

DECISIONS OF NOTE: May 2006-APRIL 2007

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SEARCH AND SEIZURE

Comm v. Guthrie G, 66 Mass. App. Ct. 414 (2006): The Court found that a 14 year old who fled with a gun triggered the heightened safety concern and the limited public safety exception to Miranda. Officers in exigent circumstances were justified in questioning him about the gun. By fleeing with an unknown gun, the juvenile created an exigency; the police did not know whether the gun was loaded or had been disposed of in a public area. Once he admitted to possessing it, the Court concluded, the police were further justified in asking to see it and that the juvenile's consent to produce the gun was freely and voluntarily given. The officer was justified in following the juvenile to his bedroom by concerns for officer safety. The Court concluded that once the officers had secured the gun, they acted properly in discontinuing questioning until the juvenile's father came to the police station. The Court concluded that the juvenile had the opportunity to consult with an adult, but chose not to take advantage of it.

Judge Duffly's dissenting opinion argued that the juvenile's consent to produce the gun was not freely and voluntarily given, and that the opportunity to consult with his father at the police station was not meaningful. The dissent concluded that the public safety exception obviating the need for Miranda warnings was limited in this case to ascertaining whether the gun was in a public place. Once the police learned that the gun was not in a public place, they could have "taken the juvenile into custody, then conducted a sweep of the home and secured it while they obtained a search warrant." Once the police learned the gun was in the home, there was no longer any exigency supporting a public safety exception. Moreover, the juvenile posed no danger to the police officers until they asked him to produce the gun.

The dissent concluded that the Commonwealth did not meet its burden of proving that that the juvenile's response to officer's request to retrieve the gun was voluntarily and freely given. It also found that the juvenile was not given a meaningful opportunity to consult with an adult about the Miranda warnings at the police station and emphasizes that the opportunity to consult provides some assurance that the juvenile has access to a "supportive and knowledgeable adult who can advise him about the meaning of the rights under Miranda and the significance of waiving them."

Commonwealth v. Roland R., 48 Mass. 278 (2007). Court reversed allowance of juvenile's motion to suppress drugs seized from his bag after he refused to allow the bag to be searched as he entered the courthouse. Juvenile placed his bag on a table next to the X-ray machine and walked through the electronic metal detector. When the court officer told him that his bag was going to be searched manually, the juvenile stated that he did not want anyone to search his bag, picked it up and turned to leave. The court officer told a police officer, who approached the juvenile on the steps outside the courthouse, saying

“Hey, come here.” The juvenile then ran and was chased by several police officers.

The court found that the search was justified as a lawful administrative search for safety and security purposes. It determined that the juvenile was not entitled to withdraw his consent to search after the inspection had begun, at the time he became aware that a manual search of his bag would take place. Allowing the defendant to stop the search at will would undermine the deterrent effect of random searches and jeopardize courthouse safety.

Commonwealth v. Bettencourt, 447 Mass. 631 (2006). Commonwealth was not entitled to raise on appeal, for the first time, the argument that police were authorized to inquire into the defendant’s identity under the community caretaker function. Because there was no reasonable basis for further inquiry after the defendant passenger informed police that he did not have a driver’s license, continued questioning regarding his name and date of birth was impermissible and evidence obtained as a result was properly suppressed.

Commonwealth v. Bryant, 447 Mass. 494 (2006). As a law firm employee, defendant had no reasonable expectation of privacy in firm’s premises or its computer files and thus lacked standing to challenge the seizure files used as evidence to support convictions for conspiracy to commit larceny of insurance companies.

Commonwealth v. DePeiza, 66 Mass. App. Ct. 398 (2006), *review granted*, 447 Mass. 1105 (2006). Firearm and ammunition produced by pat frisk should have been suppressed where police lacked factual basis for a reasonable suspicion of criminal activity or a reasonable apprehension of danger. The Court concluded that defendant’s manner of walking with his arm rigid and pressed to his side was “by itself too idiosyncratic” to serve as the basis for a reasonable suspicion of criminal activity” and the defendant’s nervousness and avoiding eye contact when approached by two plainclothes officers late at night did not create a reasonable suspicion of criminal activity. Court found no objective factual basis existed for concluding that the defendant possessed a firearm, much less an unlicensed one. That the frisk took place in a high crime area was not enough to create a reasonable suspicion, especially where the police had no prior knowledge of the defendant.

Commonwealth v. Costa, 448 Mass. 510 (2007). Because the informant provided information to police knowing that her call was being recorded and that her phone number had been identified, her reliability should have been accorded greater weight than that of an anonymous caller even though she did not provide her name. Because the police were able to corroborate details provided by the caller, police had a reasonable basis on which to believe that the suspect was violating the law.

Commonwealth v. Dasilva, 66 Mass. App. Ct. 556 (2006). Anonymous tip, when combined with police corroboration, gave officers reasonable suspicion to stop the defendant when they observed him move his hand to his waistband upon seeing the officers and flee.

Commonwealth v. Toledo, 66 Mass. App. Ct. 688 (2006). Although the search warrant contained ambiguity regarding the address of location to be searched, probable cause to search was established by the details of the building described in the warrant and the executing officer's personal familiarity with the target location and the defendant's name.

Commonwealth v. Nestor N., 67 Mass. App. Ct. 225 (2006). A seizure occurred when the officer grabbed the defendant's hands as he reached toward his waistband, but probable cause existed for such a stop, in light of the defendant's suspicious behavior up to that point, the possibility that he was reaching for a weapon, and the potential threat to the officer in a high crime area, late at night.

Commonwealth v. Rivera, 67 Mass. App. Ct. 362 (2006). Police officer's instruction to defendant to exit his vehicle was supported by reasonable suspicion where the defendant's extreme nervousness in response to ordinary traffic stop—hands shaking “violently” and answers to routine questions nearly inaudible—together with the officer's observation of a police baton in plain view were sufficient gave rise to a reasonable suspicion of danger.

Commonwealth v. Rodriguez, 67 Mass. App. Ct. 636 (2006), *review granted* 448 Mass. 1101 (2006). No reasonable expectation of privacy where the defendant had never previously visited the informant's home, had stopped at the home only briefly to pick up a package, and the defendant and informant were neither close business associates nor close friends. As a result, warrantless electronic surveillance between the defendant and a police informant inside the informant's home was not protected.

Commonwealth v. Quezada, 67 Mass. App. Ct. 693 (2006); *review granted*, 448 Mass. 1102 (2007). Community caretaking exception did not apply where the defendant turning and running away in response to police officer gesturing to him and asking if he could speak to him was a nonverbal response to the police that he was not in need of assistance.

Commonwealth v. Thomas, 67 Mass. App. Ct. 738 (2006). Defendant's request to officers to lock the apartment as he was being led out of his house on an arrest for domestic charges could not reasonably be understood to include opening the doors in his bedroom where a gun was found. The officers' search of the bedroom and dresser drawers exceeded the scope of any arguably implied consent created by his request to lock the front door.

Commonwealth v. Lites, 67 Mass. App. Ct. 815 (2006). Police had probable cause to arrest defendant where he was a passenger in a car that emitted a strong odor of marijuana and, when approached by officers, his hands moved furtively about his waistband.

Commonwealth v. King, et al., 67 Mass. App. Ct. 823 (2006). No probable cause existed to search vehicle where the officer's only basis for warrantless search was the “observation of a piece of green, leafy vegetable matter” on the driver's seat.

Commonwealth v. Kirschner, 67 Mass. App. Ct. 836 (2006). No exception to the warrant requirement under either 'emergency' or 'exigent circumstances' doctrine permitted officers to enter curtilage of the home to ensure that the 'unwanted guests' who allegedly set off the fireworks, in fact, left the home, as the resident claimed.

Commonwealth v. Wallace, 67 Mass. App. Ct. 901 (2006). Police did not exceed the scope of the warrant where the attic found on the premises was determined to be "functionally part of the second-floor apartment" for which the warrant was issued.

Commonwealth v. McDermott, 2007 WL 1080416. Warrantless search of defendant's home following a multiple homicide at his work was justified under the exigency exception, since the defendant's identity as the perpetrator was not in question and the officers were concerned that additional victims might be found at the home.

Commonwealth v. Brown, 68 Mass. App. Ct. 261 (2007). Affidavit supporting search warrant did not provide probable cause to search "any person present" in apartment where affidavit described two drug transactions outside of apartment, and there was no suggestion that all persons found in the apartment were implicated in illegal activity; search warrant, which did not name any person to be searched, did not satisfy particularity requirement, and was therefore not a lawful basis for search of defendant.

Commonwealth v. Gaylaro, 68 Mass. App. Ct. 906 (2007). Where police officer had an objectively reasonable basis for believing that the safety of an individual or the public was jeopardized, he acted properly within his community-caretaking role in conducting a well-being check that led to defendant's arrest for operating a motor vehicle under the influence of alcohol.

Commonwealth v. Perez, 68 Mass. App. Ct. 282 (2007). Probable cause existed for "any person present" search warrant when premises was a private, single-family dwelling and large numbers of persons were observed entering home for only short time periods, to include the defendant, who arrived at the premises during a police search and shared a similar relationship with the premises.

Commonwealth v. Considine, 448 Mass. 295, (2007). Fourth Amendment and Massachusetts Constitution did not apply to require suppression of evidence seized by officials of private school and hotel security acting in a private capacity. Search and seizure by police was permissible because school officials with control of hotel room gave consent.

Commonwealth v. Pierce, 66 Mass. App. Ct. 283 (2006). Police station intercom was an office intercommunication system used in the ordinary course of business, and thus fell within one of the state wiretap statute's enumerated exceptions from general prohibition on interception of oral communication.

Commonwealth v. Zorn, 66 Mass. App. Ct. 228 (2006). The affidavit supporting search

warrant for defendant's home contained totem pole evidence that was sufficiently reliable to establish probable for search; the first link in the chain of hearsay was the alleged victim who based statements on personal experience and who was known to police, and all other members of the chain based their knowledge on victim's statements.

Commonwealth v. Bly, 448 Mass. 473 (2007). No error in the denial of incarcerated defendant's motion to suppress physical evidence he abandoned during a voluntary meeting with police because no search or seizure occurred. The meeting was ostensibly held to ask defendant to provide a blood sample to the police, which he declined to do. Police provided defendant with a pack of cigarettes, a clean ash tray, and a water bottle, and later collected DNA samples from three cigarettes and the water bottle. The defendant did not manifest a subjective expectation of privacy in these items because he did not attempt to take them with him, even when prompted, and he did not return to protest or collect the items after the meeting, when the police waited one half hour.

Commonwealth v. Dillon D., 2007 WL 1098210. Failure to administer Miranda warnings in presence of an interested adult did not warrant suppression of evidence because the 13-year-old defendant's possession of more than 50 bullets was enough to support the inference that a gun was in close proximity and to invoke the public safety exception to the requisite Miranda warnings.

MIRANDA WARNINGS AND THE RIGHT TO COUNSEL

Commonwealth v. Kirwan, 448 Mass. 304 (2007). Interrogation by police was not "custodial" and did not require Miranda reading where police officer was invited into defendant's father's apartment where defendant lived, posed questions in an investigatory and non-aggressive manner in the father's presence, and acquiesced in defendant's decision not to respond to further questions.

Commonwealth v. Jackson, 447 Mass. 603 (2006). Trial court's finding that confession was voluntary was not 'clearly erroneous,' in spite of the defendant's three-day confinement prior to presentment and the failure to obtain and administer the psychiatric medications prescribed for him by a physician during his period of confinement and prior to the confession.

Commonwealth v. Murphy, 448 Mass. 452 (2007). Defendant's right to counsel was violated by the admission of post-indictment statements to a jailhouse informant who deliberately elicited statements from the defendant and who was a state agent because he received a specific benefit from an articulated agreement with the government, even if he was not directed to the defendant specifically.

Commonwealth v. Anderson, 448 Mass. 548 (2007). Statements that defendant made to police in absence of counsel after he was indicted by a grand jury were admissible where the defendant initiated the conversation and was informed of his Miranda rights, as well as the fact that assigned counsel asked that he not be questioned without counsel present.

Commonwealth v. Ferrer, 68 Mass. App. Ct. 544 (2007). Defendant's pre-Miranda statements at booking for trespassing arrest were initiated by the defendant spontaneously and voluntarily, and the officer's response was not reasonably likely to elicit the incriminating remarks that led to possession of firearm charge.

IDENTIFICATION

Commonwealth v. Martin, 447 Mass. 274 (2006). Show-up, one-on-one identification of defendant by 16-year-old complainant five days after the assault was not unnecessarily suggestive because police had "good reason" for using the procedure because they had insufficient evidence to compel the defendant to participate in a line-up or subject himself to photographing. The Court states that it is following the "good reason" to justify a show-up test set out in Commonwealth v. Austin, 421 Mass. 357 (1995) but rejects the proposition that showups take place only if necessary.

Justice Cordy's dissent, which was joined by Chief Justice Marshall and Justice Ireland, states that the majority's reasoning erodes the test articulated in Commonwealth v. Johnson, 420 Mass. 458 (1995). It objects to the majority's argument that the show-up was justified because of the lack of evidence allowing the police to take the defendant's photograph or compel his participation in a line-up, stating: "If there is no good reason to hold a showup, such a procedure is unnecessary. If an inherently suggestive procedure is unnecessary, it is unnecessarily suggestive" (at 301).

FIFTH AMENDMENT

Commonwealth v. Ewing, 67 Mass. App. Ct. 531 (2006), *review granted* 447 Mass. 1113 (2006). Prosecutor's cross-examination of the defendant asking him if he reviewed discovery before trial improperly invited inference that he conformed his testimony to fit the evidence. Prosecutor's closing argument also improperly urged the jury to discredit the defendant's testimony because he did not seek out police and give his exculpatory version.

Commonwealth v. Labelle, 67 Mass. App. Ct. 698 (2006). A defendant who makes himself 'unavailable' at trial by invoking his rights against self-incrimination under the Fifth Amendment is not entitled to have his grand jury testimony admitted under an exception to the rule against hearsay.

EXPERT TESTIMONY

Commonwealth v. Grissett, 66 Mass. App. Ct. 454 (2006). Judge abused discretion by permitting the testimony of Commonwealth's expert witness on subject of drug quantities obtained in arrest of defendant when it was "laced with improper opinions that could be understood by the jury as a direct comment as to guilt."

Commonwealth v. Robinson, 2007 Mass. LEXIS 269. Judge did not abuse discretion in refusing to admit expert testimony on police interrogations and confessions where the proposed testimony that certain interrogation techniques have previously produced false confessions did not meet either the general acceptance or reliability criteria established under Lanigan.

PLEAS

Commonwealth v. Simmons, 448 Mass. 687 (2007). Removing an indictment from file five years after guilty plea did not violate substantive due process or right of the defendant to a speedy trial, but sentencing judge created a substantial risk for the miscarriage of justice by failing to consider the original sentencing scheme.

Commonwealth v. Berrios, 447 Mass. 701 (2006). The defendant, claiming that he had no choice but to plead guilty due to pressure from his family, failed to show that his plea was involuntary.

Commonwealth v. Hoyle, 67 Mass. App. Ct. 10 (2006). Defendant's attempt to withdraw his plea after 15 years, and only because of its effect as a federal sentencing enhancement, demonstrated his satisfaction with the plea and failed to show that a plea colloquy would have made a difference in his decision.

Commonwealth v. Barreiro, 67 Mass. App. Ct. 25 (2006). Defendant's motion to withdraw guilty plea need only be granted to the extent that the threat of immigration consequences as a result of the conviction had become real.

Commonwealth v. Hiskin, 68 Mass. App. Ct. 633 (2007). Court ruled that absent "objective indicia" or "credible extrinsic proof," defendant's sworn statements at plea colloquy were sufficient evidence that plea was made knowingly and voluntarily and could not later be ignored on basis of assertions of coercion in motion for new trial.

IMMIGRATION

Lopez v. Gonzales, 127 S.Ct. 625 (2006). Court found that a noncitizen is not subject to deportation for a drug crime that, while a felony in the state where the crime was prosecuted, is only a misdemeanor under federal law.

Commonwealth v. Casimir, 68 Mass. App. Ct. 257 (2007). Defendant was not entitled to withdraw a guilty plea based on trial court's failure to give him immigration warning; his claim was not ripe because he failed to show that immigration proceedings had been initiated against him or naturalization had been denied due to his conviction.

SEXUALLY DANGEROUS PERSON

Commonwealth v. Gillis, Jr., 448 Mass. 354 (2007). Defendants, who had completed

their sentences and faced no pending charges when commitment procedures commenced, were not "prisoners" in the ordinary sense of the word, and thus not within the class of persons for whom the Sexually Dangerous Persons statute authorizes commitment.

TRIAL MATTERS

Commonwealth v. Matis, 446 Mass. 632 (2006). Judge had authority to allow defendant's motion to order access to a crime scene in a private residence because information obtainable at the scene was relevant to the defense, but the owner of the residence should be served with notice of the motion and have an opportunity to be heard.

Commonwealth v. Clark, 446 Mass. 62 (2006). Defendant entitled to a new trial because judge failed to seek clarification of potential juror's answers, which raised concerns about potential racial prejudice.

Commonwealth v. Pring-Wilson, 448 Mass. 718 (2007). Trial judge did not abuse discretion in granting new trial where the original trial was governed by pre-Adjutant rules on self-defense evidence, which barred the defendant from admitting prior bad act evidence of the victim who was unknown to him at the time of the crime. Although Adjutant—which gives trial judges discretion in self-defense cases to admit prior bad act evidence of the victim for purposes of illuminating the identity of the first aggressor—applies prospectively, the defendant's conviction was not yet final when the case was decided. It could not be said that "no conscientious judge, acting intelligently" could have concluded, as the trial judge did, that the integrity of the verdict in the first trial was suspect because the jury did not have the benefit of relevant evidence critical to the issue of whether the defendant acted in self-defense.

Commonwealth v. Urban, 67 Mass. App. Ct. 301 (2006). Rape conviction reversed when trial judge erroneously gave an instruction that the alleged victim could not have consented to the sexual encounter simply because she was drunk.

Commonwealth v. McKay, 67 Mass. App. Ct. 396 (2006). Defendant was entitled to a jury instruction on his defense theory of mistake or accident when he had called former fiancée and left a message on her answering machine, in violation of a 'no contact' order. Defendant argued the violation was inadvertent, since he believed he was placing a call to an acquaintance with the same first name, listed next to the fiancée in his speed dial list.

Commonwealth v. Miller, 2007 Mass. App. LEXIS 495. Court reversed conviction, finding that the trial judge should have conducted an evidentiary hearing outside the jury's presence to determine whether the defendant's confession was voluntary, even when the confession was obtained by private investigators and not government law enforcement.

ADMISSIBILITY OF TESTIMONY

Commonwealth v. Galicia, 447 Mass. 737 (2006). Statements made by the victim to the 911 dispatcher that her husband was beating her were properly admitted as excited utterances because the statements identified an exigent circumstance and provided law enforcement with the information necessary to assess the current level of dangerousness of the situation. Victim's statements to the police when the emergency had passed were improperly admitted but harmless beyond a reasonable doubt.

Commonwealth v. DeOliveira, 447 Mass. 56 (2006). Statements by a six-year-old child to an emergency room doctor disclosing that she had been anally raped were made for purposes of medical evaluation and treatment, were not "testimonial," and were therefore admissible.

Commonwealth v. Weichell, 446 Mass. 785 (2006). Confessions of defendant's alleged accomplice were not admissible as statements against penal interest because alleged confessions lacked trustworthiness and were not sufficiently corroborated.

Commonwealth v. Connors, 447 Mass. 313 (2006). At SDP hearing, defendant who refused to submit to interviews with court-appointed psychiatrists was not permitted to offer his own expert testimony based on personal interviews because to do so would offend basic notions of fairness.

Commonwealth v. Hall, 66 Mass. App. Ct. 390 (2006). Victim's testimony about defendant's statements to her regarding his use of this man to 'take care of' those who caused him trouble was admissible because it was offered not to prove the defendant had committed the rape, but as evidence of explanation of the victim's fear of going to the police.

Commonwealth v. Leneski, 66 Mass. App. Ct. 291 (2006). Court concluded that videotapes, like photographs, are not subject to the best evidence rule, and that a CD containing surveillance footage of the defendant was sufficiently authenticated to be admissible as evidence.

PRIVILEGE

In the Matter of a Grand Jury Subpoena, 447 Mass. 88 (2006) Spousal privilege set forth in G.L. c. 233, sec. 20, applies only to trial testimony and not grand jury proceedings.

SUFFICIENCY OF EVIDENCE

Commonwealth v. Davidson, 68 Mass. App. Ct. 72 (2007). Defendant's conduct in inducing a child to touch his penis with her hand and nose constituted battery under indecent assault and battery on a child under the age of fourteen statute even though the defendant did not commit the touching himself.

Commonwealth v. Clark, 446 Mass. 62 (2006). In order to prosecute the charge of

providing a false name, the Commonwealth is not required to prove what a person's "true" name is, only that the name was given to police "for a dishonest purpose."

Commonwealth v. Cahill, 446 Mass. 778 (2006). Evidence that defendant's behavior toward victim was offensive and disorderly was sufficient to support a conviction for accosting or annoying a person of the opposite sex, when defendant grabbed victim from behind in a way that had sexual overtones in the context of his words and other actions.

Commonwealth v. Carlson, 447 Mass. 79 (2006). Victim's decision to be taken off ventilator did not break the chain of causation to relieve defendant of criminal responsibility for victim's death.

Commonwealth v. Namey, 67 Mass. App. Ct. 94 (2006). Evidence of popped ignition, damage to passenger side of the car, and disguises was enough for a reasonable jury to find that the defendant knew the vehicle he occupied was stolen and that he had sufficient dominion and control.

Commonwealth v. Drew, 67 Mass. App. Ct. 261 (2006). Evidence that the defendant continued to beat the victim with a baseball bat, after he had been left unconscious and as his head moved closer and closer to a space heater was sufficient to prove a specific intent to maim or disfigure.

Commonwealth v. Tanner, 66 Mass. App. Ct. 432 (2006). Though not overwhelming, the evidence that the defendant distributed cocaine in a school zone was legally sufficient when police witnessed the defendant conversing closely with another individual in an area known for drug sales and looking as though he were displaying something. They later saw him "surreptitiously" counting money.

Commonwealth v. Gonzalez, 68 Mass. App. Ct. 620 (2007). Court reverses conviction of possession of firearm without a license due to insufficient evidence, stating that no evidence of the weapon's dimensions was presented at trial, only that the weapon used was a shotgun or rifle.

Commonwealth v. Frongillo (No. 1), 66 Mass. App. Ct. 677 (2006). Evidence was sufficient to support an inference that the defendant either lived in or spent a great deal of time at his fiancée's apartment so as to show defendant's knowledge and ability to control the firearm found in a closet, but insufficient to establish the requisite intent to do so.

Commonwealth v. Militello, 66 Mass. App. Ct. 325 (2006). Evidence was insufficient to support the defendant's conviction for disseminating matter harmful to minors when prosecutor did not introduce Playboy magazine into evidence, and nothing in minors' testimony suggested that photographs shown to them depicted sexual conduct in any way; evidence was insufficient to support open and gross lewdness conviction where minors' emotional reactions fell short of the serious negative emotional experience required by statute.

Commonwealth v. Morrill, Evidence was sufficient to support the defendant's conviction for committing an unnatural and lascivious act where a prisoner performed oral sex on the defendant in a courthouse holding cell and basement. The court found that the second-floor holding cell and the basement hallway were both public places for the purposes of G. L. c. 272, § 35, where there was sufficient evidence that at the time of the sexual acts, the defendant recklessly disregarded a substantial risk of disclosure to others.

Commonwealth v. Ramirez, 2007 Mass. App. LEXIS 510. Court reversed conviction for failing to register as a sex offender because the Commonwealth failed to introduce sufficient evidence to prove that the defendant's failure to register was knowing at the time of his arrest; no evidence was introduced to show that the defendant received notice of the registration requirement at the time of his arrest. The Court also reversed the conviction for accosting or annoying a person of the other sex, where the evidence failed to show that the defendant's actions or words created a physically offensive condition as required, where the defendant offered to buy the complainant candy and sang a song about falling in love with a little girl, but did not attempt to come near her, restrict her movement or otherwise create a physical offense.

DNA TESTING

Commonwealth v. Draheim, 447 Mass. 113 (2006). State can compel DNA samples from someone who is not a suspect in a criminal investigation. Married defendant charged with raping two teenage boys and had a child by each of the alleged victims. Prosecutors sought saliva samples from the two children, the two complainants and the defendant. Court found that the state had the right to compel the DNA samples because the Commonwealth satisfied its burden to compel the defendant, the complainants, and the defendant's children to submit saliva samples by establishing probable cause to believe the defendant committed a crime and that the sample sought would provide evidence relevant to the defendant's guilt. The court remanded the case, stating that the lower court judge should also consider the seriousness of the crime, the importance of the evidence and the unavailability of less intrusive means of obtaining it.

CONSTITUTIONALITY OF STATUTES

Commonwealth v. Maloney, 447 Mass. 577 (2006). Upheld amendments made by §6A of Melanie's Law, 2005 Mass. Acts, c. 122, regarding proof of prior drunk driving convictions, finding that the provisions do not violate the ex post facto, due process or confrontation clauses. The Court also found that §6A did not alter the legal rules of evidence and that introduction of documentary evidence under this section was sufficient to sustain a finding of a prior conviction when it demonstrates, through corroborating identifying information, that the defendant is the same person as that named in the prior conviction.

Commonwealth v. Abramms, 66 Mass. App. Ct. 576 (2006). Statute ascribing criminal penalties for failure to obey a police officer's order to disperse from an unlawful assembly was not unconstitutionally vague or overbroad and did not constitute a facial violation of the constitutional guarantee of freedom of assembly.

Suliveres v. Commonwealth, 2007 Mass. LEXIS 279. Court found that fraudulently obtaining consent to sexual intercourse does not constitute rape when the complainant mistakenly believed she was having sex with her boyfriend instead of the defendant, who was the brother of her boyfriend.

DISCOVERY ISSUES

Commonwealth v. Laguer, 448 Mass. 585 (2007). The defendant was not entitled to new trial based on prosecutor's failure to produce a fingerprint report where he was aware at trial that the fingerprint found on the telephone was not his and that there was no basis for assuming the other fingerprints would have identified a third party suspect. He did not meet his burden of showing that the Commonwealth withheld exculpatory evidence.

AVAILABLE DEFENSES

Commonwealth v. Ogden O., WL 1098204 (2007). Court found that the Commonwealth satisfied its burden of proving that the juvenile acted with specific intent in committing mayhem and was not obligated to present evidence to rebut a purported common-law presumption of incapacity based on youth. Defense counsel was not ineffective for failing to raise the issue of lack of capacity or obtaining a psychological examination to determine whether the juvenile understood the consequences of his actions. Because the Commonwealth already affords juveniles greater protections than those afforded adults in the traditional criminal justice system, a defense of incapacity based on youth, "to the extent it ever existed in the Commonwealth" has been rendered inapplicable to current juvenile proceedings.

SENTENCING

Commonwealth v. Simmons, 448 Mass. 687 (2007). Removing an indictment from file five years after guilty plea did not violate substantive due process or right of the defendant to a speedy trial, but sentencing judge created a substantial risk for the miscarriage of justice by failing to consider the original sentencing scheme. Noting that Massachusetts is the only state that still places indictments on file, as well as the merits of doing so, the court also spoke to "the necessity of colloquy confirming consent and enunciating express expectations of good behavior."

POST-CONVICTION MOTIONS

Commonwealth v. Butler, WL 1080415 (2007). Ten years and eight months delay between filing of original complaint to commencement of trial “required scrutiny,” but did not amount to a denial of due process or a Rule 36 violation because prosecutor acted with reasonable diligence and could only be deemed responsible for 310 days of the total period of delay.

Commonwealth v. Barboza, 68 Mass. App. Ct. 180 (2007). Defendant established "good cause" for failing to timely file notice of appeal, when counsel had timely mailed but failed to verify receipt and filing of notice by clerk.

Commonwealth v. Trussell, 68 Mass. App. Ct. 452 (2007). Because the defendant's motion papers suggest that failure to file a timely appeal resulted from an act or omission of counsel to which the defendant did not assent, knowingly or otherwise, defendant's appeal should be allowed to proceed.

Commonwealth v. Zinser, 446 Mass. 807 (2006). Defendant properly raised claim that counsel provided ineffective assistance -- by failing to adequately investigate the possibility that defendant suffered from a mental illness or impairment at the time of the offenses-- in post-appeal motion for new trial, rather than on direct appeal, because the claim required consideration of new facts.

INEFFECTIVE ASSISTANCE OF COUNSEL

Commonwealth v. Hudson, 446 Mass. 709 (2006). Trial counsel’s tactical decision not to impeach witness with affidavit recanting recorded testimony was not manifestly unreasonable when rebuttal evidence might have shown that the affidavit was produced under duress and was false. Counsel's failure to timely notify Commonwealth of a proposed alibi witness, resulting in the exclusion of alibi testimony, fell measurably below that which is expected from an ordinary fallible lawyer, but did not result in deprivation of a substantial defense.

Commonwealth v. Berry, 68 Mass. App. Ct. 78 (2007). Neither trial counsel’s failure to object to prosecutor’s unsupported statement in closing nor his causing three witnesses to sign “identical, sloppy” affidavits deprived defendant of a substantial defense such as to amount to ineffective assistance of counsel.

Commonwealth v. Williams, 68 Mass. App. Ct. 287 (2007). Where trial counsel and motion counsel were both CPCS lawyers, defendant who did not advance ineffective assistance in motion for new trial did not waive the issue on direct appeal.

Commonwealth v. Brazie, 66 Mass. App. Ct. 315 (2006). Rape conviction reversed where defendant was denied constitutional right to confront witness after complainant became upset during direct examination, did not continue, and was not cross-examined. Defense counsel’s failure to address the effects of the uncross-examined testimony, including failing to move to strike witness’s testimony, was “manifestly unreasonable” and constituted ineffective assistance of counsel.

