

DECISIONS OF NOTE: May 2007 - April 2008
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SEARCH AND SEIZURE

Abandonment

Commonwealth v. Augello, 71 Mass. App. Ct. 105 (2008). A closed suitcase containing stolen items located in defendant's apartment not "abandoned" even though defendant denies ownership and knowledge of the item. Defendant manifested reasonable expectation of privacy by its placement inside his apartment and its contents not immediately visible without opening suitcase.

Automobile Exception

Commonwealth v. Eggleston, 71 Mass. App. Ct. 363 (2008) Court finds the police were not required to obtain a warrant to search the vehicle because it was unnecessary to demonstrate the presence of particularized exigent circumstances to search an operable vehicle in a public place when they had probable cause to search it. The vehicle's inherent mobility and a reduced expectation of privacy in it justified the warrantless search.

Commonwealth v. Bostock, 450 Mass. 616 (2008): Reversal of the allowance of a motion to suppress evidence found in bags found in defendant's vehicle following an exit order. The trial judge found that there was reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime, but that the police did not have a reasonable belief that they were in danger so the automobile exception to the warrant requirement did not apply. The SJC reasoned that because the police had reasonable suspicion that the defendant was engaged in criminality when they stopped him, and they had probable cause to believe that his truck and its contents contained evidence of a crime, their search was a valid use of the automobile exception of the warrant requirement. Allowance of motion to suppress reversed.

Community Caretaking Exception

Commonwealth v. Knowles, 451 Mass. 91 (2008) SJC reverses denial of motion to suppress finding that neither the defendant's actions were indicative of criminal activity nor did a "public safety" exception apply where there no objective indication that either the defendant's or the public's well being were in immediate jeopardy. At the suppression hearing the officer testified that he had responded to a dispatch of a man swinging a baseball bat and shortly thereafter observed the defendant standing at the rear of his, place a bat up against a pole next to the car as he was leaning into the trunk. The officer ordered the defendant to stop where he was, move away from the car, and walk towards the officer with his hands out of his pockets. The defendant was detained by other officers. The officer then searched the trunk finding drugs. The Court reasoned these actions were "more than the circumstances justified for the protection of the officer and beyond what we have held to be permissible in the absence of reasonable suspicion of criminal activity."

Consent

Commonwealth v. Ocasio, 71 Mass. App. Ct. 304 (2008). Police investigating an assault with a sawed-off shotgun, detain and handcuff defendant immediately outside the door of his mother's apartment. Police enter apartment to answer phone and speak to mom not present but says he allowed to stay there. Police not search at that time. After mom arrives, she signs a "consent to search" form. Police then reenter and search finding various weapons in a bedroom closet. Because the defendant was present and never protested or objected, the "cotentant" mom's consent validates the search.

Exigent Circumstances

Commonwealth v. Cataldo, 69 Mass. App. Ct. 465 (2007). Appeals court affirms the trial court's allowance of the motion to suppress evidence. Police investigating three armed incidents, conduct surveillance of defendant's residence believing suspects to be there. After two suspects leave the apartment and drive away, the police attempt to stop the car about ½ a block away. After a brief foot chase the defendant and other suspect caught. The police then go to search the apartment without getting a warrant, fearing that evidence inside might be destroyed. After no response to their knocks and hearing shuffling around inside, they forcibly enter the apartment. A gun, ammunition, and other evidence were found inside the apartment.

The court reasoned that in order to justify an "exigency search" the police must have an objectively reasonable belief that evidence will be destroyed or that life will be endangered unless they immediately search. The court determined that the police had no specific information following the defendant's arrest, that the inside occupants knew of the arrest or that they been told of the arrest or to remove the evidence. The court also notes that after detaining the two suspects, the police had a reasonable opportunity to secure the premises from the outside and obtain a warrant.

Exit Order

Commonwealth v. Goewey, 69 Mass App. Ct. 429 (2007) A trooper who stopped a driver for motor vehicle infraction justified in ordering the passenger, the defendant, out of the car and conducting a pat frisk where he had provided the trooper a possibly false license, acted nervously, and made a number of furtive reaching movements while inside the car.

Commonwealth v. Nunez, 70 Mass. App. Ct. 752 (2007). The exit order to the defendant, a front seat passenger, in car stopped for infraction, appropriate where stop occurs in high crime area and defendant acting nervous while placing hands in pocket after ordered by police officer to keep hands in view.

Knock and Announce

Commonwealth v. Bush, 71 Mass. App. Ct. 130 (2008). Mere five second delay between announcing presence and executing forced entry permissible from the "perspective of a reasonable officer at the scene" where officers inside a darkened hallway, officer hears 'scurrying' sounds without a verbal response, and the officers' awareness that there might be a firearm in the apartment- officers' fear of a threat to their safety justified

Scope –warrantless

Commonwealth v. Garden, SJC-09860 (April 1, 2008): A trial judge granted a motion to suppress, and the SJC affirmed, reasoning that in appropriate circumstances, the smell of marijuana can provide probable cause to search a car, but in the circumstances of this case, there was not probable cause to also search the trunk.

Scope-warrant

Commonwealth v. Pierre, 71 Mass. App. Ct. 58 (2008). Seizure of counterfeit CDs from locker located in basement within the scope of warrant authorizing search of 2nd floor apartment where basement within the "curtilage" of the targeted apartment where stairs connected apartment to the basement and the locker designated as belonging to the same apartment. Seizure of CDs themselves lawful as a plain view seizure.

Terry/Pat Frisk

Commonwealth v. DePeiza, 449 Mass. 367 (2007). Firearm and ammunition produced by pat frisk should not have been suppressed where defendant's manner of walking with his arm rigid and pressed to side provided reasonable suspicion that defendant in possession of a firearm, thereby justifying his stop and pat frisk. In addition to other contributing factors--high crime area, late at night, defendant's nervous demeanor, defendant attempting to hide pocket from police—officer's training and experience indicate the defendant's "straight arm" walk suggest he concealing a firearm.

Taint/intervening Acts

Commonwealth v. Kolodziej, 69 Mass. App. Ct. 199 (2007). Although police initiated a stop of defendant's car without sufficient cause, any taint from the "illegal" stop was attenuated when the defendant thereafter committed an independent crime of operating to endanger, justifying the stop and warranting the denial of the motion to suppress based on the initial impropriety.

WHAT CONSTITUTES A "SEIZURE?"

Commonwealth v. Sykes, 449 Mass. 308 (2007). In an admittedly "close case", the Supreme Judicial Court overturns the trial court's allowance of motion to suppress a firearm, finding that a "seizure" did not take place at the moment where plain clothes officers in an unmarked cruiser drove along side defendant pedaling his bike, asked if they could speak with the defendant who continued to ride away from the officers who still continued to follow. The Court noted that there was no chase, command, or physical restraint of the defendant that would convert the "following" into a stop/seizure. However, once the defendant abandoned his bike and the police began a foot chase, the defendant was seized, and given the facts presented to the police—high crime area, defendant looking back at the officers several times, abandonment of bike, running away and grabbing waistband—the officers actions were justified.

Commonwealth v. Isaiah I., 450 Mass. 818 (2008) Firearm should not have been suppressed where juvenile not seized until officers ordered the juvenile not to move, at which point the officers possessed sufficient factual basis for seizure. The Court addressed the various points during the officers' investigation that did not constitute a seizure including the discussion amongst the officers to stop the juvenile and following the juvenile into the store communicated "to the reasonable person an attempt to capture or otherwise intrude on a person's freedom of movement." The court determined the seizure and pat frisk justified by the suspicious factors presented to the officer—high crime area, officers investigating string of robberies, juvenile suspiciously looking into store and manipulating pocket, quickly walking into store after seeing police, and attempting to conceal something inside his sock. The officer need not specifically testify that he feared for his or the public's safety in order to justify the pat frisk given the objective factors presented at the hearing.

Commonwealth v. Monteiro, 71 Mass. App. Ct. 477 (2008) In relying on the factual similarities to the Sykes case, the appeals court finds the firearm should not have been suppressed by the trial court. (Although both the majority and the dissent note that the factual record is limited) In this case, three police officers were talking with four males known to the officers for gun-related incidents. The defendant was nearby on a bike. One of the four males made a hand gesture to the defendant and then walked away from the defendant, the 3 other males, and the police. The defendant then turned and pedaled his bike away from the officers and the others. The officers got into their car and followed the defendant, pulling up next to him asking to speak with him. The defendant who had a "panicked look" pedaled away until he dropped his bike and ran. Officers pursue him on foot while defendant grabbing at his waistband as running and then throwing a gun onto a nearby roof.

INCULPATORY STATEMENTS

VOLUNTARINESS

Commonwealth v. Hilton, 450 Mass. 173 (2007): The defendant filed a motion to suppress statements made to a court officer. After the first interlocutory appeal, the trial judge again granted the motion, concluding that the defendant's statement was involuntary. In making his ruling, the trial judge based much of his findings on the fact that the defendant's mental illness and mental retardation prevented her from making voluntary statements. The SJC found the trial court's ruling to be based on inadequate

subsidiary findings, reversed the trial court decision and remanded the case for further consideration on the issue of voluntariness.

INTERESTED ADULT

Commonwealth v. Escalera, 70 Mass. App. Ct. 729 (2007). Fifteen year old juvenile in DSS custody, living in a foster home, validly waived Miranda rights during police interrogation where foster mother present for the reading of Miranda, understood the rights, and foster mom and juvenile left alone to consult privately prior to the questioning. The Court noted that an “interested adult” need not be the actual parent, nor even be completely free of conflicting loyalties, just that in the view of the officers, objectively, the adult must have the capacity to appreciate the juvenile’s situation and render advice. If the adult is “actually antagonistic” or lacking a meaningful relationship with the juvenile, they not qualify as an interested adult. Although the foster parent has a contractual relationship with DSS and does not have all the rights and privileges of a parent or guardian, they’re required to provide care for the child, which is consistent with the duty of an interested adult. Also, unlike a DYS worker, the foster parent could not be considered “an agent of the police” just because DSS is a state agency.

PUBLIC SAFETY EXCEPTION

Commonwealth v. Guthrie G., 449 Mass. 1028 (2007) The SJC affirms and agrees with the articulated reasoning of the Appeals Court decision reversing the trial court’s order allowing the motion to suppress in Commonwealth v. Guthrie G., 6 Mass App. Ct. 414 (2006). In that case, the Appeals 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. By fleeing with an unknown gun, the juvenile created an exigency in that the police did not know whether the gun was loaded and/or had been disposed of in a public area. Once he admitted to possession the gun, The Court concluded, the police were justified in asking to see it and the juvenile’s consent to produce the gun was freely and voluntarily given. The Court concluded that once the officers had secured the gun, they acted properly in discontinuing questioning until the juvenile’s father arrived.

IDENTIFICATION

Commonwealth v. Kachoul, 69 Mass. App. Ct. 352 (2007) Video lineup evidence and testimony concerning the lineup that occurred months after the incident properly admitted in rape trial even though identification conceded at trial, where accuracy of victim’s identification at lineup relevant to establishing the strength of her memory and powers of observation.

FIFTH AMENDMENT

Commonwealth v. Chase, 70 Mass. App. Ct. 826 (2007). Although defendant’s pre – arrest statements, “I ain’t talking to you anymore” and “I’m not talking” improperly elicited by the prosecution at trial, harmless error in light of other evidence pertaining to consciousness of guilt, circumstantial evidence, and that the trial judge immediately struck the improper testimony

SORB

Commonwealth v. Becker, 71 Mass. App. Ct. 81(2008) Defendant, considered to be a part-time Massachusetts resident, conviction for failing to register as a sex offender under Mass. Gen. Laws ch. 6, § 178H appropriate because conviction in New York State constituted a sex offense in Massachusetts under Mass. Gen. Laws ch. 6, § 178C.

Commonwealth v. Rosado, 450 Mass. 657 (2008) Improper to convict for failure to register where homeless defendant did not knowingly provide false information when he listed his shelter as his address and therefore was in compliance with his statutory obligation.

Commonwealth v. Ramirez, 69 Mass. App. Ct. 9 (2007) Evidence was insufficient to prove defendant knowingly failed to register as sex offender where it was not shown he had knowledge of the requirement until the day after date of offense listed on complaint. Court noted that SORB never mailed notice to defendant and the publication of notices informing sex offenders of their duty to register insufficient in this case.

SUFFICIENCY OF EVIDENCE

Commonwealth v. Grant, 71 Mass. App. Ct. 205 (2008). Resisting arrest conviction overturned where insufficient evidence to show that defendant who fled from police was actually or constructively seized or detained by the police who did not tell him he under arrest, did not order him to stop, nor even closely approach.

Commonwealth v. Murphy, 70 Mass. App. Ct. 774 (2007). Convictions for uttering affirmed where defendant's conduct allowed for reasonable inference that he had knowledge of the bills counterfeit status, specifically he purchased multiple rounds of drinks, offered to buy drinks for all the patrons at club, repeatedly paid for drinks with counterfeit \$20 bills although had lesser genuine bills, segregated money he received as change from the counterfeit bills, and when found in possession of one fake, he lied saying he received at another establishment.

Commonwealth v. Kerns, 449 Mass. 641 (2007). In this youthful offender case, the juvenile was indicted on charges of threatening to use deadly weapons, and conspiracy to commit mass murder. The evidence at trial showed that the defendant, along with some other students, planned to attack students, teachers, resource officers, and administrators at Marshfield High School. The defendant never communicated the threats to the targets of his plan, but did talk about the plan to other students and his co-conspirators. At the close of the Commonwealth's evidence, following a debate during the judge's denial of a required finding of not guilty on the threats charge, the Commonwealth sought relief from a single justice under G.L.c. 211 s. 3. The Commonwealth sought guidance as to whether a conviction for threats to use deadly weapons requires that the defendant directly or indirectly communicate the threat to a potential victim. The full SJC ruled that the communication may be proved by evidence that the threat was communicated to any person, besides a co-conspirator or co-venturer, and need not be communicated directly to a target or potential victim.

Commonwealth v. Hines, 449 Mass. 183 (2007). The defendant was convicted of, among other crimes, unlawful possession of a firearm while in the commission of a felony. In this case, a loaded .40 caliber Smith and Wesson handgun was found in a locked safe in the bedroom of an apartment where a large quantity of drugs were found sufficient for proving intent to distribute but not unlawful possession in the commission of a felony. The SJC upheld the conviction, using both a literal application of statutory language and Federal decisions regarding the nexus between a defendant's possession of a firearm and the predicate felony.

Commonwealth v. Casiano, 70 Mass. App. Ct. 705 (2007) Witness intimidation conviction upheld because defendant's act of pointing a cellular telephone camera at an undercover officer waiting to testify in a criminal case was intimidation as it threatened the officer's safety, and it was irrelevant whether photographs were taken.

Admissibility of Testimony

Commonwealth v. Austin A., 450 Mass. 665 (2008). The SJC holds "that a proper grant of immunity protects a witness from prosecution on the basis of the immunized testimony in any court in the Commonwealth, and must be recognized in the Juvenile Court." In this case, two adults in Superior Court,

and two juveniles in the juvenile court. One of the juveniles granted immunity in Superior Court. In the prosecution of the remaining juvenile, the Commonwealth moved in limine requesting the Juvenile Court “honor” the Superior Court’s immunity order for the juvenile witness (codefendant). The SJC held the Juvenile Court is “bound by the immunity order and is without discretion to disregard it.”

The SJC distinguished its prior ruling in Commonwealth v. Russ R., 434 Mass. 515 (2001) noting in that case they ruled the Juvenile Court cannot grant immunity in the first instance, rather only justices in the SJC, Appeals Court, or Superior Court may do so. In Austin, the issue presented is the authority of the Juvenile Court to enforce a lawful immunity order deriving from one of the three authorized courts. The SJC noted that although the language of M.G.L. 233 § 20E is ambiguous, the intent is to prevent the subsequent prosecution of an immunized witness in any other court in the Commonwealth.

Commonwealth v. Burton, 450 Mass. 55 (2007). Out-of-court statements by joint venturers are admissible against the others if the statements are made during the pendency of the criminal enterprise and in furtherance of it. The conversation took place immediately after the murder when three of the joint venturers were still together, discussing what had happened, and when the murder weapon was hidden in an effort to evade detection. In addition, the judge promptly and properly instructed the jury that they could consider the statements only if they found the existence of a joint venture apart from the statements, and that the statements were made in furtherance of that venture. See also Commonwealth v. Braley, 449 Mass. 316 (2007).

Commonwealth v. Robinson, 69 Mass. App. Ct. 576 (2007) Conviction for robbery and A&B reversed where trial court improperly admitted prior probable cause hearing testimony of victim who did not testify at trial. On the night of the robbery, the defendant was arrested after being identified by the victim. He was also found in possession of the victim’s wallet. The victim was also with his brother on the night of the incident. The victim testified at a probable cause hearing about 2 ½ months after the incident. A little over a year after the incident, about two weeks before trial, the prosecution filed a motion in limine to introduce the victim’s prior testimony asserting he was unavailable despite their good faith efforts to locate him, including letters sent to the last known address, searching court records, and investigation by the State police.

The victim’s brother was located and appeared for the trial, which was the first time the commonwealth spoke to the brother. The brother did not know the victim’s precise whereabouts. In finding that the trial erred in admitting the prior testimony, the appeals court found that because they failed to use many potential and significant additional sources of information before the trial date, including contacting the family at an earlier date, the internet, the databases of other federal and state agencies, there was an insufficient showing that the witness was unavailable.

Commonwealth v. Wooden, 70 Mass. App. Ct. 185(2007). Appeals court holds that trial court correctly denied the defendant’s motion to subpoena a witnesses testimony, finding that the witness had a valid 5th Amendment claim, and that the judge did not commit error by not independently immunizing the witness. Although the SJC has previously “declined to recognize a defendant’s constitutional right to a judicial grant of immunity to defense witnesses,” the appeals court holds open the possibility that in “unique circumstances... due process may require the granting” a limited form of immunity. In this case, defense counsel did not present the independent grant of immunity issue to the trial court.

Commonwealth v. Paiva, 71 Mass. App. Ct. 411 (2008). Defendant's firearm possession convictions reversed where trial court improperly prevented an expert defense witness from testifying. After the prosecution rested, counsel for the defendant informed the court that he intended to call an expert regarding the operability of the weapon. Counsel had not notified the prosecution or court in advance that he intended to call the witness. The trial judge did not permit the witness to testify.

The appeals court held that in balancing the need for an orderly trial with the defendant's right to present evidence, the court must consider: prevention of surprise, evidence of bad faith, prejudice to the opposing party, effectiveness of less severe sanctions, and the materiality of the testimony to the outcome of the trial. The Court found that although there was potential for prejudice to the commonwealth, the trial court could have mitigated it, and, given the materiality of the expected testimony and no indication of bad faith, it was improper to exclude the witness. Defendant's conviction for possession with intent to distribute also reversed where trial court excluded "lay witness" testimony regarding defendant's narcotics consumption.

Commonwealth v. Lao, 450 Mass. 215 (2007). The SJC reversed the defendant's first degree murder conviction, finding that trial counsel was ineffective for failing to challenge the admissibility of statements made by the defendant's estranged wife under *Crawford v. Washington*. The SJC concluded that a 911 call from the victim to the police, in which she reports the defendant's alleged attempt to run her over with his car, would most likely be inadmissible under *Crawford*. Further, the victim's statements to a police officer after he arrived at her home following a 911 call would also likely be inadmissible. Finally, statements of victim's daughter in which she testified to the conversation between the officer and her mother would also likely be inadmissible. The SJC held "that once the principles of *Crawford* are applied here, we are unable to conclude, with certainty, that the admission of the statements at issue did not affect the outcome of the defendant's trial, thereby resulting in a substantial risk of a miscarriage of justice."

Commonwealth v. Pelletier, 71 Mass App. Ct. 67 (2008). Conviction for A&B affirmed, the Appeals Court holds that because the alleged victim's statements to the police officer- that she fell down the stairs- was not admitted for its truth, rather to provide context for the officer's investigation, therefore its admission did not violate the confrontation clause.

SEXUAL ASSAULT

Commonwealth v. Blache, 450 Mass. 583 (2008) Extended discussion of consent defense to rape law in Massachusetts. The SJC stated that "if the complainant's capacity to consent is... at issue, the defendant will be entitled to an instruction that, in order to sustain a conviction on a theory of incapacity to consent, the Commonwealth must prove that the defendant knew or reasonably should have known that the complainant's condition rendered her incapable of consent." Case remanded for a new trial. Also, in Commonwealth v. Urban, 450 Mass. 608 (2008), the SJC reiterated that if the Commonwealth seeks to prove lack of consent by intoxication, the Commonwealth must prove "beyond a reasonable doubt that because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation or helplessness), the complainant was so impaired as to be incapable of consenting to intercourse."

Suliveres v. Commonwealth, 449 Mass. 112 (2007) Affirming the holding in Commonwealth v. Goldenberg, 338 Mass. 377 (1959), the Court held that it is not rape when consent to sexual intercourse is obtained through fraud or deceit. In *Goldenberg*, a physiotherapist convinced a woman seeking an abortion that he had to have intercourse with her as part of an abortion procedure. In the case at hand, the defendant had intercourse with a woman by impersonating her long term boyfriend, his twin brother. In both cases, the defendants were found not guilty.

DWYER/LAMPRON

Commonwealth v. Martin, 451 Mass. 113 (2008). It was error for the Superior Court judge to conclude that communications made to social workers or psychotherapists pertaining to the subjects of child custody or adoption were "absolutely protected" under the statutes creating a social worker or psychotherapist privilege, and for that reason "wholly insulated" from any disclosure to a criminal defendant. Records protected by all statutory privileges, including the social worker and psychotherapist privileges, were subject to the Bishop-Fuller protocol, and are now subject to the Dwyer protocol.

SENTENCING

Commonwealth v. Keon K., 69 Mass. App. Ct. 495 (2007). Juvenile judge's inquiry at sentencing hearing for open and gross and indecent A&B (over fourteen) concerning juvenile's other delinquency case for a similar incident that had been nolle prossed, and comment that the sentence is in "...the best interests of decent people who want to pray to the Blessed Virgin Mary without being sexually assaulted" did not create a substantial risk of a miscarriage of justice. The appeals court found that it was proper for trial court to consider a "defendant's" entire record, including dismissals and nolle prosses (as opposed to the prohibition against adverse consideration of acquittals); that the prior case was relevant as a "pattern of conduct or modus operandi"; and, the "best interests" comment was specific to the victim in this case rather than evincing a "religious motive" for the sentence. Also, no miscarriage of justice to permit jury to be present in court for sentencing.

Commonwealth v. Ly, 450 Mass. 16 (2007). Defendant was sentenced in 1990 to three five-year terms and three twenty-year terms to be served concurrently. After serving two months, defendant was released after a single justice of the Appeals Court allowed his motion to stay execution pending appeal. In 1991, one sentence was vacated, while the remaining were affirmed. The stay of execution was not vacated nor were the sentences put into effect until June 26, 2007. During those 16 years, although the defendant was twice the subject of criminal charges, he remained in the community, working, paying taxes, and raising a family. Reasoning that "a defendant who unsuccessfully appeals from a criminal conviction bears no burden to come forward voluntarily to be taken into custody and incarcerated," the Court concluded that "execution of the defendant's sentences... would violate due process and principles of fundamental fairness."

Commonwealth v. McCulloch, 450 Mass. 483 (2008). Trial court judge vacated his finding of guilt on the charge of negligent operation of a motor vehicle and then entered a continuance without a finding for one day, conditioned on the defendant's immediate payment of restitution. Commonwealth appealed, and the SJC determined that the judge had no authority to revoke a guilty finding based solely on the defendant's positive subsequent conduct while on probation.

POST CONVICTION

Commonwealth v. Despres, 70 Mass. App. Ct. 645 (2007). Trial court's denial of motion for new trial based on newly discovered evidence affirmed where defense presented deposition and affidavit of two previously unknown witnesses who worked at the DMR respite facility where victim had previously lived and would state that "cognitively limited" victim misperceived, exaggerated, and fabricated events in order to draw attention to himself, finding they not qualified to be considered "experts" regarding victim's mental impairment nor sufficiently familiar with victim to render lay opinion about victim's credibility

NECESSITY

Commonwealth v. Kendall, 451 Mass. 10 (2008). Defendant in an OUI case requested a jury instruction on the defense of necessity. At trial, the evidence showed that after returning from a night at a bar, the defendant and his girlfriend returned to the defendant's trailer. The girlfriend fell and hit her head, the defendant was unable to stop the bleeding, and they did not have a telephone or cell phone. However, there were people home at nearby trailers, and there was a fire station very close by. The trial judge refused to instruct on a necessity defense, and the SJC affirmed, reasoning that "the defendant failed to present any evidence to support a reasonable doubt that his operation of a motor vehicle" while intoxicated was justified by necessity.

Commonwealth v. Livingston, 70 Mass. App. Ct. 745 (2007) Necessity a valid defense to reckless operation where defendant shot in the abdomen and drives his car away to flee from his attackers and attempting to reach the hospital.

PROBATION

Commonwealth v. Morales, 70 Mass App. Ct. 839 (2007). After jury finds defendant no longer a sexually dangerous person for civil commitment purposes, defendant files motion to modify his probation to remove a residency restriction citing the change in circumstances, trial court did not abuse its discretion in denying the motion given the broad discretion given to a judge in setting appropriate conditions in order to achieve the rehabilitative as well as community protection goals of probation.

MISCELLANEOUS ISSUES

Competency/Criminal Responsibility

Commonwealth v. Robidoux, 450 Mass. 144 (2007). The defendant was convicted of first-degree murder by reason of extreme atrocity or cruelty. Defendant's ten month old son died of malnutrition caused by a restricted diet of water and breast milk, which the defendant insisted he followed due to a dictate by God. Defendant asserted that his trial counsel was ineffective for failing to raise the issue of competency and for failing to raise an insanity defense. The SJC rejected these claims, finding that the trial judge found the defendant competent after conducting an extensive colloquy. Further, the SJC stated "a defendant may refuse to label himself as criminally insane, even if that precludes his most effective defense, as long as he is competent and does so with knowledge of the consequences."

Confidential Informant

Commonwealth v. Madigan, 449 Mass. 702 (2008). After the defendant raised a potentially viable entrapment defense, the Commonwealth refused to disclose requested information regarding a confidential informant, including information regarding the relationship between the CI and law enforcement, and any promises or inducements made to the CI. The Court concluded that "the Commonwealth's privilege may not shield information that is material to the defense of entrapment," and denied the Commonwealth's G.L.c. 211 s.3 petition, ordering that the Commonwealth provide the requested information to the defendant.

Double Jeopardy

Edge v. Commonwealth, 451 Mass. 74 (2008). Where the defendant pled guilty to a violation of a restraining order (209A) it violates double jeopardy for the Commonwealth to subsequently prosecute him for stalking in violation of restraining order (c. 265 § 439b) where the same 209A violation is involved in both cases.

First Complaint

Commonwealth v. Stuckich, 450 Mass. 449 (2008). The SJC reversed the defendant's convictions on four counts of indecent assault and battery for errors made by the trial court judge. First, the judge erred by giving the jury a consciousness of guilt instruction when there was insufficient evidence to base this instruction. Second, the judge erred in failing to conduct a voir dire to determine who was the first complaint witness, and further, allowed evidence of multiple complaints, contrary to the 'first complaint' doctrine. Additionally, the judge improperly admitted the following evidence: testimony as to how the initial complaint of abuse became the charge in front of the jury, testimony and a stipulation involving the care and protection proceeding that resulted from the initial complaint of abuse, and testimony by the

victim's grandmother. The SJC also found that it was improper for the prosecutor to ask the defendant if the alleged victim was lying, and it was also improper for the prosecutor to argue that the police had to track down the defendant. Finally, the SJC was concerned that the sentencing of the defendant had been based on uncharged conduct.

Commonwealth v. Murungu, 450 Mass. 441 (2008): In upholding a youthful offender conviction for statutory rape, the SJC created two new exceptions to the first complaint rule. The SJC explained that the trial judge may permit someone other than the first complaint witness to testify. The first exception is "when the encounter that the victim has with the first person does not constitute a complaint, when, for example, the victim expresses to that person unhappiness, upset, or other such feelings, but does not actually state that she has been sexually assaulted." The second exception is when "the listener has an obvious bias or motive to minimize or distort the victim's remarks." The SJC recommended trial judges conduct a voir dire when determining if any exceptions apply in a case.

Privilege

Commonwealth v. Vega, 449 Mass. 227 (2007): Holding that G.L.c. 112 s. 172 creates an evidentiary privilege that encompasses communications with Allied Mental Health Professionals, such as a licensed marriage and family therapist, a licensed rehabilitation counselor, a licensed educational psychologist, or a licensed mental health counselor.

Prosecutorial Misconduct

Commonwealth v. Williams, 450 Mass. 894 (2008): The SJC remanded this first degree murder case because "the prosecutor's closing argument is so replete with prejudicial improprieties that the convictions must be reversed." During closing argument, the prosecutor personally vouched for the reliability of two witnesses including the key Commonwealth witness, argued facts not in evidence, and used language that "improperly urged the jury to do something beyond fact finding."

Protective Orders

Commonwealth v. Holliday, 450 Mass. 794 (2008). Rule 14 protective order, limiting discovery of witnesses' identifying information, did not abuse discretion because a threat to witnesses was inherent where it could be found crimes were due to a feud between gangs still operating in the witnesses' neighborhood and that incarcerated witnesses feared becoming targets of violence.