

DELINQUENCY DECISIONAL LAW/LEGISLATIVE UPDATE

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The following is a synopsis of some of the more important appellate decisions that bear on the practice of juvenile delinquency law. It is important to note that this brief review is by no means a comprehensive review of the last year's decisional law in criminal cases. Rather, this compendium is an idiosyncratic compilation of cases that the writer believes bear on issues that are common to the practice of delinquency law. It cannot be overstated that the practice of delinquency law is the practice of criminal law, with the overlay that children charged as delinquents may be in "adult-size" trouble, but bring "child-size" problems to the court room. There is no substitute for regular review of the advance sheets to stay abreast of the decisional law. The quarterly CPCS Training Bulletins contain highly readable, concise and comprehensive casenotes. These bulletins are a good source for quick updates on the decisional law.

DECISIONAL LAW UPDATE

The past year did not produce many juvenile decisions of particular note. This is certainly not because juveniles are not being committed to the DYS or being convicted of delinquency offenses. Rather, too many cases are pled out to terms of probation that are oftentimes just slow commitments. As a bar, those of us who represents juveniles in delinquency cases need to be more "objectionable" that is, more attentive to creating a record for a later appeal and more chary of accepting plea "bargains" that inevitably and predictably lead to probation violations.

School Searches

Schools are becoming increasingly aggressive in their search practices. Included in these materials is the Procedure of the Boston Public Schools that governs searches of students. When dealing with a school search issue, you should request the governing policy from the relevant school district. (If there is any suggestion in the police or school reports that the search was conducted pursuant to a school procedure request the same in discovery. Alternatively, a public records request pursuant to G.L. c. 66 § 10 and c. 66A is a good way to get this information.) Remember, school procedures can grant students more privacy rights than do the U.S. or Massachusetts constitutions, but not less.

Contrary to what some judges have said from the bench, neither school procedures nor the decisional law give school administrators carte blanche to search students. All searches must be reasonable at their inception and in their scope. There is currently at least one case pending before the Appeals Court that may bring some further clarity to the scope of a school administrator's authority to search. Until this case is decided, the school searches in the Commonwealth are governed by New Jersey v. T.L.O., 469 U.S. 325, 333-334, 341 (1985), Commonwealth v. Carey, 407 Mass. 528, 530-531 (1990) and Commonwealth v. Snyder, 423 Mass. 75, 77-78 (1996).

Under these decisions, school officials are not bound by the Fourth Amendment's¹ probable cause or warrant requirements, but are constrained by its reasonableness requirement. T.L.O., 469 U.S. at 333-334, 341. To pass Fourth Amendment muster, a search conducted by school officials must be reasonable under all the circumstances of the search as determined by a two fold inquiry. Courts are to consider first, whether "the action [was]. . . justified at its inception," Terry v. Ohio, 392 U.S. [1] at 20 [(1968)]; and, second, whether the search as actually conducted was "reasonably related in scope to the circumstances which justified the interference in the first place." Ibid. 469 U.S. at 341. A search is justified at its inception, "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or rules of the school." T.L.O., 469 U.S. at 342. The search is permissible in its scope, "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Id.

The T.L.O. formulation for judging the legality of searches by school administrators was followed by the Supreme Judicial Court in Commonwealth v. Carey, 407 Mass. 528, 530-531 (1990) and Commonwealth v. Snyder, 423 Mass. 75, 77-78 (1996). In Carey, the SJC wrote that "[r]easonable suspicion of wrongdoing is a 'common-sense conclusio[n] about human behavior' upon which 'practical people'-including government officials-are entitled to rely." 407 Mass. at 528, quoting, T.L.O., 469 U.S. at 346.

Search and Seizure Generally

The SJC has continued the Commonwealth's proud tradition of granting a person's reasonable expectation of privacy greater protection under Article 14 than does the U.S. Supreme Court under the Fourth Amendment. When filing a motion to suppress, always invoke the protection of Article 14. Remember, arguments under Article 14 must be made separately from Fourth Amendment Arguments and must be supported by state authority in order to preserve the issue for appeal.

¹ Neither the Carey nor Snyder decisions reached the question of whether Article 14 of the Massachusetts Constitution provides more protection than does the Fourth Amendment. Carey, 407 Mass. at 531 n. 3; Snyder, 413 Mass. at 529.

Last year, the Court decided Commonwealth v. Gonsalves, 429 Mass. 658 (1999), which held that Article 14 requires that before a police officer who is making a routine traffic stop can order the driver or any passengers to get out of the car the officer must have a reasonable belief that the safety of the officer or of others is in danger.² This year, the Court decided, Commonwealth v. Rodriguez, 430 Mass. 577 (2000). In Rodriguez the Court held that Article 14 prohibits police from establishing drug interdiction roadblocks. The Court distinguished drug interdiction roadblocks from drunk driving roadblocks, which it had upheld in the face of a challenge under Article 14 in Commonwealth v. McGeoghegan, 389 Mass. 137, 143 – 145 (1983). The Court reasoned that the public danger from drunk drivers is “immediate and grave,” and that the intrusion of a drunk driver checkpoint stop is relatively slight. 430 Mass. 580 – 582. Conversely, a drug interdiction roadblock entails a general program of surveillance and a wholesale invasion of privacy. 430 Mass. 433 – 434. The Court wrote that, “Drug interdiction roadblocks stop citizens without probable cause or reasonable suspicion to look for evidence of criminal activity. Such a search is precisely what James Otis and John Adams sought to prevent by art. 14.” 430 Mass. at 586.

Following Gonsalves, the Appeals Court decided Commonwealth v. Torres, 49 Mass. App. Ct. 348 (2000). In Torres, the Court held that ordering the passengers of a car stopped for running a stop sign to get out and lie on the ground to be frisked at gun point exceeded the scope of a permissible stop. The order in Torres was preceded by one of five passengers fleeing when the car was stopped. The officer did not chase the fleeing passenger, but approached the car believing it to be stolen. As the officer approached the car, the back seat passengers were bent over and he believed them to be concealing a weapon. The officer ordered the passengers to put their hands on their heads, but they did not comply with the order until he drew his weapon. The officer called for backup. When the backup arrived, the assisting officers stood with weapons drawn, while the first officer ordered one passenger at a time to get out of the car and get on the ground where the officer frisked them. A handgun was found on one of the passengers. The Appeals Court held that this use of force was disproportionate to the reasonable belief that the car had been stolen. 49 Mass. App. Ct. at 350.

Taken together, Gonsalves, Rodriguez and Torres interpret Article 14 as permitting only searches that are supported by individualized suspicion. We must also remember that reasonable suspicion to stop does not automatically equate with reasonable suspicion to search. To stop a person, the officer need only have a reasonable suspicion, based on specific and articulable facts, that the person has committed, is committing or is about to commit a crime. To search that person, the officer must also have a reasonable suspicion, based on specific and articulable facts, that the person is armed and a danger to the officer or to the public. The Court’s

² Justice Ireland’s concurrence in Gonsalves is particularly noteworthy as it recognizes what many of our young clients know all too well, skin color alone is often taken by the police as reasonable cause to stop and search. 429 Mass. at 669 – 670.

decision in Gonsalves makes this point abundantly clear. See also Terry v. Ohio, supra.

Search and Seizure—Guns

The Appeals Court decision in Commonwealth v. Barros, 49 Mass. App. Ct. 613 (2000), reaffirms that a report that a person is carrying gun standing alone, does not provide reasonable grounds for a threshold inquiry. In this case, a Brockton police officer was stopped by a person who identified himself only as a businessman. The informant told the officer that he had just seen a man pull a gun from his waistband, show it to his friends, laugh and then return the gun to his waist. The man was described as a light-skinned Cape Verdean male, about five feet, six inches tall, wearing a blue baseball cap, a blue and white T-shirt, and blue jeans. The officer called for back-up and located the defendant a few minutes later. The officer pulled his cruiser to within five feet of the defendant and called out to him saying, “Hey you . . . I wanna speak with you.” The defendant continued walking with his companions, ignoring the officers request to speak. The officer then got out of his care and pointed at the defendant saying, “Hey you, I wanna talk to you. Come here.” The defendant, who had turned to look at the officer, “broke eye contact, turned away . . . and stopped walking.” According to the officer, the defendant made a move with his hands his waistband area. The officer, fearing for his safety, drew his service revolver and ordered the defendant to put his hands where they could be seen. The defendant complied with these orders, but began to back away from the officer. The officer then holstered his gun, grabbed the defendant, handcuffed hm and took him to the cruiser. A frisk of the defendant turned up a handgun.

The Appeals Court held that this was an unreasonable search and seizure based on its conclusion that the defendant was seized when the officer exited his car, and pointing to the defendant ordered him to “come here.” 49 Mass. App. Ct. at 618. The Court reasoned that the officer’s first inquiry of the defendant, “Hey you . . . I wanna speak with you,” was merely a “request to engage in conversation” and did not implicate constitutional rights. The second statement, “Hey you. . . . Come here,” was a seizure as the defendant would reasonably thought “that he was to free to leave.” This determination of when the defendant was seized is critically important to this decision. If the defendant was not seized until after he had made the hand movements around his waistband, then the movements, coupled with the informant’s information would have provided the requisite reasonable suspicion to justify the stop. Because the officer asserted authority over the defendant before the “furtive gesture” the court analyzed whether the informant’s information provided grounds for the stop. The Court concluded that it did not. The court reached this determination because, “carrying a gun in Massachusetts is not a crime.” 49 Mass. App. Ct. at 619, citing, Commonwealth v. Alvarado, 423 Mass. 266, 269 (1996); Commonwealth v. Couture, 407 Mass. 178, 183, cert. Den. 498 U.S. 951 (1990). Thus, the Court was left with a case in which the defendant showed a gun to friends, laughed and put it away. There was no evidence that he was about to commit a crime with the gun. Hence, there were no grounds for the stop.

In Barros, the Appeals Court noted that if the police had information that the defendant was “so apparently young that the police could reasonably assume they were not of age to obtain a license to carry a firearm, that would be an objectively reasonable suspicion that the defendant was carrying unlawfully.” 49 Mass. App. Ct. at 619. This point is made abundantly clear by the Appeals Court’s decision in Commonwealth v. Moscat, 49 Mass. App. Ct. 622 (2000). In Moscat, a police officer had probable cause to believe that the defendant, a minor, was in possession of alcohol. When the officer stopped the defendant and reached toward the side of the defendant’s shirt, he expected to find a bottle of beer. Instead, he found a .32 caliber revolver. The trial court upheld this search as a reasonable frisk for weapons based on the information known to the officer. The Appeals court did not decide whether the trial court was correct in this determination, ruling instead that there was probable cause to arrest the defendant for possession of alcohol and therefore, the frisk that uncovered the handgun was a reasonable search incident to arrest.

The decision in Barros should be compared with the SJC decision in Commonwealth v. Grandison, 432 Mass. 278 (2000).

On the issue of guns and searches, the U.S. Supreme Court decision in Florida v. J.L., 120 S. Ct. 1375 (2000), is a must read. In J.L.

Victim Rights Act

In several cases, the victim’s rights act, G.L. c. 258B s. 3 has been invoked for the proposition that the Court can impound the name and address of an alleged victim. A careful reading of the act does not support this argument. A sample pleading to release the name and address of the victim is included in these materials.

Trial After No Bill

In Commonwealth v. Dale D, 431 Mass. 757 (2000), the juvenile moved to dismiss a complaint charging him with rape after a grand jury declined to indict him as a youthful offender on the same charge. The motion was denied and the juvenile proceeded to trial before a jury. He was convicted and committed to the DYS. On appeal, the SJC held that the failure of the grand jury to return an indictment did not preclude the Commonwealth from proceeding to trial on the complaint. In reaching this conclusion, the Court reviewed G.L. c. 119 s. 54 and noted that the statute’s language does not require dismissal of a complaint if the Commonwealth fails to obtain an indictment. 431 Mass. at 760. The Court reasoned that, because the youthful offender statute was enacted to address, “growing concern about violent crimes committed by juveniles,” and was designed to give prosecutors greater discretion when “proceeding against violent juvenile offenders,” while eliminating protections previously afforded to juveniles charged as delinquents, “the Legislature could not have intended the Commonwealth to attempt to indict a juvenile at the peril of losing its ability to prosecute.” 431 Mass. at 760, citations omitted. An argument should be made that Dale D supports the proposition that if the Commonwealth may proceed by complaint

even when the grand jury returns a no bill, then the return of an indictment does not require dismissal of the complaint. If both an indictment and a complaint are pending, the Commonwealth can certainly elect to proceed to trial on the indictment rather than the complaint. Nonetheless, leaving the complaint open may provide additional options for disposing of a case by a plea.

Sex Offender Registry

In Commonwealth v. Albert A., 49 Mass. App. Ct. 269 (2000), two juveniles moved to vacate their pleas to sex offenses as defined in the Sex Offender Registration and Community Notification Act, G.L. c. 6 ss. 178C – 178O, (the Act). They argued that they pled due to promises of confidentiality that inhered prior to the passage of the Act and that they would not have pled if they had known that they would face public disclosure of their convictions as sex offenders. The court upheld the denial of these motions. It reasoned that public disclosure was merely a collateral consequence of the plea and that the juveniles need not be informed of such collateral consequences in order for the plea to be voluntary as a matter of law. 49 Mass. App. Ct. at 271.

Voluntariness of Pleas

In Commonwealth v. Carter, 50 Mass. App. Ct. 902 (2000), prior to trial on a charge of armed assault with intent to rob the judge inquired of the parties as to whether they had tried to resolve the case. Following a sidebar, where the parties respective positions on a plea were discussed, the judge stated on the record that if the defendant pled, he would sentence the defendant to “six years to six years and a day . . . but after trial it’s eighteen to twenty.” The defendant elected to plead guilty after the first witness testified and the promised six years to six years and a day sentence was imposed. The defendant moved for a new trial in the Superior Court and the motion was denied. On appeal, the Appeals Court vacated the plea and remanded the matter for trial writing that “the defendant’s plea was ‘induced at least in part by threat of punishment for exercising a basic constitutional right and was voidable.’” 50 Mass. App. Ct. at 903, citing, Letters v. Commonwealth, 346 Mass. 403, 408 (1963). Although trial judges remain free to “inform defendants about their options and about the ramifications of a decision to enter a plea or proceed to trial,” they can do nothing to coerce a plea or to punish the exercise of constitutional rights. 50 Mass. App. Ct. at 903 – 904.

Some variant of this practice, punishing a juvenile for exercising his/her constitutional rights occurs in the juvenile court daily. We need to make sure that the record reflects what happens at sidebar that may be coercive of the juvenile. It is likely that what judges will take from the decision in Carter is that they must be more subtle when they punish a defendant for asserting hi/her rights; not that they cannot punish a defendant who does so.

Miranda Custody

In Commonwealth v. Coleman, 49 Mass. App. Ct. 150 (2000), the Appeals Court held that the defendant, who was interrogated in his home and was not under arrest,

was in custody for purposes *Miranda*. The circumstances of the questioning included that the nineteen-year old, black defendant who had an eleventh grade education was interrogated in an 11' X 12' room by three white male police officers. One six foot tall officer sat next to the defendant on a bed while the other two (both also six foot tall) stood blocking the door of the room. Although the interrogating officer testified that he repeatedly told the defendant he could leave if he wished, the Court considered these assurances meaningless as they were accompanied by the threat of arrest if the defendant did not talk. In *Coleman*, the trial judge expressly found that the defendant was not in custody when interrogated and therefore denied the motion to suppress. In reversing this decision, the Appeals Court discussed both the criteria for determining custody and the standard of appellate review of a trial court's factual findings.

Miranda Right to Counsel

In *Commonwealth v. Mavredakis*, 430 Mass. 848 (2000) the Court held that Article 12 requires the police to inform a suspect an attorney has tried to reach him. Failure to do so deprives the suspect of his right to counsel and renders any statement taken after the attorney contacted the police on behalf of the suspect inadmissible. In so holding, the Court expressly rejected U.S. Supreme Court precedent to the contrary. See, *Moran v. Burbine*, 475 U.S. 412 (1986), (holding that the Sixth Amendment does not require the police to inform a suspect that an attorney has tried to contact the suspect until the suspect invokes his right to counsel).

Miranda Silence

In several cases, the SJC or Appeals Court have had occasion to review arguments of unfair comment on a defendant's silence. These decisions emphasize the importance of objecting whenever argument is made or evidence is introduced that may lead the jury to draw a negative inference from a defendant's silence. A selection of these cases is discussed below.

In *Commonwealth v. Farley*, 432 Mass. 153 (2000), the SJC found error in the cross-examination of the defendant which touched on her post-arrest silence. At trial, the defendant had presented evidence that a drug dealer named "Raoul" had committed the murder she was being tried for. When cross-examined, the prosecutor asked her why she did not provide this information to the police after being advised of her *Miranda* rights. The defendant responded that she was under arrest and wanted a lawyer. On appeal the defendant argued that this questioning was prosecutorial error. The Court agreed. 432 Mass. at 158. Because the Court reversed the conviction due to the ineffective assistance of trial counsel, it did not decide whether the error in eliciting the defendant's post-arrest silence alone required reversal. The Court relied on decisions in *Doyle v. Ohio*, 426 U.S. 610 (1976); *Commonwealth v. Peixoto*, 430 Mass. 654, 658 - 659 (2000), and *Commonwealth v. Hunter*, 416 Mass. 831, 836 (1977), S.C., 398 Mass. 806 (1998) in reaching this result. Compare, *Commonwealth v. Martinez*, 431 Mass. 168, 184 (2000); *Commonwealth v. Habarek*, 402 Mass. 105, 110 (1988), where the Court held that evidence of a defendant's post-arrest silence may be in the context of the entire conversation and for the limited purpose of clarifying why an interview ended abruptly. See also, *Commonwealth v. Fowler*, 431 Mass. 30, 36 - 40 (2000),

(prosecutor improperly commented in closing on defendant's postarrest silence; error not reversible in light of overwhelming evidence of defendant's guilt).

In Commonwealth v. Thompson, 431 Mass. 108 (2000), the court found error, but not reversible error, in the admission of testimony that after being informed of his wife's death, the defendant just looked at the floor and did not ask any questions. The Court held that this testimony burdened the defendants' right to remain silent and was not admissible as evidence of consciousness of guilt. In the circumstances of this case, the error was harmless.

Commonwealth v. Russo, 49 Mass. App. Ct. 579 (2000), concerned whether the defendant's right to remain silent was burdened by the opening and closing arguments of the co-defendant's counsel. The Court held that under Article 12, there is no principled reason to distinguish comments on a defendant's silence that are made by a co-defendant from those made by a judge or prosecutor. Comment from either source burdens the defendant's exercise of his privilege against self-incrimination. 49 Mass. App. Ct. at 581 - 582. The Appeals Court upheld the conviction in Russo, however, because the comments in question did not make a direct reference to the defendant, could be cured by proper jury instructions, and the defenses advanced by the two defendants were not mutually antagonistic. 49 Mass. App. Ct. at 583.

Escape from DYS

In Commonwealth v. Carrion, 431 Mass. 44 (2000) the SJC affirmed the defendant's conviction for escape from the DYS. When the juvenile escaped, he was being escorted in handcuffs from a hospital where he had visited his critically ill father. On appeal, the juvenile argued that he was not in the custody of a secure treatment facility when he escaped and that the statute, G.L. c. 120 s. 26, did not sanction escapes from "lesser forms of custody." The Court had no trouble rejecting these arguments in the circumstances of this case.

Kidnapping

A twelve-year old cannot consent to leave the custody of her parents; hence, the defendant could be tried for kidnapping. Commonwealth v. Colon, 431 Mass. 188 (2000).

Receiving A Stolen Motor Vehicle/Use Without Authority

In Commonwealth v. Bynoe, the defendant had been charged with and went to trial on, inter alia, a complaint charging receiving a stolen motor vehicle. G.L. c. 266 § 21A. He was convicted of use without authority. G.L. c. 90 § 24(2)(a). Use without authority is not a lesser included offense of receiving a stolen motor vehicle. Bynoe, 49 Mass. App. Ct. 687, 691 (2000), citing, Commonwealth v. Guero, 357 Mass. 741, 750 (1970); Commonwealth v. Lewis, 41 Mass. App. Ct. 910, 912 (1996). Nonetheless, the Appeals Court found no error in this case. The court reasoned that the complaint had been constructively amended by when jury instructions on use without authority were

sought by the Commonwealth and delivered by the judge. “A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instruction to the jury), or both broadens the possible bases of conviction beyond those presented by the grand jury.” 49 Mass. App. Ct. at 686 - 687, citations omitted. The judge should not have instructed on use without authority. But, because defense counsel did not object and the record supported the determination that the failure to object was a reasoned tactical decision, which allowed the defendant to be convicted of a crime carrying a lesser penalty, there was no error. This decision emphasizes once again, that we need to be more “objectionable.”

Another objection was missed in Bynoe. The automobile owner, who had loaned the car to her husband before it was found in the defendant’s possession, was allowed to testify about her husband’s version of the events (he was carjacked) that led to his losing possession of the car. The husband did not testify at trial. Because there was no objection to the wife’s testimony, it was admitted for all purposes. Again, we need to be more “objectionable.”

Required Finding On Commonwealth’s Opening

Commonwealth v. Lowder, 432 Mass. 92 (2000) reaffirms that trial judges can enter a required finding of not guilty after the Commonwealth’s opening. The Court identified two circumstances in which it is appropriate to do so. First, where the “[opening] statement ‘clearly and deliberately’ admits a fact ‘which must necessarily prevent a conviction and require an acquittal,’ . . . and (2) the statement ‘embraces all operative facts to be proven at trial and those facts are insufficient to sustain a claim for relief under any legal theory,’ showing unmistakably that the prosecutor’s evidence cannot prove one or more elements of the offense charged.” 432 Mass. at 101 (citations omitted). The SJC noted that the cases in which court should exercise this power are “rare” and that two procedural safeguards should be followed: “(1) counsel must be given a full opportunity to be heard and (2) the trial judge must give careful consideration to alternatives.” 432 Mass. at 102, citing, Commonwealth v. Steward, 396 Mass. 76, 79 (1985). Although the case in Lowder, was not one of those rare cases where the trial judge should have entered a required finding on the Commonwealth’s opening, a retrial was barred by double jeopardy principles.