2018 YEAR IN REVIEW

Cases from the Supreme Judicial Court & the Appeals Court

Disclaimer

- This list is the product of four appellate attorneys reviewing all of the 2018 published opinions from the Appeals Court and Supreme Judicial Court.
- We hope it provides a decent review of the most important happenings in Massachusetts appellate courts.
- We are not covering topics that we expected to be discussed by other panels/presenters today.
- Reasonable minds can differ about what's "important" and oversights happen. Please excuse any omissions.

Batson/Soares Issues

Comm. v. Robertson, 480 Mass. 383

- 1st degree murder
- 2 *Soares* objections, when:
  - ADA used peremptory to challenge first available black male juror; judge found no prima facie showing of pattern of discrimination b/c other people of color were on jury
  - ADA used peremptory challenge on Dominican man.
    - In response to objection, ADA claimed that juror "did not seem all that intelligent."
    - But judge again found no prima facie showing b/c two black women were seated, and therefore did not decide whether that was an adequate and genuine explanation.

Comm. v. Robertson, 480 Mass. 383

Judge's failure to find prima facie pattern of discrimination, at least as to 2nd juror, was error for at least two reasons:

1) Defendant specifically challenged removal of black *men* from jury
2) Mere presence of other members of group in question on jury is not dispositive. Otherwise, court "would send the unmistakable message that a[n] [attorney] can get away with discriminating against some [group members] so long as [that attorney] does not discriminate against all such individuals."

Comm. v. Robertson, 480 Mass. 383

Parties disagreed about race of Dominican juror. Court holds:

"Consistent with our cautious jurisprudence when analyzing *Batson* and *Soares* challenges, where a juror's membership in a protected class is **reasonably in dispute**, trial judges, in performing the first step of the *Batson-Soares* analysis, **ought to presume that the juror is a member of the protected class at issue**."

Commonwealth v. Ortega, 480 Mass. 603

- 1st degree murder
- Counsel objected on *Soares* grounds to ADA's use of fifth peremptory challenge to remove an African-American woman. At time of objection:
  - one African-American woman had been seated.
  - ADA had used 2 of first 4 peremptories to remove black men.
- Nonetheless, judge found no prima facie showing of discrimination -- because there was already a woman of color on the jury.

Commonwealth v. Ortega, 480 Mass. 603

- SJC reverses conviction.
- Establishing a prima facie case is "not an onerous task."
- Pattern can be based on single strike. Composition of seated jurors is only one of at least six factors to be considered.
- Presence of other members of the group in question cannot be dispositive.

Deja Vu?

- As the SJC noted, error in *Ortega* is same error that led to reversal in *Comm. v. Jones*, 477 Mass. 307 (2017).
  - Same judge: no prima facie case of discrimination in use of 5 of 13 peremptories to remove black jurors *because there was one black woman on the jury.*
  - See also Sanchez v. Roden, 753 F. 3d 279 (1st Cir. 2014) (MAC unreasonably applied clearly established federal law by "reject[ing] Sanchez's racial discrimination claim in a single sentence that merely acknowledged the presence of other black people on the jury.")
  - these are all Suffolk County cases

RETURN OF FEES, FINES & RESTITUTION

Commonwealth v. Martinez & Green, 480 Mass. 777

- *Nelson v. Colorado*, 137 S.Ct. 1249 (2017) says that Due Process Clause requires return of fees, fines, and restitution exacted:
  1) as a consequence of conviction (or CWOF or juvenile adjudication),
  2) when that conviction is invalidated, and
  3) the defendant is either acquitted on retrial or no retrial will occur (e.g., nolle prosse or dismissal).

Commonwealth v. Martinez & Green, 480 Mass. 777

- Defendant has initial burden of production. Must file motion for refund, w/affidavit, in court of conviction, w/ service on prosecutor, asserting:
  1) that the conviction has been invalidated and there will be no retrial;
  2) that requested refund is of monies assessed solely as a result of that conviction;
  3) the amount of requested refund; and
  4) that the defendant has paid that amount. Any available documentation demonstrating payment should be attached (but is not necessary to satisfy defendant's initial burden).
- Burden of proof then shifts to prosecutor, by preponderance. Court can hold evidentiary hearing if necessary.

Commonwealth v. Martinez & Green, 480 Mass. 777

- Court leaves open two "complex" procedural questions related to the return of restitution:
  - whether due process requires the refund of restitution related to an invalidated conviction where there is a surviving civil judgment.
  - whether the Commonwealth must refund restitution paid to a private victim.

Commonwealth v. Martinez & Green, 480 Mass. 777

- If you have a *Martinez/Green* issue in a case in which your NAC is still open, file and bill for the motion.
- If there is a *Martinez/Green* issue in a case in which your appellate NAC is closed, send Dolly Mele the NAC number, cc'ing Don Bronstein, and ask that the NAC be reopened so that you can file and bill for the motion.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Commonwealth v. Lastowski, 478 Mass. 572

- Open question: whether counsel's failure to explain duty to register as sex offender, or its consequences, can be constitutionally ineffective.
  - SJC doesn't answer question here b/c finds no prejudice: strength of evidence involving three separate victims, extreme unlikelihood that CWOF could have been obtained, and danger of incarceration if he did not plead guilty.

Commonwealth v. O'Neal, 93 Mass. App. Ct. 189

- Reverses ABDW conviction for kicking cop while in "restraint chair": CW negligently failed to preserve police station video and failed to disclose that video had existed.
- Court does not decide if it was IAC to fail to learn police policy on use of restraint chairs, BUT disputes judge's conclusion that policy had only "marginal" value for defense that police misused the chair:
  - "It is one thing for a jury to hear a defendant's complaints about police conduct, and quite another for them to learn that the complained-of conduct might well have violated a mandatory, written policy governing such conduct."

SUFFICIENCY

Guns: Large-Capacity

Commonwealth v. Cassidy, 479 Mass. 527

- Commonwealth must prove knowledge
- Defendant must know that the firearm:
  - Met the legal definition of "large capacity"
    OR
  - Was "was capable of accepting, or readily modifiable to accept, more than ten rounds of ammunition or more than five shotgun shells"
- New model jury instruction in opinion
  - Trial judge's instruction had been sufficient, but should not be used subsequently.

continued...

Guns: Large-Capacity

Commonwealth v. Cassidy, 479 Mass. 527

- Evidence of knowledge sufficient here:
  - General familiarity with firearms
  - Long-term ownership of the guns (since 2008 or 2009)
  - Had fired the guns in the past
  - Familiarity with how to load the larger magazines
  - Purchased one extended magazine separately from gun
  - Magazines noticeably larger than those that hold ten rounds.

Guns: Loaded

Commonwealth v. Brown, 479 Mass. 600

- Commonwealth must prove knowledge
- Defendant must know that the firearm was loaded with ammunition.
- Evidence insufficient here:
  - Defendant "could not have discerned whether gun was loaded merely by looking at it"
  - Magazine inserted in handle and not visible
  - Commonwealth presented no other evidence.
- Positive application of *Brown* in *Commonwealth v. Galarza*, 93 Mass. App. Ct. 740 (2018).

"Bodily Injury"

Commonwealth v. Sudler, 94 Mass. App. Ct. 150
G.L. c.265. §39 (hate crime statute).

- If injury alleged is not one enumerated, there must be "substantial impairment of the physical condition."
- Evidence of bleeding cuts to fingers by knife <u>insufficient</u>
  - Injury that"considerably or significantly compromises the usual functioning of any part of the victim's body."
- No evidence here of:
  - being "hampered" for any time, medical records, stitches, continued medical care or recovery period, pain beyond initial

"Indecent"

Under G.L. c.265, §13B, indecent A&B on a child

<u>Is</u> "indecent":

- hugging for a prolonged time while "extensively licking in and around [the] ear."

Commonwealth v. Colon, 93 Mass. App. Ct. 560

<u>Is not</u> "indecent":

- A very tight hug like one would receive from parents, and lifting a shirt slightly without exposing or touching any skin. *Commonwealth v. Cruz*, 93 Mass App. Ct. 136

continued...

"Indecent"

Commonwealth v. Cruz, 93 Mass App. Ct. 136

- Concurring (Milkey, J.)
  - Significant concerns that "our cases included some expansive pronouncements that lend support to the Commonwealth's position"
  - If standard is "contemporary views or personal integrity and privacy" and "fundamentally offensive to contemporary moral values," then Court should probably be affirming conviction

continued...
"Indecent"

Commonwealth v. Cruz, 93 Mass App. Ct. 136

- Concurring (Milkey, J.)
  - Court's "prior pronouncements" too expansive
  - Such an interpretation "rests on notions of impropriety so vague so as to raise due process concerns"
  - "[C]ourts have the responsibility to make explicit where the boundaries of illegality are drawn. The role of a jury should be to decide whether a defendant has committed the offense charged, not to resolve what that crime is." (emphasis added)

continued...
"Indecent"

Sounds promising, but....

continued...
"Indecent"

Commonwealth v. Colon, 93 Mass App. Ct. 560

- Uses the "fundamentally offensive to contemporary moral values" language to affirm.
- Statute is not unconstitutionally vague
- Notes Court's opinion in *Cruz*.

Helpful note: Court recognizes that "the majority and concurring opinions in *Cruz* help to further define the boundaries of indecent assault." (emphasis added)

DNA

Commonwealth v. Anitus, 93 Mass App. Ct. 104

- Armed robbery while masked and ABDW
- Robbery of fast-food restaurant. Surveillance video showed two assailants, one of whom tossed something away as they fled in a car.
- T-shirt and bandana found and tested for DNA
  - T-shirt: one of major DNA profiles found matched the defendant's
  - Bandana: the major DNA profile found matched the defendant's
- Commonwealth's evidence:
  - Defendant's DNA on clothing
  - Make, model and year of car matched defendant's mother's car
  - Surveillance footage showed profile of one assailant

continued…

DNA

Commonwealth v. Anitus, 93 Mass App. Ct. 104

- Evidence insufficient
- DNA evidence found on movable object at crime scene was insufficient to support conviction of armed robbery.
- Presence of DNA on an object does not show when it was deposited there.
  - It suggests that the defendant may have touched the object, but "[a]lone, does not establish that the defendant was one of the assailants who wore the objects during the crime, and is not enough to support a conviction beyond a reasonable doubt"
- Court relies on *Commonwealth v. Morris*, 422 Mass. 254 (1996), which established the principle as to fingerprints.

continued…

Commonwealth v. Anitus, 93 Mass App. Ct. 104

Innovative use of charts and graphics in Mr. Anitus's brief

- To visualize the facts:

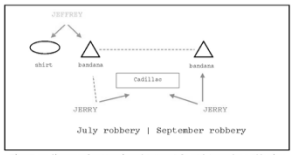


Figure 1: diagram of connections between July and September robberies

The theory of defense was that brother Jerry had committed the July Dunkin Kind robbery with someone

continued…

Commonwealth v. Anitus, 93 Mass App. Ct. 104

- To compare cases:

MORRIS	ANITUS
The fingerprint expert could not tell when the print was placed on the mask. Morris, 423 Mass. at 257.	The DNA expert could not tell when the DNA was placed on the masks. Tr.III/45.
The intruders used a car that was consistent in appearance with the car owned by the defendant's mother. Morris, 423 Mass. at 259.	The robbers used a car that was consistent in appearance with the car owned by Anitus' mother. Tr.II/142.
Defendant was associated with two people who were likely intruders. Morris, 422 Mass. at 258-259.	Anitus was associated with the person who was likely the gunman (namely, his brother). Tr.III/246-247.
A witness said the man in the fingerprinted mask resembled the defendant, but this conflicted with his description of the masked man as taller and heavier than him. Morris, 422 Mass. at 257.	A witness said Man 2 was taller than Man 1, but this conflicted with evidence that Anitus was shorter than his brother. Tr.II/88; Tr.III/141,248.

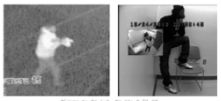
Indeed, the foregoing categories of evidence were even weaker in Anitus' case than in Morris in several

continued…

Commonwealth v. Anitus, 93 Mass App. Ct. 104

- To aid in analyzing the evidence:

"same profile." Tr.IV/55. The defense opposed the prosecution's use of the interrogation photo as "too prejudicial." Tr.III/108-109. Counsel urged that the image of Anitus with his foot raised, in a hoody, in police custody, was "sinister and imposing." Id. The objection was overruled. Id. See also R.19 (motion to exclude photograph).



The prosecution further bolstered its argument that the profiles matched by drawing the jury's attention to the face of the defendant at bar. Tr.IV/54-55. At the Commonwealth's request, in the

hundred other black men of similar age and stature and come as close. See Fig. 7.

Figure 7: Dr. Martin Luther King, Jr.; Man 2; Ice Cube

2. The evidence was highly prejudicial.

There were at least two significant problems

PSYCHOTHERAPIST PRIVILEGE

Commonwealth v. Waweru, 480 Mass. 173

- Patient under police guard does not automatically waive psychotherapist-patient privilege by speaking to the psychotherapist in the presence of the police guard.
  - Important that patient can receive necessary psychiatric attention while medical personnel and the public are protected

continued...
Commonwealth v. Waweru, 480 Mass. 173

- Open question: **Can the presence of a third party, generally, waive the psychotherapist privilege absent an affirmative waiver by the patient?**

- Plain language of statute includes no such waiver
- Court declined to answer this question

Commonwealth v. Pickering, 479 Mass. 589

- Open question: **Does the psychotherapist privilege apply to group therapy?**
- Court left open this question because of the odd posture of this particular case.
- Wide open issue: whether psychotherapist privilege applies in group therapy is largely undecided in all 50 states.

SEARCH & SEIZURE

Commonwealth v. Ortiz, 478 Mass. 820

Scope of consent search: must be unambiguous.

Where driver consents to a search "in the vehicle," whether the scope of the consent extended to the air filter, under the hood, is (at best) ambiguous.

Standard is reasonable person, not reasonable officer.

Failure to object, while search in progress = acquiescence.

Police cannot take advantage of ambiguity in scope to search under the hood, where they could have clarified it. Affirming order suppressing guns found.

Commonwealth v. Hilaire, 92 MAC 784

Motion judge erred in taking judicial notice (sua sponte) that "black population of East Bridgewater is decidedly small" in rejecting MTS backpack search after defendant was found nearby home invasion, six hours later.

for three reasons:

- (1) Adjudicative facts (connecting D to description of suspects) not susceptible to judicial notice.
- (2)Judicial notice should not be taken without notice to parties & opportunity to be heard.
- (3) demographics irrelevant to:
  - determining whether D was seized.
  - determining RS -- since that relies only on facts in officer's knowledge

Commonwealth v. Hilaire, 92 MAC 784 (cont.)

- . . . setting aside reliance on demographics, RS existed to search backpack.
- Even though description vague (three young black men, two with backpacks), it was "enhanced" by (1) proximity of defendant to scene (2) and inferences from "disingenuous explanations" of another suspect, repeatedly circling area in a car, in an apparent attempt to pick up Defendant.
- *Unclear why Court uses RS and not PC. Presumably bc D's motion argued in terms of RS.*

Commonwealth v. Harris, 93 MAC 56

- Defendant was seized for constitutional purposes when the police asked for and obtained ID.
- No reasonable suspicion justifying stop:
  - report that individuals resembling D & companions were "casing" university bike racks, not sufficient for prolonged stop requiring RS.
  - no reason to disbelieve that bikes belonged to the men.
- No basis to extend encounter by requesting ID and running criminal history check.
- Knife found and gun dropped in chase, suppressed.

Commonwealth v. Santiago, 93 MAC 792

Police stop of car where was an arrest (CW concedes no PC) because disproportionate to level of suspicion.

Conduct:

- Boxed in by cruiser and four other unmarked cars.
- At least four officers approach, two with guns drawn.

Suspicion:

- Vague involvement with firearms & drug investigation.

No actions by D, no evidence of fear for officer safety, no evidence D had gun, no evidence of prior violent conduct, furtive conduct, etc.

- Car pulled over immediately upon signal for lane violation. Close, fact-dependent case. Money and Gun suppressed.

Commonwealth v. Owens, 480 Mass. 1034

- Affirming MTS evidence seized during "freeze" of house in prostitution raid, while police obtained warrant.
- "Fundamental difference" between securing perimeter and "entry and physical surveillance from inside."
- At time of warrantless entry, police knew only that house used for prostitution.
- Dearth of evidence that of evidence at risk of loss
  - to the extent that physical evidence inferred from prostitution (condoms?), no record evidence that it was susceptible to loss.

Commonwealth v. Alexis, 481 Mass. 91

- Police may not bypass warrant requirement through foreseeable self-created exigency. Art. 14 more protective than 4Am, See *Kentucky v. King,* 563 U.S. 452 (2011)
- FACTS: Police approach house where suspect (who they had PC to arrest for home invasion previous day) lived. No warrant. Upon seeing officers approach through glass door, the defendant turned and ran towards the back of the house, officers forced their way in.
- During protective sweep, evidence seized in plain view. Later warrant secured, more evidence recovered.

Commonwealth v. Alexis, 481 Mass. 91 (cont.)

- Police were in the process of getting a warrant, but went to house before it was issued, and planned to arrest defendant if opportunity arose anyway
- Securing warrant would not have been impracticable, procedure for after-hours warrant available; no risk to officer safety.
- Reasonably foreseeable that five police officers approaching home would cause defendant to flee. "[G]enerally permissible for police to approach . . . and knock on the door" but not when it is reasonably foreseeable that "exigent circumstances" leading to warrantless entry of home will follow.

Commonwealth v. Alexis, 481 Mass. 91 (cont.)

- PC for a search warrant (executed after warrantless entry) existed before the warrantless approach to the house, *and* remained if the court excised plain view observations from warrant application.
- WAIVER: BUT Commonwealth waived this argument by not raising it at the MTS hearing or on appeal.

ELECTRONIC SEARCHES

Commonwealth v. Raspberry, 93 MAC 633

- Where police learn (via legal wiretap) of target's plan to shoot victim, emergency aid exception applies to 2 hours of warrantless CSLI tracking.
- Standard exceptions to warrant requirement apply to electronic searches.
- Car search (at destination) justified by auto exception where defendant arrested for lack of license and police reasonably thought gun might be in trunk.

Commonwealth v. Raspberry, 93 MAC 633 (cont.)

- The Appeals Court assumed that 2 hours of real-time CSLI was a search pending decision in *Almonor*. (*Augustine* and *Carpenter* are *historical* CSLI cases: 6 hr safe harbor).

SENTENCING

Commonwealth v. Jones, 479 Mass. 1

- Defendant was convicted of first degree murder, and sentenced to mandatory life w/o parole. Stabbing, apparently premeditated.
- D suffers from "pervasive developmental disorder, not otherwise specified" a variation of autism, under diagnosis in DSM.
- Competency: CW established competency by a preponderance of the evidence, dueling experts at hearing.

Commonwealth v. Jones, 479 Mass. 1 (cont.)

- Art. 26 (cruel or unusual)/ 8th Am. (cruel and unusual). Court does not conduct separate analysis. Holds that the mandatory sentence is constitutional under either.
- Court declines to extend constitutional protections to eliminate mandatory sentences of life w/o parole for defendants suffering from developmental disability.
- Distinguishes between intellectual and developmental disabilities, mirroring the distinction made in statute, G.L. c. 123B, § 1. Suggests intellectual disability is a more difficult question.

Commonwealth v. Eldred, 480 Mass. 90

Defendant, suffering from substance use disorder, violated the drug-free condition by testing positive for fentanyl.

Reported question: Whether judge may order Defendant addicted to drugs to remain drug free as a condition of probation?

Held, revocation appropriate because:

- drug-free condition "reasonably related" to goals of probation in this case, permissible to affect const. rights
  - judges have great latitude
- Condition not cruel and unusual under art. 26/8th Am.

Commonwealth v. Eldred, 480 Mass. 90 (cont.)

Probation revocation is punishment for underlying conviction, not probation violation.

Guidance on reported questions?

- The "reported question . . . contains a factual conclusion about the science of addiction that was not resolved at the trial court level"
- "[D]efendant's claim of [substance use disorder] rests on science that was not tested below."
- Present expert evidence below, adversarial hearing w/ findings of fact?

Voluntariness of Statements to Police

Commonwealth v. Lujan, 93 Mass. App. Ct. 95

- Allowance of MTS statements affirmed because statement involuntary
  - Circumstances: Moldovan-speaking D interviewed w Russian-speaking student police dept. intern translating
- Interview confusing because
  - not D's primary language
  - D had limited facility w/Russian
  - interpreter untrained, did not accurately translate what officers or D said
- Lack of procedural safeguards for methods, accuracy, & reliability of intern acting as interpreter

Commonwealth v. Rivers, 93 Mass. App. Ct. 120

- Denial of MTS statements reversed where:
  - officer said D was very likely to avoid felony if he cooperated
- Improper assurance that making statement would aid in defense or lessen sentence rendered statement involuntary
- Other factors weighing towards involuntariness finding:
  - D's relatively young age (26),
  - lack of prior involvement with system,
  - prior personal acquaintance with officer

Discovery

Commonwealth v. Torres, 479 Mass. 641

- D sought records of complainant's application to AG victim's compensation division - relevant to credibility
- D was prejudiced by refusal to order records
- Records subject to discovery under Mass. R. Crim. P. 17(a)(2), despite AG regulation on confidentiality

Commonwealth v. Escobar, 479 Mass. 1010

- D sought limited post-conviction discovery regarding Hinton Drug Lab chemist Della Saunders
- Saunders' productivity numbers were comparable to Annie Dookhan's
- Allowance of motion affirmed

Cross-examination by Innuendo

Commonwealth v. Knowles, 92 Mass. App. Ct. 617

- Application of rule termed "cross-examination by innuendo"
- Prohibits impeachment of witnesses with statements they allegedly made to third parties if:
  - witness denies statement
  - 3rd party not available to testify

Commonwealth v. Knowles, 92 Mass. App. Ct. 617

Examples:
- cross of D's lay witness with statement allegedly made to state trooper improper, because witness denied memory of conversation and trooper not present, but not prejudicial
- BUT… cross of D with statement he allegedly made to trooper proper where he admitted speaking to trooper
- AND… rule not applicable to expert witness

Unit of Prosecution

Commonwealth v. Casbohm, 94 Mass. App. Ct. 613

- Child pornography found on cell phone where D found to have posed & photographed child
- Posing and photographing a child in state of nudity (c. 272 § 29A(a)) & posing and photographing a child engaged in sexual conduct 272 § 29A(b) are NOT duplicative on double jeopardy principles
- Act of posing the child is the unit of prosecution

Live question: See *Commonwealth v. Wassilie* (to be argued in April) asking whether unit of prosecution for secretly recording nude persons is episode of recording or number of people recorded