

OTHER CRIMINAL CASES OF NOTE

SEARCH AND SEIZURE

Warrantless Searches

Automobiles

1. Commonwealth v. Murphy, 63 Mass.App.Ct. 11 (2005) (Motion to Suppress firearm found in vehicle properly allowed because police improperly transformed inventory search of person into search of vehicle when officer sought to match key to rental vehicle where there was no overtly criminal information on keys. Motion to Suppress drugs found on codefendant also properly allowed where police had no reasonable suspicion of criminal activity or danger from co-defendant who had approached simply to give police a necklace that he had found).
2. Commonwealth v. Henley, 63 Mass.App.Ct. 1 (2005) (Motion to Suppress drugs found during inventory search properly denied where car legally impounded because there was no authorized driver to remove rental car from breakdown lane of highway).
3. Commonwealth v. Carkhuff, 441 Mass. 122 (2004) (Suspicionless stop and administrative search of defendant at roadblock unconstitutional where troopers failed to provide any prior notice or warning to motorists of the roadblock to minimize the intrusiveness of the stop and search procedure).
4. Commonwealth v. Silva, 61 Mass.App.Ct. 28 (2004) (Motion to Suppress drugs should have been allowed where Commonwealth failed to establish that there were written guidelines for towing impounded vehicles that permitted entry into defendant's car to search for registration and ownership information).
5. Commonwealth v. Feyenord, 62 Mass.App.Ct. 200 (2004) (Appeals Court concluded that dog sniff of the air outside trunk of car stopped for traffic offense did not constitute a search and officer's decision to issue exit order to separate defendant from passenger for questioning was justified after nervous defendant failed to produce valid license or registration in his name. Court also stated that defendant's detention while the dog was summonsed did not constitute a seizure implicating the 4th Amendment or Article 14)
NOTE: Further Appellate Review granted regarding Motion to Suppress
6. Commonwealth v. Goncalves, 62 Mass.App.Ct. 153 (2004) (Motion to Suppress should have been denied where officer's action of leaning into car to turn off engine after defendant arrested for driving with suspended license was physically necessary to effect lawful impoundment and rendered officer's plain view observation of firearm while doing so lawful).

7. Commonwealth v. Muckle, 61 Mass.App.Ct. 678 (2004) (Search of crumpled bag found in car during inventory search was unlawful in the absence of standard written police procedures regarding the opening of closed but unlocked containers during inventory searches of impounded vehicles).

Persons

8. Commonwealth v. Prophete, 443 Mass. 548 (2005) (Court found that search of defendant which involved his removal of his shirt, shoes, socks and pants in special van used by police to conduct strip searches was a permissible search incident to his lawful arrest and not a strip search since he was not required to remove his underwear).
9. Commonwealth v. Scott, 440 Mass. 642 (2004) (The Court finally accepted the judge's finding, after multiple remands, that the trooper could not have seen the distinguishing physical characteristics of the defendant from 15-20 feet away and did not have a reasonable suspicion to stop defendant).
10. Commonwealth v. Perry, 62 Mass.App.Ct. 500 (2004) (Defendant who ran at sight of police was not seized by officer who pursued him because officer did not make any show of authority or say anything to defendant and there was no evidence that defendant knew officer was running behind him).

“Plain Feel”

11. Commonwealth v. Osborne, 62 Mass.App.Ct. 445 (2004) (Officer's seizure of hard object between the cheeks of the defendant's buttocks after officer had located folding knife in defendant's front pocket was justified under “plain feel” doctrine where contraband nature of item was immediately apparent on touch and in context of knife found).
NOTE: Further Appellate Review granted on issue of jury waiver executed by defendant.
12. Commonwealth v. Cullen, 62 Mass.App.Ct. 390 (2004) (Officer's seizure of coins from defendant's pocket was justified by “plain feel” doctrine where police had reasonable foundation to believe weapon may be found and the coins “appeared” to be a fruit of the burglary the officer was investigating).

Warrant Based Searches

1. Commonwealth v. Forish, 61 Mass.App.Ct. 554 (2004) (Search of defendant's residence pursuant to warrant was unlawful where officers noted the location rather than the specify items to be seized in the applicable space on the warrant and affidavit failed to specify items to be seized).
2. Commonwealth v. Peterson, 61 Mass.App.Ct. 632 (2004) (Appeals Court held that affidavit which was based on hearsay was still reliable because the hearsay used was reliable and supported by additional information).

3. Commonwealth v. Catanzaro, 441 Mass. 46 (2004) (Portion of warrant allowing the search of persons present inside apartment at time of search includes persons outside premises where person outside can be shown to be an occupant of apartment).
4. Commonwealth v. Silva, 440 Mass. 772 (2004) (Police seeking to enter home to serve arrest warrant must possess a reasonable belief that location to be searched is the arrestee's residence and that the arrestee is in residence at the time of the search).

Miranda Issues

1. Commonwealth v. Hilton, 443 Mass. 597 (2005) (Court credited trial court's finding that defendant who agreed to accompany police to station for questioning was not capable of waiving Miranda, but determined that she was not in custody for purposes of Miranda until officers began to ask her specific detailed questions regarding her role in the crime. The Court declined to suppress any statements made prior to their finding of "custody." The Court also affirmed the suppression of certain statements defendant made to a court officer, finding that her Sixth Amendment rights had attached prior to her conversation with the court officer and that the court officer could be construed a law enforcement agent).
2. Commonwealth v. Cruz, 442 Mass. 299 (2004) (Statements made by defendant who was wrongfully arrested when police unlawfully entered his home without a warrant in the absence of exigent circumstances were still admissible because defendant conceded that he received and understood his Miranda warnings and there was no connection between the evidence unlawfully seized at his home and his later statements at the police station).
3. Commonwealth v. Novo, 442 Mass. 262 (2004) (Portion of defendant's statement to police made after police began to misrepresent his trial rights must be suppressed because such coercive tactics tainted his confession and rendered his statements involuntary; however, defendant's earlier statements post Miranda and pre coercion were still admissible).

ELEMENTS OF CRIMES

Criminal Harassment

1. Commonwealth v. Clemens, 61 Mass.App.Ct. 915 (2004) (Crime of criminal harassment requires evidence of no less than three separate incidents of wilful and malicious conduct intended to alarm a specific person which did cause alarm and would cause a reasonable person to suffer substantial emotional distress. Criminal harassment conviction overturned where court determined that only the last of four encounters between defendant and victim constituted harassment).

Destruction of Property

1. Commonwealth v. McDowell, 62 Mass.App.Ct. 15 (2004) (Crime of defacing personal property requires that there be willful and malicious conduct OR wanton conduct. Conviction for defacing property appropriate where defendant intended to drive car without concern for consequences, which included the destruction of a fence and other property).
2. Commonwealth v. Kirker, 441 Mass. 226 (2004) (Defendant convicted of slashing automobile tires, was entitled to a finding of guilty on lesser included offense of malicious destruction of property under \$250 because correct measure of valuation for damaged property was cost of replacement of the tires and not the value of the automobile).
3. Commonwealth v. Deberry, 441 Mass. 211 (2004) (Court concluded that Defendant who punched hole in wall was responsible for cost to repair hole and held that where damage caused to a portion of a property can be repaired or replaced, the value of the property is to be measured by the pecuniary loss rather than the fair market value of so much of the property as has been destroyed).

Disorderly Conduct

1. Commonwealth v. Lopiano, 60 Mass.App.Ct. 723 (2004) (Commonwealth failed to establish that defendant who was yelling and flailing his arms in a motel parking lot engaged in tumultuous behavior where there was no claim that his loud protestations constituted a threat of violence or that his flailing arms were anything more than a demonstration of his agitation, or that he was extremely noisy).

Identity Fraud

1. Commonwealth v. Giavazzi, 60 Mass.App.Ct. 374 (2004) (Where defendant altered identification of another and attempted to cash checks in that person's name, but additional evidence showed that the owner of the checks had asked the defendant to cash checks, court found that Commonwealth had failed to prove that defendant impersonated another without his express authorization).

Incest

1. Commonwealth v. Rahim, 441 Mass. 273 (2004) (Consanguinity is essential element of incest; statute only criminalizes relationships between persons related by blood or adoption).

Indecent Assault and Battery

1. Commonwealth v. Rosa, 62 Mass.App.Ct. 622 (2004) (Adult defendant who inserted his thumb into 11 year old victim's mouth past her teeth while making sexually suggestive statements clearly intended to engage in "pseudo

fellatio” and as such engaged in conduct that is fundamentally offensive to contemporary moral values sufficient to sustain his conviction for indecent assault and battery).

Mayhem

1. Commonwealth v. Tavares, 61 Mass.App.Ct. 385 (2004) (Injury to victim’s fingernails suggesting that a needle had been stuck under them would have been so painful and required such repetition and restraint as to qualify as serious under the second prong of the mayhem statute. Similarly, evidence of serious injuries to victim’s eyes though not permanently disabling were also rightly submitted to jury under first prong of mayhem statute).

Open and Gross

1. Commonwealth v. Kessler, 442 Mass. 770 (2004) (Defendant’s conviction for open and gross lewdness and lascivious behavior set aside where victims who saw defendant expose and manipulate his penis were neither shocked or nor alarmed, but rather, excited and giggly).

Possession of an Infernal Machine

1. Commonwealth v. Carter, 442 Mass. 822 (2004) (Unassembled elements that could be combined to create an infernal machine that are not in and of themselves capable of inflicting unusual damage do not constitute infernal machines for the purposes of the statute).

School Zone

1. Commonwealth v. Bell, 442 Mass. 118 (2004) (Court determined that defendant not entitled to admit Department of Education regulations regarding alternative education programs where defendant sought to challenge Commonwealth’s designation of an alternative education program as a secondary school for the purposes of the school zone statute and instructed the trial court to use a dictionary definition of the term “secondary school” rather than DOE regulations because that fits better with the broad purpose of the school zone statute).

Threats

1. Commonwealth v. Maiden, 61 Mass.App.Ct. 433 (2004) (Defendant who uttered threat against boyfriend’s former wife while she and the former wife were leaving a courtroom within earshot of a police detective was appropriately convicted of threats though the former wife did not hear the threat until the detective told her about it because the defendant should have reasonably expected that the detective would hear her and communicate her threat to the former wife).

EVIDENTIARY ISSUES

Identification

1. Commonwealth v. Zimmerman, 441 Mass. 146 (2004) (Superior Court denied defendant's motion for funds for expert on cross racial identification, finding that an average person would not go to the expense of hiring an expert given the questionable admissibility of such evidence. SJC reversed holding that judge should have considered the desirability and necessity of the testimony to the defendant's case and not only the potential for admissibility. The opinion contains great language from Justice Cordy about the dangers of cross-racial identification, including a review of recent research).

(Someone else is guilty)

1. Commonwealth v. Dew, 443 Mass. 620 (2005) (Defendant not entitled to introduce evidence that a different murder occurred at same address two days before murder at issue to suggest that someone else was responsible for the murder at issue because evidence showed that defendant had unlimited access to entire address and could have committed that murder as well as the one at issue).
2. Commonwealth v. Conkey, 443 Mass 60 (2004) (Defendant entitled to introduce evidence that 3rd party had pattern of sexually aggressive behavior because details were so closely connected in point of time and method of operation as to cast doubt on the identification of the defendant as the perpetrator of the crime)

Bad Acts

1. Commonwealth v. Delong, 60 Mass.App.Ct. 528 (2004) (Evidence of two prior robberies admissible as bad acts against defendant where all three robberies occurred within 3 days of each other, within a few miles of each other and of the defendant's home, and were committed by someone in similar clothes who accosted a victim in a similar manner and in the same location in each store).
2. Commonwealth v. Swafford, 441 Mass. 329 (2004) (Judge properly admitted evidence of gang affiliation where the evidence was relevant to show both motive and to support a joint venture theory of prosecution).
3. Commonwealth v. John, 442 Mass. 329 (2004) (Judge properly admitted evidence of gang affiliation where evidence was relevant to establish the background for the murder and was not being offered for the purpose of demonstrating that the defendant had a propensity for criminality).
4. Commonwealth v. Mendes, 441 Mass. 459 (2004) (Judge properly admitted evidence of defendant's prior (cocaine and prostitutes) and subsequent (lots of cocaine and big spending) bad acts because they were relevant to his motive to kill his wife).

Character Evidence

1. Commonwealth v. Martin, 442 Mass. 1002 (2004) (Judge improperly admitted evidence of defendant's alias where alias was not relevant to any of the crimes charged and was simply used by Commonwealth for the impermissible purpose of impeaching the defendant's character and credibility where the defendant had not put his character at issue).
2. Commonwealth v. Walker, 442 Mass. 185 (2004) (The Court declined to adopt Proposed Mass. R. Evid. 405 (a) which would permit witnesses to testify not only about a person's reputation in the community, but also to offer their own opinion of his character).

Rape Shield

1. Commonwealth v. Harris, 2005 WL 667821 (Mass.) (Court re-affirmed trial court's discretion despite rape shield statute to allow defendant to impeach sexual assault complainant with prior common nightwalker conviction if impeachment value of conviction outweighed prejudice to Commonwealth and complainant).

Bishop

1. Commonwealth v. Pelosi, 441 Mass. 257 (2004) (Where judge failed to make a Bishop Stage One determination of privilege, defendant's submission could not be said to fail to meet the relevancy standard of Stage 2 and was adequate to meet the "different and less demanding standard of relevance applicable to obtain access to unprivileged records as compared to records for which privilege has been asserted").
2. Commonwealth v. Lampron, 441 Mass. 265 (2004) (Court found that Bishop is not implicated until a privilege is asserted and that motions for production of potentially privileged records fall under Rule 17(a)(2), which covers all requests for records held by 3rd parties. Court further found that the affidavit for a motion for production under Rule 17(a)(2) may contain hearsay as long as the sources are identified, the hearsay is reliable, and the affidavit establishes with specificity the relevance of the requested documents.
3. Commonwealth v. Maxwell, 441 Mass. 773 (2004) (Defendant sought to obtain complainant's privileged AIDs treatment records which Commonwealth claimed were barred from disclosure due to the fact that the AIDs treatment records are protected by an "absolute privilege." The Court held that Bishop-Fuller protocol applies to AIDs treatment records and that even "absolute privileges" may be trumped by a defendant's right to a fair trial).

Impeachment

1. Commonwealth v. Hailey, 62 Mass.App.Ct. 250 (2004) (Commonwealth's impeachment of own witness with prior grand jury testimony did not

implicate Benoit because Commonwealth did not call witness for the sole purpose of impeachment; rather, witness had current memory of events surrounding the incident and his testimony contained probative evidence).

Verbal Completeness

1. Commonwealth v. Bruce, 61 Mass.App.Ct. 474 (2004) (Where a witness was confronted in cross-examination with the fact that he had testified to something on direct that he had omitted to mention to the police and the Commonwealth sought to introduce grand jury testimony that was consistent with the witnesses trial testimony to rehabilitate him, the judge erred in allowing in admitting the grand jury statements under the doctrine of verbal completeness because the statement at issue was entirely separable from the witnesses grand jury testimony).

Missing Witness

1. Commonwealth v. Ortiz, 61 Mass.App.Ct. 468 (2004) (Where there was no evidence to suggest that defendant willfully attempted to withhold or conceal significant evidence by refusing to call an available witness, rather the record reflected that the witness' testimony would have been cumulative and that the defendant had made efforts to secure the presence of the witness and had no superior knowledge as to the witness' identity or whereabouts, the foundation was not met for the judge's missing witness instruction).

Consciousness of Guilt

1. Commonwealth v. Delaney, 442 Mass. 604 (2004) (Defendant's refusal to accompany the police when they presented him with a warrant at his place of employment and his act of walking away from the police was properly admitted as evidence of "consciousness of guilt" and did not implicate Article 12 or the 5th Amendment because the defendant had no choice but to comply with a lawful warrant).

ASSORTED TRIAL ISSUES

Competency

1. Commonwealth v. Torres, 441 Mass. 499 (2004) (While bail statute has been interpreted to require that a defendant be given a reasonable opportunity to be heard on the matter of bail and to be represented by counsel at such a hearing, and that bail is a critical stage in the proceedings, the Court concluded that there is no statutory bar against conducting a bail hearing for a defendant who has been found incompetent to stand trial and that the conducting such a hearing does not per se violate that defendant's due process rights, but may if the defendant's infirmity precludes any meaningful communication with counsel).

Severance / Joinder

1. Commonwealth v. Perez, 62 Mass.App.Ct. 912 (2004) (Appeals Court held that the trial judge did not abuse his discretion when he joined three robberies for trial where all three crimes happened in the same area in the span of 30 minutes and the defendant failed to demonstrate prejudice).
2. Commonwealth v. Pillai, 61 Mass.App.Ct. 603 (2004) (Trial judge erred in joining indecent assault and battery on a child charges where the charges involved separate acts against different children that occurred four or five months apart from each other despite similarities in the victims, the offenses and the circumstances of the offenses because the acts could not be said to be part of a single course of action, scheme or plan).
NOTE: Further Appellate Review granted.
3. Commonwealth v. Gaynor, 443 Mass. 245 (2005) (Trial judge did not err in joining four separate murder indictments where the joinder served the interests of judicial economy and the evidence supported a common plan to prey on cocaine addicted women for sexual gratification and a similar temporal and schematic nexus. The Court also noted that the defendant failed to demonstrate any prejudice from the joinder).

Jury Selection

1. Commonwealth v. Lopes, 440 Mass. 731 (2004) (The Court found that though it would have been preferable to ask, it was not reversible error for the trial judge in a homicide case to refuse to ask the venire whether or not they or anyone in their family had been the victim of a violent crime).

Jury Instructions

1. Commonwealth v. Graham, 62 Mass.App.Ct 642 (2004) (Defendant facing, among other charges, three counts of assault and battery on police officers and resisting arrest, was entitled to instruction on self defense where evidence called into question whether the officers involved used excessive or unnecessary force to subdue him such that he would have been allowed to use reasonable force to defend himself).

ASSISTANCE OF COUNSEL

1. Commonwealth v. Godwin, 60 Mass.App.Ct. 605 (2004) (Defendant bears burden of demonstrating to court that s/he is indigent and unable to retain counsel).
2. Commonwealth v. Yates, 62 Mass.App.Ct. 494 (2004) (Defendant who pled to 2nd degree murder permitted to withdraw plea where Court found that defendant's plea was not intelligently made because counsel failed to explain or discuss with him the concept of "adequate or reasonable provocation.")

3. Commonwealth v. Teti, 60 Mass.App.Ct. 279 (2004) (The Appeals Court declined to find that a conflict of interest existed where defense counsel's co-counsel had briefly represented a key witness in defendant's trial, long before co-counsel had learned of the status of this witness as an informant against the defendant, where there was no evidence that co-counsel had gained any privileged information through this representation that was used to the detriment of the defendant or shared any information that could have harmed the defendant, where co-counsel's involvement in the trial was "virtually nonexistent," and the defendant had indicated that he was satisfied with his representation by his lead counsel. The Appeals Court also did not find that it was ineffective for lead counsel to fail to advise the defendant of the potential conflict where informing him would not have "accomplished anything material for the defense.")

PROBATION SURRENDERS AND RELATED ISSUES

1. Commonwealth v. Negron, 441 Mass. 685 (2004) (Court held that when an Assistant District Attorney assists in a probation surrender, the Commonwealth becomes a party to the proceedings and can take a direct appeal from an order finding that a defendant has not violated the terms and conditions of his probation).
2. Commonwealth v. Kendrick, 63 Mass.App.Ct. 142 (2005) (The Appeals Court concluded that the defendant violated a condition of his probation that mandated he not have any contact with children under the age of 16 by attending a car show that was held in the parking lot of a candy store which he should have realized would place him in close proximity to children, and by then displaying an antique car and dog in a manner that he'd used in the past to attract children, and ultimately by failing to leave the car show when he became aware that children were present).
3. Commonwealth v. Wilcox, 63 Mass.App.Ct. 131 (2005) (The Appeals Court concluded that defendant violated a condition of his probation that he have no unsupervised contact with anyone under the age of 16 by following a girl in his car who was walking home from school to her home, then staring at that girl and two others through the window of a grocery store, and then following them back to one girls home where he proceeded to circle the block repeatedly).

MISCELLANEOUS

1. Commonwealth v. Wemers, 61 Mass.App.Ct. 182 (2004) (Where a trial judge dismisses an indictment without prejudice, the Commonwealth has the right to appeal that dismissal).

2. Commonwealth v. Clegg, 61 Mass.App.Ct. 197 (2004) (Appeals Court concluded that it was an abuse of discretion for a judge hearing motion to suppress to deny the Commonwealth's Motion to Continue and require it to proceed without the presence of its sole witness where the judge failed to inquire into the reason for the witness' absence and there was no evidence that the witness' failure to appear was not based on good cause or that the defendant (who had previously defaulted) was prejudiced. The Appeals Court perceived the judge's action of allowing the Motion after the Commonwealth failed to present its witness as tantamount to dismissing the case and felt that there were other more appropriate less severe sanctions available to the judge including the issuance of a warrant for the witness).

3. Commonwealth v. Adkinson, 442 Mass. 410 (2004) (Where a child witness or victim is in the custody of the Department of Social Services, the Department has the authority to refuse to allow that child to be interviewed by the defendant, his attorney or any experts. Such refusal cannot be construed as interference with a defendant's rights by prosecution because, according to the Court, there is no agency relationship between the District Attorney's Office and the Department. The Court noted that just because the Department refers cases to the District Attorney's Office, such a referral does not create an interest in the prosecution or give the prosecutor any control over the Department. The Court concluded that the relationship is best described as a cooperative effort intended to support the best interest of a child and not the prosecution of criminal cases).