez) held a Brandano hearing and made specific written findings supporting her conclusion that the interests of public justice required dismissal of the indictments. The Commonwealth appealed and the Supreme Judicial Court transferred the matter from the Appeals Court on its own initiative.

The Court's assessment of the matter began with its recognition that the statute that the defendant had been indicted under prohibited a judge from filing the matter or continuing the matter without a finding, just as in Tim T., 437 Mass. 592 (2002). The Court then characterized its holding in Tim T. as precluding a judge from disposing of an otherwise valid indictment under the same law by means of pre-trial probation and dismissal under Brandano, because it was inconsistent with the Legislature's intent in enacting that law. The Court then noted that it had held in Tim T. that such pre-trial probation could be used as a step leading to the disposition of a case in the Juvenile, District, or Municipal Court(s) when done in conjunction with the G.L. c. 278, sec 18, which requires a plea of guilt or admission to sufficient facts prior to such continuance and conditional dismissal, but only where permitted by law, and that Brandano was no longer available for that purpose.

The Court's analysis then shifted to whether Brandano can still be used in conjunction with pre-trial probation in Superior Court, where G.L. c. 278, sec. 18 does not apply. The Court reflected that the initial decision in Brandano dealt with how a judge could continue a case with out a finding and enter a dismissal over the Commonwealth's objection where the underlying statute (receipt of a stolen motor vehicle) did not permit that the matter be filed or disposed of by any means but trial and judgment unless a written motion, supported by an affidavit was filed and the judge then certified in writing that the interests of public justice require the allowance of the motion. The Court noted that in establishing this procedure, they had allowed that it might be permissible to use in prosecutions brought under other statutes, but had declined to decide whether or not it would be constitutional to do so. The Court then opted to reach the constitutional question and decided that it would be a violation of art. 30 of the Massachusetts Declaration of Rights for a judge to dismiss an otherwise legally adequate indictment, "in the interests of justice" over the objection of the Commonwealth prior to a verdict, finding or plea. The Court concluded to allow a judge to substitute his judgment as to whom or which crimes should be prosecuted over that of those who are constitutionally mandated to do so, and accountable to the public for doing so, would result in an unconstitutional incursion of the judiciary into powers reserved for the executive branch.

VI. Other Criminal Cases of Note

A. Institution of Criminal Process

1. Commonwealth v. Clerk-Magistrate of the West Roxbury Division of the

District Court, 439 Mass. 352 (2003) (where Court concluded that statute permitting show cause hearing does not authorize clerk magistrate to conduct a hearing prior to issuing a felony complaint, regardless of whether the suspect has been arrested)

2. Commonwealth v. Irick, 58 Mass. App. Ct. 129 (2003) (where Appeals Court held that failure by clerk magistrate to hold a hearing on a complaint which otherwise would have been entitled to a show cause hearing prior to issuance did not require dismissal of the complaint or preclude prosecution because the complaint was supported by probable cause and it was unlikely that the defendant would have been able to prevail at a hearing)

B. Bail Revocation Hearings

1. Commonwealth v. Paquette, 440 Mass. 121 (Court upheld constitutionality of bail revocation under G.L. c. 276, sec. 58, finding that the statutory provision was narrowly tailored to further a legitimate and compelling state interest and did not deprive defendant of substantive due process rights. Court then addressed procedural due process aspects and concluded that the defendant was entitled to a hearing, though not necessarily a full-blown evidentiary hearing, depending on the circumstances, where the applicable standard is probable cause to arrest, not probable cause to bind over for indictment)
- 2) Commonwealth v. Blasi, 440 Mass 1004 (judge's decision to revoke bail based on police report from defendant's new arrest for multiple counts of breaking and entering in the daytime, witness intimidation and malicious destruction of property, and his board of probation record in conjunction with a finding that no conditions of release would reasonably assure the safety of several specified members of the community did not violate the defendant's constitutional rights to due process)
- 3) Commonwealth v. Costa, 440 Mass. 1003 (judge's decision to revoke bail based on police report for defendant's new arrest for domestic assault and battery on same victim as prior arrest and board of probation record in conjunction with finding that no condition of release would assure the safety of complainant did not violate defendant's due process rights. Court also concluded that affidavit in support of Commonwealth's motion to revoke bail was unnecessary)

C. Search and Seizure and/or Suppression Decisions

1. Commonwealth v. Brinson, 440 Mass. 609 (2003) (Court held that evidence seized by police during inventory search of vehicle should have been suppressed because police had no authority to impound lawfully parked car where there was no evidence that the car posed a risk to public safety)

2. Commonwealth v. Pagan, 440 Mass. 62 (2003) (Court held that search of defendant's backpack during Terry stop without prior pat frisk of pack for weapons was lawful)
3. Commonwealth v. DeJesus, 439 Mass. 616 (2003) (Court held that authorization to secure dwelling while warrant is being obtained does not allow officers to enter the dwelling absent specific information that evidence supporting an objectively reasonable belief that evidence will indeed be removed or destroyed unless preventive measures are taken)
4. Commonwealth v. Molina, 439 Mass. 206 (2003)(where alleged assault occurred day before and police had discussion of case at the station before proceeding to defendant's apartment to effectuate arrest, no exigency existed to justify officers' failure to obtain a warrant)
5. Commonwealth v. Netto, 438 Mass. 686 (2003) (officers' warrantless searches a day apart of motel room justified initially as search incident to arrest because items seen before suspects handcuffed and removed from motel room though evidence seized after removal; search the next day was with lawful consent of motel manager)
6. Commonwealth v. Grant, 57 Mass. App. Ct. 334 (2003)(roadblock justified as emergency police effort to apprehend one or more fleeing suspects where police had no physical description, no information as to how many suspects, and no indication of the manner of flight because minimal intrusion upon the reduced privacy of drivers was outweighed by strong public interest)
7. Commonwealth v. Gomes, 59 Mass. App. Ct. 332 (2003)(absent the use of excessive or unnecessary force by the police, individual may not forcibly resist an unlawful entry into his residence by a person he knows or has good reason to believe is a police officer)
8. Commonwealth v. Dora, 57 Mass. App. Ct. 141 (2003)(defendant who did not have exclusive control of common area in apartment had no expectation of privacy in locked common areas of building)
9. Commonwealth v. Collins, 440 Mass. 475 (2003)(where Court held that suspect who had retained and consulted counsel prior to his arrest, and was not informed at the time of his arrest that counsel had told officers that he wished to be present at any interview of suspect, made valid waiver of Miranda rights)
10. Commonwealth v. LaFleur, 58 Mass. App. Ct. 546 (2003) (Miranda not necessary where police questioned defendant strapped to stretcher in

ambulance after he'd told EMTs that he'd had too much to drink because defendant not in custody)

11. Commonwealth v. Sylvia, 57 Mass. App. Ct. 66 (2003) (one-on-one identification not unduly suggestive where officer who engaged in two hand to hand sales within forty minutes shown two single booking photographs, one for each suspect and identified one as defendant, due to the detailed description the officer had provided and the need for immediacy so that other images would not crowd in the officer's mind)
12. Commonwealth v. Diemer, 57 Mass. App. Ct. 677 (2003) (where officers failed to alert a German citizen suspected of murder of his right under the Vienna Convention to have the consulate notified of his detention, the Appeals Court held that suppression of the defendant's statements was not the appropriate remedy, but then refused to decide whether the treaty creates individual rights or what an appropriate remedy would be, based on its finding that the defendant had suffered no prejudice)

D. Trial Issues – Evidentiary and Practical

1. Hearsay

- a. Commonwealth v. Moquette, 439 Mass. 697 (2003) (where Court held that a spontaneous utterance, by itself, is sufficient to support a conviction, and the fact that other evidence introduced at trial may controvert the facts alleged in the spontaneous utterance does not change the fact that the spontaneous utterance has been admitted as substantive evidence and that it is for the jury to decide its weight)
- b. Commonwealth v. Marrero, 60 Mass. App. Ct. 225 (2003) (admission of statement against penal interest limited to that specific portion of statement where declarant has incriminated himself)
- c. Commonwealth v. Johnson, 60 Mass. App. Ct. 243 (2003) (testimony of officer relating hearsay identifications of several persons went beyond the scope of what was permissible to show how the officer's attention became focused on the defendant and its admission constituted reversible error)

2. Witness Issues

- a. Commonwealth v. Barnes-Miller, 59 Mass. App. Ct. 832 (2003) (exercise of 5th amendment privilege not to incriminate herself in divorce action did not preclude alleged victim from testifying in trial of criminal complaint)
- b. Commonwealth v. Andujar, 57 Mass. App. Ct. 529 (2003) (court

concluded that judge improperly allowed the admission of officer's opinion of whether certain transactions preceding the drug transaction at issue in the case were street level narcotics transmissions because the prosecutor failed to use the language approved in Commonwealth v. Woods, 419 Mass. 366 (1995) and as such the officer's opinion of the defendant's guilt intruded impermissibly upon the jury's fact-finding function)

3. Prior/Subsequent Bad Acts

- a. Commonwealth v. Anderson, 439 Mass. 1007 (2003) (Court concluded that trial judge acted within his discretion when he found that defendant's past violent acts toward other women were insufficiently similar to murder allegations as well as too remote in time to demonstrate the defendant's state of mind at the time of the murder and that their prejudicial impact outweighed their probative value)
- b. Commonwealth v. Martin, 57 Mass. App. Ct. 272 (2003) **further appellate review granted** (Appeals Court held that officer's use of defendant's alias was not relevant to the crime charged and its admission without any curative instruction resulted in a substantial risk of a miscarriage of justice)

4. Evidentiary Issues in Sexual Assault Cases

- a. Commonwealth v. Freitas, 59 Mass. App. Ct. 903 (2003) (Appeals Court found that trial court properly admitted testimony regarding witness' reaction to fresh complaint where defendant placed credibility of witness at issue in his opening statement by suggesting that she had forced child victim to fabricate allegations based on her own anger toward defendant)
- b. Commonwealth v. Owens, 57 Mass. App. Ct. 538 (2003) (counsel's failure to renew motion in limine regarding details of sexual knowledge in DSS report and to bring to court's attention other information regarding victim's prior sexual abuse was ineffective and resulted in a substantial risk of a miscarriage of justice. Case remanded for an evidentiary hearing pursuant to Commonwealth v. Ruffen, 399 Mass. 811 (1987))

5. Elements and Defenses

- a. Commonwealth v. Prentice P., 57 Mass. App. Ct. 766 (2003) (defendant entitled to required finding of not guilty on charge of receiving a stolen motor vehicle where defendant merely observed kneeling next to car which was jacked up with its doors and trunk open and a tire and crowbar on the ground nearby because no evidence that defendant possessed car)

- b. Commonwealth v. Campbell, 60 Mass. App. Ct. 215 (2003) (passenger defendants entitled to required finding of not guilty on charge of receiving stolen motor vehicle where no evidence either ever drove car, or how long they'd been passengers, that either had keys, had any relationship to the driver, or any evidence that either knew the car was stolen. Driver was not entitled to required finding although evidence that he knew the car was stolen was improperly admitted because Commonwealth had shown that it could fill in evidentiary gap at retrial)
- c. Commonwealth v. McCourt, 438 Mass. 486 (2003) (where victim severely beaten by defendant after he raped her, court held that aggravating factors that transform rape into aggravated rape need not play a facilitating role in the rape, but instead may occur in its aftermath and affirmed defendant's conviction for aggravated rape)
- d. Commonwealth v. Mulvey, 57 Mass. App. Ct. 579 (2003) (defendant entitled to required finding of not guilty on charge of being a disorderly person where conduct alleged to be disorderly took place on private rather than public property)
- e. Commonwealth v. Quinn, 439 Mass. 492 (2003) (defendant charged with open and gross lewdness where he was alleged to have exposed his buttocks to a group of young girls while he was wearing a red thong did not have sufficient notice that such exposure would be unlawful. The Court then construed the statute as thereafter prohibiting the intentional exposure of genitalia, buttocks or female breast to one or more persons to produce alarm or shock and actually causing such alarm or shock)
- f. Commonwealth v. Boria, 440 Mass. 416 (2003) (defendant entitled to required finding of not guilty where officers executing search warrant found her sitting on floor watching television, cocaine in the VCR and various agents for processing cocaine in kitchen, but nothing on defendant's person, and only an AFDC application with the defendant's name and the apartment's address on it because there was nothing to link her to the cocaine or related paraphernalia seized)
- g. Commonwealth v. Charles, 57 Mass. App. Ct. 595 (2003) (judgments vacated because judge failed to instruct jury that to convict defendants as joint venturers jury must find that each defendant knew that the principal had a gun before the shooting occurred)

6. Practicalities

- a. Commonwealth v. Muckle, 59 Mass. App. Ct. 631 (2003) (outlines

protocol that must be followed when defendant disappears during trial)

- b. Commonwealth v. Mitchell, 438 Mass. 535 (2003) (where Court articulated standard for how trial attorney should proceed when s/he believes that the defendant intends to perjure himself)
- c. Commonwealth v. Hatch, 438 Mass. 618 (2003) (where Court clarified the scope of the hearing to be held when incompetent defendant seeks to offer a defense under G.L. c. 123, sec. 17 (b) to the charges pending against him in order to have the court dismiss the charges or indictments)

E. Violation of Probation Hearing Issues

1. Commonwealth v. Ortiz, 58 Mass. App. Ct. 904 (2003) (violation of probation should not have entered where only evidence was hearsay and judge made no findings with respect to the trustworthiness or reliability of the officer's testimony about the victim's allegations of domestic violence or any findings as to the existence of good cause for proceeding without the victim)
2. Commonwealth v. Hardiman, 57 Mass. App. Ct. 928 (2003) (conviction or later plea of guilt to crime that served basis of probation surrender precludes probationer from relitigating the issue in a revocation proceedings)

F. Post Conviction Issues

1. Commonwealth v. DeJesus, 440 Mass. App. Ct. 147 (2003) (where defendant had filed motion to revise and revoke sentence within the time allotted in Mass. R. Crim. P. 29, but had failed to attach affidavit with the specific grounds for the motion, the Court concluded that the motion was inadequate for purpose of Mass. R. Crim.P. 29 and not properly filed within the rule's time limit)
2. Commonwealth v. Jones, 60 Mass. App. Ct. 88 (2003) (Appeals Court concluded that in order for defendant make intelligent plea either the judge must explain the elements to the defendant, counsel must represent that s/he has explained to the elements to the defendant, or the defendant must make a stated admission to facts covering the elements during plea colloquy)