

Case Law Update – Juvenile Delinquency and Youthful Offender Law¹

Wendy Wolf, Esq.

Youth Advocacy Project/Juvenile Defense Network/Committee for Public Counsel Services

DYS Extension Statute Unconstitutional

Kenniston v. Department of Youth Services
453 Mass. 179 (2009)

This case involved three individuals, in three separate counties, who were committed to the Department of Youth Services (DYS) as delinquent children to age eighteen. Prior to each of the juveniles discharge from DHS, DHS filed an application and order for extension of commitment, pursuant to Mass. Gen law c. 120 §17. Each defendant filed motions to dismiss on the grounds that the statutes allowing for DHS extension of commitment violates procedural and substantive due process requirements under the United States Constitution and the Massachusetts Declaration of Rights. All three cases were joined and the SJC agreed that the extension statute is unconstitutional.

Mass. Gen law c. 120 §17² provides that juveniles committed to DHS to age 18 can have their commitment extended to age 21 if DHS is of the opinion that the discharged of the juvenile would be “physically dangerous to the public.” If DHS seeks to extend the commitment they must file a complaint in the court in which the juvenile was originally committed.

The SJC found that the statute does not comport with substantive due process requirements and is unconstitutional since, among other things it “fails to establish or require any link between a youth's alleged dangerousness and a mental condition or defect making the youth incapable of controlling his or her behavior, and fails to provide any standard for what constitutes dangerousness.” Additionally, the statute allows for youth to be held in DHS with out any new charges and with no prerequisite new charge.

¹The cases in this section cases originated in the juvenile court. Cases in the criminal law section apply to delinquency and youthful offender cases.

² “Whenever the department is of the opinion that discharge of a person from its control at the age limit stated in section sixteen would be physically dangerous to the public, the department shall make an order directing that the person remain subject to its control beyond the period and shall make application to the committing court for a review of that order by the court. The order and application may be made at any time prior to the date of discharge stated in said section sixteen. The application shall be accompanied by a written statement of the facts upon which the department bases its opinion that discharge from its control at the time stated would be physically dangerous to the public, but no such application shall be dismissed nor shall the order be discharged, merely because of its form or an asserted insufficiency of its allegations; every order shall be reviewed upon its merits.”

Miranda – Foster Parent is Interested Adult

Commonwealth v. Escalera

70 Mass. App. Ct. 729 (2007), *fur. app. rev. den.* 450 Mass.1107 (2008)

The appeals court held that the foster parent of a fifteen year old juvenile can qualify as an “interested adult” for *Miranda* purposes as long as the foster parent “has a relationship with the juvenile and is sufficiently interested in the juvenile’s welfare to afford the juvenile appropriate protections.” In *Escalera* the juvenile was at a foster home for six months prior to him being questioned by police. The juvenile was interrogated by the police and his foster mother was present prior to and during the questioning. The interrogation was audiotaped. *Miranda* warnings were read to the juvenile in the presence of the foster mother, and both the juvenile and foster mother signed a *Miranda* waiver form. The juvenile and foster mother consulted privately before the interrogation.

The appeals court dismissed the juveniles’ argument that a foster parent acts as an instrument of the state (Department of Social Services, now Department of Children and Families) and therefore has a conflicting interest. The court cited to a number of Massachusetts Regulations (CMR) to support its finding that a foster parent is not an agent of the Department. For example, the court stated that foster parents provide care and protection; they do not rehabilitate, treat or detain children. The juvenile argued that the foster parent could not act as an “interested adult” since Department regulations state that the Department can not consent to a child being interviewed by police. The appeals court disagreed because “foster parents” do not fall within the definition of the “Department” in the CMR. Furthermore, the court stated that foster parents provide care to children and therefore fit within the function of an “interested adult.”

Search and Seizure – Pat Frisk

Commonwealth v. Isaiah I.

450 Mass. 818 (2008)

The SJC reversed the allowance of the juvenile’s motion to suppress evidence (gun). This case was remanded twice due to the motions judge’s inadequate findings of fact and legal conclusions.

Three police officers were investigating a string of armed robberies and purse snatching which they believed were committed by black or Hispanic young adults between the ages of fourteen and twenty. The officers observed the juvenile peering through the front window of a store and observed another black male in the area of the store. There were no reports of any crimes occurring at this location on the day of the juvenile’s arrest. The officers observed the juvenile “manipulating” something in his right front pants pocket. One officer came to the conclusion that the juvenile was about to rob the store and all the officers

decided to stop the juvenile. As one officer approached the juvenile, the juvenile “quickly” walked into the store. The officer followed the juvenile and observed him go down an aisle to the rear of the store, bend down toward his right foot, and appeared to place something in his right sock. As the officer approached, the juvenile stood up and reached for a bag of “Cheetos.” The juvenile was ordered not to move and the officer found a gun in the juvenile’s sock.

In allowing the motion to suppress, the motion judge concluded that the juvenile was stopped when the officers decided to follow him and that the pat frisk was unjustified since the officer was not in danger.

In reversing the allowance of the motion to suppress, the SJC found that the juvenile was not seized when the police decided to stop him. The intent on the part of the officers was not communicated to the juvenile therefore there was “no impact on whether the juvenile felt free to leave.” *Id.* at 822. Furthermore, the juvenile was not seized when he was followed into the store. “Pursuit by the police becomes a seizure when it would communicate[] to the reasonable person an attempt to capture or otherwise intrude on [an individual’s] freedom of movement.’ *Id.*, quoting *Commonwealth v. Watson*, 430 Mass. 725, 731 (2000), quoting *Commonwealth v. Williams*, 422 Mass. 111, 116, (1996). When police only follow and observe someone it does not constitute a “pursuit.” However, the juvenile was seized when the officer ordered him not to move since a reasonable person would have believed he was not free to leave. The SJC found that this action by the police was justified based on the events the officers observed outside the store (peering into the store, manipulating something in his pocket) and his attempt to conceal something in his sock. “An officer does not have to exclude all the possible innocent explanations for the facts in order to form a reasonable suspicion.” *Id.* at 823. Additionally, it was not necessary for the officer to testify that he feared for his or the public’s safety since the officer could reasonable infer that the juvenile had a weapon and was therefore dangerous.

Search and Seizure – Warrantless Search of Room in Shelter

*Commonwealth v. Porter P*³.
73 Mass. App. Ct. 85 (2008)

The appeals reversed the allowance of the juvenile’s motion to suppress evidence (warrantless search of gun).

The juvenile and his mother were living in a room in a highly regulated temporary housing shelter for homeless families. The juvenile and his mother were referred to the shelter by the Department of Transitional Assistance, which also paid their rent. Prior to becoming residents of the shelter, the juvenile and his mother went through an intake process where the rules of the shelter were explained. The rules included, *inter alia*, a zero tolerance policy for weapons, entry by shelter

³ SJC has allowed further appellate review in this case.

staff into the resident's rooms, random room checks and inspections at any time and without warning.

The Director of the shelter was told that the juvenile had a gun. The Director contacted the police and they entered the room using a master key, the juvenile was the only person in the room. The juvenile was told why the Director and the police were there and a gun was found under a duffle bag in a closet. After the juvenile was arrested he spontaneously stated that the gun had "no bodies on it" and that it was "clean."

The juvenile bears the burden of establishing whether there was an expectation of privacy in the shelter room. The juvenile must show "(1) whether the defendant has manifested a subjective expectation of privacy in the object of the search, and (2) whether society is willing to recognize that expectation as reasonable." *Commonwealth v. Montanez*, 410 Mass. 290, 301(1991). The appeals court found that there was no constitutionally protected expectation of privacy in the room. Upon entering the shelter all residents are notified that staff can enter their room at any time and make random checks at any time. The residents don't pay rent, the shelter is highly regulated, and residents don't have exclusive control over their rooms. In fact, the court found that the Director had more control over the room than the juvenile or his mother. Even if the juvenile had an objectively reasonable expectation of privacy in the room, the search was conducted with the consent of the Director and she had the authority to consent to the search.

Witness Immunity

Commonwealth v. Austin A.
450 Mass. 665 (2008)

A grant of immunity to a witness, pursuant to G.L. c. 233 §20E, issued in superior court must be recognized in juvenile court.

Austin A. involved co-defendants - two juveniles were charged in Juvenile Court as youthful offenders and two adults were charged in Superior Court. A grant of immunity was given to a witness in the Superior Court proceedings. The Commonwealth moved in *limine*, in the Juvenile Court to "honor" the immunity order for the witness. The Juvenile Court judge denied the motion stating "this court cannot extend and apply in the Juvenile Court a Superior Court's order granting immunity to a witness in a pending Superior Court matter." The Commonwealth filed an interlocutory appeal and the single justice reserved and reported the case to the full court.

The juveniles argued that G.L. c. 233 § 20E does not allow Juvenile Court judges to issue grants of immunity. See, *Commonwealth v. Russ R.* 433 Mass 515 (2001). G.L. c. 233 § 20E does not include the Juvenile Court as one of the

courts that can grant immunity to a witness.⁴ The SJC distinguished this case from *Russ R.*, which dealt with the issue of whether a Juvenile Court judge could grant immunity in the first instance. While acknowledging an ambiguity in c. 233 § 20E the court reasoned that the purpose of the statute is to protect necessary witnesses from prosecution in another court. The witness could not be protected if an immunity order in one court was not honored in another. Therefore, the Juvenile Court must honor an immunity order and does not have the discretion to disregard it.

The court did not address the issue that juvenile judges, in the first instance, can grant immunity; and what happens if the immunized witness does not testify and which court would hear the contempt.

Discovery-Selective Prosecution-Statutory Rape

Commonwealth v. Bernardo B.
453 Mass. 158 (2008)

The SJC upheld a single justice decision, pursuant to a G.L. c. 211 §3 petition, denying the Commonwealth's appeal to vacate a juvenile court order allowing the juvenile's discovery motion.

The juvenile was charged with nine counts of sexual offenses (including statutory rape, indecent assault and battery under fourteen) with three complaining witness. He sought discovery, pursuant to Mass. Rule Crim. Pro. 14 (a) (2), to investigate and make a claim that he was selectively prosecuted because of his gender. The juvenile was fourteen years old and entering the ninth grade, two of the girls were twelve years old and entering the seventh grade, and the third girl was almost twelve and entering the sixth grade. The juvenile and the complaining witnesses were all under the age of consent. The evidence suggested that the sexual acts between the juvenile and the three girls individually, were consensual. None of the girls were charged. The juvenile made the following discovery request:

1. "The number of cases charges in the last five years in Plymouth County of statutory rape and/or indecent assault and battery where the accused and the complaining witness were under age 16, including the ages and sex of each."
2. "The number of cases charges in the last five years in Plymouth County of statutory rape and/or indecent assault and battery where the accused and the complaining witness were under 16 years old and the female was charged."

⁴ "(a) A justice of the supreme judicial court, appeals court or superior court shall, at the request of the attorney general or a district attorney, and after a hearing, issue an order granting immunity to a witness ..."

3. "The number of cases reported in Plymouth County District Attorney in the last five years of sexual assault of a person under 16 years of age (in adult or juvenile court or charged as a youthful offender) where the defendant was under 16 years of age, including the ages and sexes of the accused and the complaining witness. This includes cases not formally charged."
4. "The number of cases charges in the last five years in Plymouth County of statutory rape and/or indecent assault and batter where the accused was an adult female and the ages and sex of the accused and the complaining witness."
5. "The number of cases charges in the last five years in Plymouth County of statutory rape and/or indecent assault and batter where the accused was an adult female and the ages and sex of the accused and the complaining witness. This includes cases not formally charged."
6. "Any and all written polices by the Plymouth County District Attorney in the last five years concerning the charging of statutory rape when the accused and the complaining witness are both under 16 years old."

While the prosecution has wide discretion on whom to prosecute, that discretion is not unbounded and "judicial scrutiny is necessary to protect individuals from prosecution based on arbitrary or otherwise impermissible classification." *Id.* at 168. "To bring a claim of selective prosecution successfully, the defendant bears the initial burden to 'present evidence which raises at least a reasonable inference of impermissible discrimination,' including evidence that 'a broader class of persons than those prosecuted violated the law, . . . that failure to prosecute was either consistent or deliberate, . . . and that the decision not to prosecute was based on an impermissible classification such as race, religion, or sex.'" *Id.* quoting *Commonwealth v. Franklin*, 376 Mass. 885, 894 (1978).

The SJC found that the juvenile met the threshold showing required under the discovery rules that the information he was seeking was relevant to his claim of selective prosecution. The Commonwealth failed to show that that they could not and should not produce the requested discovery. "Valid statistical evidence" demonstrating disparate treatment of a protected group "may be *relevant* and *material* to demonstrate" in making a claim of selective prosecution. (Emphasis added). *Bernardo B*, at 174, citing *Commonwealth v. Thomas*, 451 Mass. 451, 455, 886 N.E.2d 684 (2008), citing *Commonwealth v. Lora*, 451 Mass. 425, 436-438, 886 N.E.2d 688 (2008).

Youthful Offender Indictment-Accessory after the fact

Commonwealth v. Hoshi H.
72 Mass. App. Ct. 18 (2008)

The appeals court affirmed the allowance of the juvenile's motion to dismiss a youthful offender indictment for accessory after the fact. G. L. c. 274 §4.

The juvenile was present when her boyfriend shot a person and injured him. The juvenile fled the scene with her boyfriend and another man. The three went to a store and the juvenile arranged for a cab to bring them to an apartment. When the police found the group at the apartment the juvenile initially denied that her boyfriend was present.

While the evidence against the juvenile might support a delinquency complaint for accessory after the fact, it did not support an indictment as a youthful offender. The appeals court reiterated the courts holding in *Clint C.*, that when the youthful offender indictment involves the infliction or threat of serious bodily harm, the court must look to the underlying facts of the offense not merely the elements of the crime. *Commonwealth v. Clint C.*, 430 Mass. 219 (1999). The court discussed the intent element of accessory before the fact and joint venture where the culpability of the offender is equated with the principal. If the juvenile in this case had been charged as a youthful offender under one of these theories the indictment might be valid. However, an accessory after the fact generally does not have advance knowledge of the principal's intent and is not involved in the planning of the crime. Moreover, in this case the juvenile assisted in her boyfriend's escape from the scene and avoiding arrest; these actions did not involve the "infliction or threat of serious bodily harm" that the youthful offender statute requires. G.L. c. 119 § 54.

Resisting Arrest-Insufficient Evidence to Support Adjudication

Commonwealth v. Quintos Q.
73 Mass. App. Ct. 828 (2009)

The juvenile's adjudication for resisting arrest, G.L. c.268 § 32B(a)(1) was reversed as there was insufficient evidence to support the elements of the crime.

With sirens and lights turned on a police officer in his cruiser attempted to stop a car in which the juvenile was the passenger. The driver was weaving in and out of traffic during the chase. Another police cruiser joined the chase also with sirens and lights on. The car eventually stopped when it crashed into some bushes at a dead end. The first police officer chased the two occupants and the second police officer joined in the chase. The second officer, while chasing the juvenile on foot yelled "stop, police, stop police." This officer then chased the juvenile over a stone wall where the juvenile became trapped. The juvenile did

not offer any resistance when he was finally caught, handcuffed and placed in the police cruiser.

"The charge of resisting arrest requires the Commonwealth to prove beyond a reasonable doubt that the juvenile "knowingly prevent[ed] or attempt[ed] to prevent a police officer, acting under color of his official authority, from *effecting an arrest* of the actor or another, by: (1) using or threatening to use physical force or violence against the police officer or another; or (2) using any other means which create[d] a substantial risk of causing bodily injury to such police officer or another G. L. c. 268, § 32B(a)." *Quintos Q.* at 830. (Emphasis added). The crime of resisting arrest is committed at the time that the arrest is effected. Here the juvenile was not uncooperative and did not resist when being handcuffed. The car chase did not constitute a pursuit for the purposes of an arrest of the juvenile, since he was the passenger. Additionally, the chase of the juvenile on foot did not constitute resisting arrest since there was no objective communication by the police that they were attempting to arrest the juvenile. "Fleeing from, or even resisting, a stop or patfrisk does not constitute the crime of resisting arrest." *Quintos Q.* at 831 quoting *Commonwealth v. Grant*, 71 Mass. App. Ct. 205, 209 (2008). Furthermore, the juvenile did not use any force to get away from the police.

Duplicative Adjudications and Faulty Jury Instructions

Commonwealth v. Niels N.
73 Mass. App. Ct. 689 (2009)

The juvenile, age sixteen, was charged with sexually assaulting his half-sister who was seven years old. The sister went into the juvenile's room whereupon the juvenile pushed her so that her knees were on the floor and face on his bed. The juvenile pulled her pants and his pants down and began "humping her" from behind. The eleven year old step-brother observed the juvenile on top of the step sister and the juvenile's pants down.

Based on the above facts the juvenile was adjudicated delinquent for assault with intent to rape, assault and battery (originally charged as rape of a child with force but found delinquent of lesser offense), and indecent assault and battery under fourteen. On appeal the juvenile argued the convictions were duplicative; assault and battery was a lesser included offense of indecent assault and battery under 14, and the acts constituting the indecent assault and battery and assault with intent to rape were so closely related that they constituted a single crime. The appeals court agreed and set aside the verdicts on assault and battery and indecent assault and battery and affirmed the adjudication on assault with intent to rape.

All the acts of the juvenile were so closely related in time, place and intent. In presenting its case, the Commonwealth did not present a theory on how the facts

were related to the elements of the individual charges. Additionally, the jury instructions did not articulate how the evidence related to the elements of the offenses and were silent as to any of the evidence in the case. "In short, the jury received no guidance -- whether from the charges, the Commonwealth's case, or the trial judge -- as to what conduct could form the predicate for which offense(s) and which offenses needed to be predicated on separate and distinct acts. *Id.* at 694. While assault and battery is not ordinary a lesser included offense of indecent assault and battery under fourteen since assault and battery does not require proof of lack of consent, in this case the court deemed it was. The trial judge failed to instruct the jury that lack of consent was required to prove assault and battery (offensive touching). "[T]hrough an erroneous jury charge that omitted the element of nonconsent -- the assault and battery in this case became a lesser included offense of indecent assault and battery on a child under age fourteen. This instruction became the law of the case." *Id.* at 698, *citing Commonwealth v. Pinero*, 49 Mass. App. Ct. 397, 399, 729 N.E.2d 679 (2000). The jury should have been instructed that the assault and battery charge and the indecent assault and battery under fourteen, must rest on separate and distinct acts.

It is well established that a person can be tried, convicted and punished for multiple crimes that are based on the same acts or a single course of conduct "provided that each [crime] requires proof of an element that the other does not." *Id.* at 697, *citing Commonwealth v. Arriaga*, 44 Mass. App. Ct. 382, 385 (1998). In the case at bar, the facts relating to the charges of indecent assault and battery under fourteen and assault with intent to rape were so closely related that they constituted a duplicative conviction. The Commonwealth did not present any evidence that the acts were separated in any way; there was no pause, delay or interruption. Additionally, the jury was not instructed that adjudication must rest on distinct and separate acts. Therefore, the indecent assault and battery charge was set aside and the assault with intent to rape was affirmed.