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Volume 1, Issue 2

Police Legal News

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Published by:

Commonwealth Police Service, Inc.
Attorney Patrick M. Rogers
Post Office Box 58
Assonet, MA 02702
Phone: 508-644-2116
Fax: 508-644-2670
www.commonwealthpolice.net

Attorney Brian E. Simoneau
161 Worcester Road, Suite 200
Framingham, MA 01701
Phone: 508-881-1119
Fax: 508-302-0212
www.policelaborlaw.com

Police Legal News is a free monthly newsletter designed to provide police officials with the latest news and information regarding court and administrative agency decisions affecting the Massachusetts law enforcement community.

Topic areas will include: summaries of SJC & Appeals Court decisions, search & seizure, motor vehicle, and criminal law, labor relations law & highlights of recent decisions of the Mass. Labor Relations Commission, Civil Service Commission cases, police civil liability, etc…

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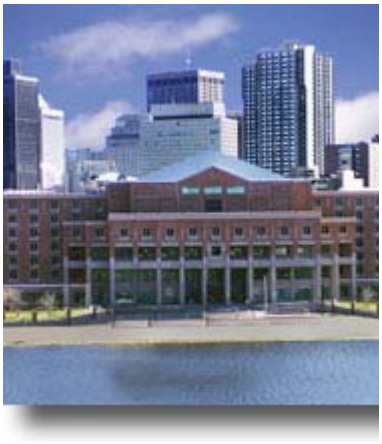
Credit on Civil Service Examinations for Employment / Experience as a Police Officer

Pursuant G.L. c. 31 § 22, individuals may apply to receive credit for employment or experience in the position title of Police Officer. It is critical to claim this training & experience when completing the T&E sheet. The Civil Service Commission has previously held that officers of the following police departments were entitled to credit for their training and experience:

- SSPOs appointed pursuant to G.L. c. 22 § 63 employed by the Massachusetts Eye & Ear Infirmary;
- Bunker Hill Community College Police Officers
- U-Mass Police Officers
- Boston Housing Police
- Boston Municipal Police
- Norfolk County Sheriff's Department (Deputy Sheriff)
- Harvard University Police
- Bridgewater State College Police

This list is not exhaustive and HRD grants credit for work performed involving the "use of full police powers." HRD defines full police powers as "The definition of Full Police Powers the authority to:

- Suppress and prevent all disturbances and disorders;
- Make arrests and imprison with or without a warrant;
- Fingerprint and photograph a person arrested.



"Upton's conduct was the result of trying to cover up the misdeeds of his fellow correction officers, and not the result of trying to cover up his own misconduct. Such conduct…did not compel termination"

Sheriff of Suffolk County v. JOEASC:

Termination for Untruthfulness REVERSED.

BY BRIAN E. SIMONEAU

A pretrial detainee housed at the Suffolk County jail, engaged in a verbal altercation with two correction officers and sustained physical injuries as a result of a scuffle with one of the officers. An internal investigation by the sheriff determined that one of the officers (Upton) had assaulted Gibson. The sheriff's investigation also disclosed that another correction officer saw some of the salient events, failed to report the matter to his superior officer, and lied to investigators in an attempt to cover up the malfeasance. The sheriff terminated Upton for these violations. Following a grievance of the termination by the union, the arbitrator found that there was just cause for the imposition of discipline against Upton, but revoked his discharge by the sheriff and ordered him suspended for six months without pay. The sheriff attempted to vacate the arbitration award in Superior Court, arguing that it exceeded the arbitrator's authority and was contrary to public policy. A Superior Court judge affirmed the award.

The question to be answered by the Appeals Court in this case was whether the arbitrator's award reinstating the officer violates public policy. The case was remanded to the Appeals Court, so that this question could be answered in light of Boston v. Boston Police Patrolmen's Assn., 443 Mass. 813 (2005).

In the Boston Police Case, while responding to a call concerning a rowdy party, Officer John DiSciullo verbally abused two individuals, acted in an "impatient, harsh and derisive" manner toward them, and falsely arrested them. DiSciullo then filed an incident report and a statement of criminal charges against the two individuals that were "knowingly untrue." During the subsequent internal investigation by the police department, DiSciullo gave "his deliberately distorted version of the event" to the investigators.

In the present case, the arbitrator found that Upton committed various offenses including **failing to "file some form of a report of an unusual and significant event (i.e., the assault)[, and that he] did not cooperate with the ... investigation and filed incomplete, misleading or false reports."**

In the Boston Police case, DiSciullo was the original perpetrator of bad acts, who then went on to "shroud[ ] his own misconduct in an extended web of lies and perjured testimony."

"In contrast, Upton's conduct was the result of trying to cover up the misdeeds of his fellow correction officers, and not the result of trying to cover up his own misconduct. Such conduct, while condemnable, and requiring substantial discipline, did not compel termination, as it did not "present one of those 'rare instances' in which an arbitrator's award must be vacated as contrary to 'an explicit, well-defined, and dominant public policy.'"

Click to Download the Case

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RMV Regulation Requiring Inspection within 7 Days of Purchase Declared Invalid & Evidence Suppressed

Commonwealth v. Conley

(Salem District Court) (Docket No. 0636-CR-1074) (Aug. 18, 2006).

Where, during a traffic stop for defective equipment, the police determined an inspection sticker on the defendant's car to be invalid, entered the vehicle and removed the inspection sticker, Judge Cornetta found that the officers acted pursuant to an invalid RMV regulation and that evidence coming into the commonwealth's possession through the officers' acts (removal of the inspection sticker) must be suppressed.

On March 26, 2006 during daylight hours, the defendant's motor vehicle was stopped on U.S. Route One in Danvers. The officer and his partner stopping the vehicle is said to have observed a defective right rear turn signal lens on the vehicle.

"The defendant pulled his vehicle to the side of the road in reasonable fashion upon the command of the police and upon request, provided the officer with his license and registration, both of which were valid. The officer then proceeded to the front right of the vehicle to observe the vehicle's inspection sticker.

"Taking down the serial number information from the inspection sticker, the officer then ran that information through his cruiser's onboard computer to the Registry of Motor Vehicles computer database. The Registry's reply indicated that while the sticker displayed on the vehicle showed that it was still valid, under 540 CMR 400 et al., an administrative regulation adopted by the agency, since the vehicle's ownership had been exchanged during the time when the sticker was otherwise valid, it was now invalid since per the administrative regulation, **the vehicle should have been re-inspected by the new owner who would then also be required to pay an additional twenty nine dollars fee for this re inspection due to the vehicle's exchange of ownership.**

"Acting upon the apparent authority of this administrative regulation, **the officer proceeded to enter the vehicle and remove the vehicle's inspection sticker.** When he so entered the vehicle, without any consent given by the operator, the officer testified that he observed a knife bulging out of the operator's pocket. The operator was then immediately removed from the vehicle by the police, was patted down and the knife was removed. Police then questioned the operator who admitted to possessing a class B controlled substance and a class C controlled substance. He was searched and such substances, consistent with personal use were found upon his person by the police.

"He was then arrested and charged with an equipment violation, an inspection sticker violation and possession of a class B and a class C controlled substance.

"The defendant has filed a motion seeking to suppress the evidence seized in this matter and questioning upon constitutional grounds a number of actions taken by the police in this.

"However, ruling is now entered that this matter can be determined by the Court upon a much narrower issue."

"G.L. c. 90, §§ 7A and 7V, provides for a comprehensive scheme of inspecting motor vehicles regarding issues of equipment safety and air quality. Every registrant must submit his (her) vehicle annually to inspection by a Registry of Motor Vehicles designated mechanic and is required to pay a twenty nine dollar fee for that inspection.

Vehicles passing the inspection process are provided with a certification sticker which is valid for one year. Vehicles failing the inspection are issued a rejection sticker. The defects found in the vehicle involving safety and environmental quality must then be corrected by the registrant within a number of days or the vehicle must be removed from the road. Violations of this law are civil in nature carrying a fifty dollars civil assessment and form the basis for permitting police to stop and cite an operator.

"While the public purpose associated with the inspection law is valid (i.e. public safety and environmental concerns), the administrative regulation requiring that such an inspections be conducted on a greater than annual basis (as is authorized by the legislature) is not.

"The Commonwealth can point to no valid public policy associated with this administrative practice which in essence shifts the inspection process from one that is vehicle oriented to one that is ownership oriented. If a vehicle passes an inspection which is valid for one year, how can a mere transfer of ownership within that one year negate the prior valid inspection certification?

"In addition, the requirement that a new owner pay an additional twenty nine dollars re-inspection fee raises the question of whether the agency's action is aimed at public safety and environmental concerns or is simply being disguised as a revenue raising measure.

"In either case, **the administrative regulation is preempted by the legislature's actions upon this public policy issue and the Registry of Motor Vehicles is without authority to impose a more stringent policy in this area than the legislature has authorized.**

"Accordingly, ruling is now entered that on March 26, 2006, the police acted without authority in determining that the inspection sticker on the defendant's vehicle was invalid and further acted impermissibly in entering the vehicle without the operator's consent and removing the inspection sticker from the vehicle on the side of the road during a routine traffic stop.

"Any evidence coming into the Commonwealth's possession after those impermissible acts by the police relying upon an invalid administrative agency regulation must ... now be ordered suppre

Secretly Recording Interrogations in Massachusetts:

Permissibly Operating Under Stealth Mode Via Intercom System Exemption

by Attorney Patrick Michael Rogers

Is it legally permissible to surreptitiously overhear electronically or record electronically the statements made by a suspect or defendant to police in the stationhouse? This article will legally explore this area which has often been considered a minefield for Massachusetts law enforcement. Curiously, this particular area of law had been clearly addressed by the Massachusetts Supreme Judicial Court and Appeals Court almost thirty years ago.

Our discussion will start off with a more contemporary decision—the landmark case of **Commonwealth v. DiGiambattista,** 442 Mass. 423 (2004), which attempts to lessen the number of motions presented to the courts where the factual precision of the suspect's or defendant's statements are in issue. In **DiGiambattista,** the Court announced "that, henceforth, the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, *on request,* to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution." In other words, where police fail to record a custodial interrogation, the defendant can have the jury instructed that the Massachusetts Supreme Judicial Court prefers that all such interrogations be memorialized on tape or other means.

The **DiGiambattista** rule will include the following types of statements elicited by the police:

1) any confession or statement of the defendant that is the product of an unrecorded ***custodial*** interrogation (anywhere—either in the station or out of the station—anywhere—as long as it was deemed ***custodial***), **or**

2) an unrecorded interrogation conducted at a place of detention—(**Note:** Any time that police are questioning an individual about a crime at the stationhouse and subsequently want to use those statements at trial, the defendant will be entitled to a **DiGiambattista** instruction whether he was in custody or not at the time the statements were made.)

Can Police Just Simply Require That the Interrogation be Recorded?

Although **Commonwealth v. DiGiambattista**, 442 Mass. 423 @ 445 (2004) in dicta envisions the possibility that a defendant may not want to have the statement recorded notwithstanding a 5th Amendment waiver, there is nothing in the decision that prohibits a police department from having a policy of recording all statements that they desire to have electronically memorialized on tape or some other device—either audio or video or both.

It is presently impossible for police agencies within the Commonwealth of Massachusetts to completely satisfy the **DiGiambattista** decision. There will be many situations where a suspect is questioned at headquarters or is subjected to custodial interrogation elsewhere without the benefit of an electronic recording. For an example, disorderly cases, arrests for disturbing the peace, barroom fights, operating unders, and domestics make up a number of situations which are so commonly encountered, that it would be prohibitive to have to record to satisfy the rule.

What if police do not record? The worst that can happen is that the defendant will simply be entitled to the jury instruction, and that will only arise if he goes to trial before a jury. Obviously, in most misdemeanor and even in many felony cases, a jury trial is uncommon. Therefore, what police can do here is to formulate an internal departmental policy directing just what situations will be recorded. As an example, perhaps a policy of recording all major cases (including some misdemeanors) **or** serious felonies.

Secretly Recording Interrogations

(continued from Page 4)

A policy of automatically excluding all misdemeanors is not acceptable because there are many misdemeanor statutes—like motor vehicle homicide—that should fall within the policy. These decisions might be left up to the commanding officer.

Is Permission Required Before Police Can Record Electronically?

There is nothing in the **DiGiambattista** rule that requires separate waivers for electronically recording the interrogation and for **Miranda**. Likewise, there is nothing in the wiretap statute that requires police to receive permission—written or otherwise—prior to recording electronically. In fact, in **Commonwealth v. Gordon**, 422 Mass. 816, 832-833 (1996), the SJC held that a police recording (video *and* audio) of the defendant's booking procedure was not a violation of the wiretap statute***—even where he was unaware that he was being recorded.*** The SJC emphasized that "the legislative focus [of the wiretap statute] was on the protection of privacy rights and the deterrence of interference therewith by law enforcement officers' ***surreptitious eavesdropping*** as an investigative tool" *[emphasis added]*. Although the SJC concluded that the statute, read literally, could make unlawful the audiotaping of booking procedures without the knowledge of arrestees, "in the absence of more specific statutory language to that effect and in light of the preamble, we [were] unwilling to attribute that intention to the Legislature." Id. at 832-833. See too **Commonwealth v. Rivera,** 445 Mass. 119 (2005). See also **Commonwealth v. Look**, 379 Mass. 893 (1980) *infra.*

What About Mandatory Recording?

A police policy where the defendant is **told** that the interrogation **will** be recorded cannot run afoul of the wiretap statute either. The wiretap stature is designed to protect ***private conversations*** from being secretly overheard through electronic means. Significantly, in **Commonwealth v. Look,** 379 Mass. 893 (1980), the Court held that "a person who is talking to a police officer after being told that anything he says may be used against him in court, cannot justifiably claim to have an expectation of privacy as to any statements he makes." Moreover, if the defendant does not want to be recorded, he or she can invoke their 5th Amendment rights.

However, having such a rigorous policy may lead to a situation where police lose out on a confession. Perhaps a policy permitting the investigating law enforcement officials to shut off the recording device where the defendant remains adamant that he will not make any statements if they are electronically recorded but does not mind speaking to police officials after waiving the 5th AMD will strike a happy balance. Although such a situation may be relatively rare, the department policy should make allowances for it. Where the defendant does not initially display such an unyielding demeanor, the policy *should* be that the interrogation **will** in fact be electronically recorded.

RECOMMENDED POLICY BY THE MIDDLESEX DA

The Middlesex District Attorney's Office **recommends that police adhere to the following procedures during custodial interrogation of a suspect and during interrogation of a suspect at a place of detention (e.g., police stations)*:

a) Before any questioning begins, use a rights form to administer **Miranda** warnings where those warnings should be given either out of an abundance of caution or where Miranda warnings are required. Have the suspect sign the form on the appropriate line.

b) Using the rights form, inform the suspect that it is the policy of your department to tape record all interviews so that there is a record of the discussion and ask him whether he gives you permission to tape record the interview. Advise him that he may change his decision about tape recording the interview at any time.

Secretly Recording Interrogations

(continued from Page 5)

c) If the suspect tells you that he does *not* want to be tape recorded, have him so indicate on the Form and have him sign the Form on the appropriate line. Then, proceed with the interview without tape recording, keeping the six-hour **Rosario** rule in mind.

d) If the suspect *agrees* to be tape recorded, have him so indicate on the form and have him sign the form on the appropriate line. Start the recording device. Repeat the Miranda warnings on tape and confirm on tape that you have discussed the tape recording of the interview with the suspect. Proceed with the interview on tape, keeping the six-hour Rosario rule in mind.

e) If the suspect *changes* his decision during the interview about being tape recorded, use the rights form again to have him so indicate his new choice regarding tape recording and have him sign the form on the appropriate line. Then, resume the interview, either with or without tape recording the remainder of the interview as the suspect chose.

EDITOR'S NOTE: Each police department can develop their own policies regarding the **DiGiambattista** rule. Some departments have fully adopted the Middlesex policy immediately above while others have adhered to a less formal approach. I have made a few recommendations concerning policy implementation on **DiGiambattista** that you may want to consider. However, I urge all police agencies of the Commonwealth to consult with your local District Attorney's Office for their input in drawing up a written policy on this most important area of Massachusetts criminal procedure. Remember, that it will ultimately be the Assistant District Attorney that will be handling the case at trial and not the police.

Intercom System Exception to the Wiretap Law in Massachusetts

In light of the **DiGiambattista** rule and the suggested policies offered by the Middlesex District Attorney's Office and commentators, such as myself, making various suggestions to assist law enforcement in this area, there have been a number of questions that have surfaced concerning possible violations of the wiretap law by police if they either electronically overhear or electronically record any statements inside the stationhouse without first obtaining the permission from the suspect or defendant. Remember the case of **Commonwealth v. Gordon**, 422 Mass. 816, 832-833 (1996), discussed above, where the Supreme Judicial Court held that a police surreptitious recording of both the video and audio component of the defendant's booking procedure was not a violation of the wiretap statute. Additionally, in the more recent decision of **Commonwealth v. Pierce**, 66 Mass. App. Ct. 283 (2006), the Massachusetts Appeals Court held that a police station's intercom system, over which an officer overheard incriminating statement from the defendant while in his jail cell, was an office intercommunication system used in ordinary course of business and, thus, fell within one of wiretap statute's enumerated exceptions from general prohibition on the interception of oral communications. G.L. c. 272, § 99 D. § D1 of the wiretap statute exempts certain activities from the general prohibition of the interception of oral communications. It provides, in pertinent part that *it shall not be a violation of this section for persons to possess an office intercommunication system which is used in the ordinary course of their business* or to use such office intercommunication system in the ordinary course of business.

Subsequent to his arrest for unlawful carrying of a firearm, the defendant in **Pierce** was placed within the cellblock of the Randolph police department. The cells were monitored with an audio visual intercom system. The arrangement of the monitors allowed the police officer sitting at the front desk to watch and listen to what was taking place inside the cells. While the defendant was in his cell, the desk officer on duty, heard him through the intercom system conversing with the prisoners. That officer subsequently testified to the substance of the overheard conversations, in which he heard the defendant admit to ownership of the gun. The defendant argued that a motion to suppress this testimony should have been allowed because the police obtained the defendant's incriminating statements using an unlawful interception in violation of the Massachusetts wiretap statute.

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Secretly Recording Interrogations

(continued from Page 6)

The Court held that the use of the overheard statements was not unlawful, because the intercom system falls within one of the wiretap statute's enumerated exemptions. The wiretap statute exempts certain activities from the general prohibition of the interception of oral communications. G.L. c. 272, § 99 D. Section D 1 provides, in pertinent part:

"It shall not be a violation of this section—

"b. for persons to possess an office intercommunication system which is used in the ordinary course of their business or to use such office intercommunication system in the ordinary course of business."

The Randolph police station's intercom system, much like the systems used in every police department throughout the Commonwealth, falls within this exception.

In the case of **Commonwealth v. Look,** 379 Mass. 893 (1980), another decision concerning surreptitious electronic surveillance by police, the defendant made incriminating statements to a police officer while in an interrogation room at a police station. Unbeknownst to the defendant, four other officers at the front desk of the station overheard the defendant's statements through an intercom system. The defendant argued that the evidence derived from the overheard statements should have been suppressed because the statements were unlawfully intercepted through the intercom system of the police station. Concluding that the intercom system was "obviously ... installed for ordinary business purposes [and] was being used for one of those purposes [assuring the safety of the interrogating officer] on the night in question," the Supreme Judicial Court held that the intercom interception was not illegal under the Massachusetts wiretap statute because the intercom system fell within the statute's exemption for intercom systems installed and used in the ordinary course of business.

Several years after the **Look** decision, the Legislature enacted G.L. c. 40, § 36B which mandates that "[a]t least one ... cell within [a] lockup facility shall have installed within it, but beyond the access of any person detained within such cell, an electronic audio system whereby a police officer ... is brought within audible range of such cell" unless at least one cell in the given lockup facility is "within audible range of the duty desk without electronic assistance." The Court in **Pierce** stated that "[r]egardless of the specific design of the Randolph police station, it is clear that the Legislature has envisioned, and in certain circumstances required, the use of these intercom systems in police stations. Additionally, that Court stated that "[w]e presume that in enacting G.L. c. 40, § 36B, the Legislature was aware of the wiretap statute [] and decided ***that intercom systems in police stations were necessary for safety purposes." [emphasis added].***

Lastly, another issue that has surfaced deals with the legal differences, if any, between secretly overhearing and secretly recording the conversations of the suspect or defendant in the station under the intercom system exception. The Appeals Court has held that the "ordinary course of business" exemption will include recording. In **Dillon v. Massachusetts Bay Transp. Authy.,** 49 Mass.App.Ct. 309, 319, 729 N.E.2d 329 (2000), the Massachusetts Bay Transportation Authority (MBTA) recorded conversations on nearly all of its telephone lines connected to major operational centers. Employees of the MBTA claimed that such recordings violated the wiretap statute, while the MBTA asserted that such recordings were necessary for efficiency and safety reasons associated with maintaining a mass transit system. The Court held that such considerations were legitimate business purposes, or, put another way, within the ordinary course of business of the MBTA.

With **Dillion** in mind, do you now think that it is necessary for a police department or public safety dispatcher to have to answer the telephone by first exclaiming, "police emergency, your call is being recorded?"

If you have any questions or comments, please email me directly at mailto:rogers.patrick@comcast.net.

LAW OFFICES OF TIMOTHY M. BURKE

NEEDHAM CORPORATE CENTER
160 Gould Street, Suite 111
Needham, Massachusetts 02494-23 00
(781) 455-0707
Facsimile (781) 455-8879

Police Legal Defense Fund

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As you may know, I began my legal career in 1976 with the Suffolk County District Attorneys' Office. I tried over 80 jury trials there, including 25 homicide cases, with a conviction rate of over 90 percent. In 1985, I opened my private law practice, specializing in the area of police liability. During the past 21 years, I have been General Counsel to the Massachusetts State Police union. My office also represents clients in the areas of medical malpractice, personal injury claims, real estate, divorce and criminal defense.

My office is comprised of talented and experienced lawyers who specialize in the issues that confront law enforcement officers every day. As police officers, you face the potential for litigation that no other occupation is confronted with. There are very few other lawyers in the state that have the breadth of knowledge and experience in representing police that I possess. From the defense of civil rights cases to 24-hour, on call response to the scene of a critical incident, my office is prepared to meet your most urgent needs.

I am proud to say that my office has represented over 500 police officers in every form of civil rights litigation, and **not one officer has ever had to pay any judgment from his or her own personal funds.** I have also personally responded to over 75 shooting incidents, frequently in the middle of the night. It is my experience that police officers require immediate response in these critical moments.

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COMMONWEALTH POLICE SERVICE, INC.

Post Office Box 58
Assonet, MA 02702

PHONE:
(508) 644-2116

FAX:
(708) 555-0102

E-MAIL:
ROGERS.PATRICK@VERIZON.NET

WEBSITE:
COMMONWEALTHPOLICE.NET

ATTORNEY BRIAN E. SIMONEAU

The Meadows
161 Worcester Road
Framingham, MA 01701

PHONE:
(508) 881-1119

FAX:
(508) 302-0212

E-MAIL:
BRIAN@POLICELABORLAW.COM

WEBSITE:
WWW.POLICELABORLAW.COM

Attorney Patrick M. Rogers, has lectured to thousands of police officers on various legal topics. He has over twenty years of police law enforcement experience and has authored a number of textbooks that are used state-wide by thousands of police officers everyday.

Attorney Brian E. Simoneau is an experienced police labor law practitioner with particular expertise in Massachusetts Civil Service matters.

Comm. v. John P. Quinn (Reasonable Suspicion)

"In the middle of the night, when snow had recently fallen, a police officer stopped the only motor vehicle on the road driving from the direction of a gas station break-in that had occurred five minutes earlier. The motion judge, finding that the police officer stopped the motor vehicle on a hunch, allowed the defendants' motions to suppress evidence." The Appeals Court determined that the officer had reasonable suspicion to make the stop and reversed the suppression order.

"Viewing the circumstances as a whole, Donahue's investigatory stop of the motor vehicle was based on specific and articulable facts, i.e., (1) it was late at night in winter; (2) an officer observed fresh footprints and tire tracks suggesting the perpetrators left by car; (3) the motor vehicle was the only car on the road; (4) the motor vehicle was in close proximity to the gas station; and (5) the motor vehicle was stopped approximately five minutes after the initial dispatch. " Stopping the only motor vehicle on the road, which was being driven from the direction of a crime, within minutes of that crime, was proper. Having to make a rapid decision, the officer acted permissibly. Download the decision (full text).

Eagle Tribune v. Clerk-Magistrate, Lawrence Dist. Court

No Right of Public Access to Clerk-Magistrate "show cause" Hearings

The Massachusetts SJC recently decided that there is no public right of access to "show-cause" hearings that precede the initiation of criminal proceedings in certain cases. Download the decision (full text).

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VERDICTS & SETTLEMENTS

Woman tries for restraining order against police officer

Type of action: Criminal

Injuries alleged: Inappropriate relationship

Name of case: Sullivan v. Watkins

Court/case #: Appeals Court, No. 05-P-1552

Tried before judge or jury: Judge

Name of judge: Mark Sullivan

Amount of verdict: $0 (defense verdict)

Date: Nov. 15, 2006

Demand: No demand made

Highest offer: No offer made

Attorney: Brian E. Simoneau, Framingham (for the defendant)

Informant fails to prove she, officer had substantive dating relationship

Defense verdict

The plaintiff, a confidential informant who attempted to obtain a restraining order against the defendant police officer, failed to meet her burden of proving, as required by G.L. c. 209A, that she and the police officer had a substantive dating relationship.

Although the plaintiff claimed that she and the defendant dated for approximately one year, "went out here and there" and had "[g]one out to eat plenty of times," when asked directly where they had gone, she was unable to recall a single restaurant or occasion.

The defendant police officer testified that he "never had a cup of coffee, dinner, shared a movie, hotel, absolutely no sexual intercourse, absolutely never in my life" with the plaintiff.