

# Motions to Suppress and Dismiss

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September 20, 2019

# Topics

- Mass. R. Crim. P. 13
- Motions to suppress
- Motions to dismiss
- General tips

# Mass. R. Crim. P. 13

- A pretrial motion:
  - Shall be in writing
  - All grounds must be stated, or otherwise deemed waived
  - Supported by affidavit of person with personal knowledge of the facts alleged
  - Accompanied by a memorandum of law, except for a motion to suppress a warrantless search

# Written Motions

- This really should never an issue

# Grounds for Which Motion is Based

- The defense needs to give clear notice of what is being challenged
  - For example, the defense cannot file a motion to suppress a warrantless search and, without raising it in the motion, argue Miranda during the hearing
- Prior to a hearing, always clarify with the Court the scope of the motion
- “Grounds not stated which reasonably could have been known at the time the motion is filed shall be deemed to have been waived...” Mass. R. Crim. P. 13(a)(2); Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 204 (2004) (“[t]he requirements of rule 13 are not empty formalities”)

# Affidavit by a Person with Personal Knowledge

- The purpose of this requirement is:
  1. Provide the judge a statement of anticipated evidence, *in reliable form*, to meet the defendant's initial burden of establishing the facts necessary to support motion, and
  2. Provide the Commonwealth with fair notice of the specific facts relied on in support of the motion

Commonwealth v. Santosuosso, 23 Mass. App. Ct. 310, 313 (1986)

- For motions to suppress, this will almost always be the defendant
- For motions to dismiss, this will almost always be the defense attorney

# Affidavit Continued

- Defendant's affidavit in support of a motion to suppress is not evidence and is not a substitute for the defendant's testimony at the motion hearing  
Commonwealth v. Mubdi, 456 Mass. 385, 389 n. 4 (2010)

- Defendant's affidavit is not admissible in the Commonwealth's case in chief at trial and is only admissible if the defendant testifies inconsistently with their affidavit at trial  
Commonwealth v. Rivera, 425 Mass. 633, 637 (1997)

# Motions to Suppress



# What is a Motion to Suppress?

- A request by the defendant that the Court preclude the Commonwealth from introducing certain evidence at trial because the defendant alleges their constitutional rights were violated

# What is Necessary to Warrant a Hearing on a Motion to Suppress?

- The defendant must alleged that there has been an intrusion into an area for which they have an expectation of privacy
- The defendant must have standing to challenge the alleged violation
- The alleged violation must have included government action

# What is a Constitutional Violation?

- Any warrantless search or seizure is presumed unreasonable placing the burden on the Commonwealth to establish the legality of the government action
- A search warrant issued without sufficient probable cause, or one that contains a material false statement or omission that affects probable cause
- Subjecting an individual to custodial interrogation without providing Miranda warnings

# What is Standing

- “Standing requires the defendant to establish that he was present at the time of the search or had a substantial possessory interest in the place searched or the item seized.”

Grasso & McEvoy, “Suppression Matters Under Massachusetts Law”, § 3-4

- In essence, the governmental intrusion must have been of the defendant’s, and not someone else’s, rights

# Except for Automatic Standing

- Under Article 14, a defendant charged with a possessory offense has automatic standing to challenge the search of another's property even if the defendant does not have an expectation of privacy in the area searched
- The defendant must have a possessory interest at the time of the contested search

Commonwealth v. Amendola, 406 Mass. 592 (1990)

# Government Action

- The purpose of the exclusionary rule is to deter official misconduct
- The exclusionary rule is not served when the government is not responsible for the violation

Commonwealth v. Leone, 386 Mass. 329, 333  
(1982)

# Issue Spotting Motions to Suppress

- Warrantless stops/searches
  - Think about any time there is a constitutional moment, i.e., motor vehicle stop, exit order, pat frisk, arrest, search incident to arrest...
- Search warrants
  - Did the warrant establish probable cause?
    - Nexus, staleness, criminality of the items sought
  - Was the officer truthful in their affidavit?
  - Did the officer omit exculpatory information from the affidavit?
- Statements
  - Was the defendant in custody?
  - Was the defendant provided Miranda warnings?
  - Did the defendant invoke the right to remain silent/attorney?
  - Were the defendant's statements voluntary?

# Burden of Proof

- The defendant has the initial burden of proof to establish that a search or other governmental intrusion occurred
  - This is accomplished via the affidavit



# Burden of Proof – Warrantless Search/Seizure

- At the hearing on a warrantless stop/search, the Commonwealth has the burden of proof by a preponderance of the evidence
- This is because all warrantless searches/seizures are presumed unreasonable

Nix v. Williams, 467 U.S. 431 (1984) (establishing burden pursuant to federal constitution); but see Grasso & McEvoy, “Suppression Matters Under Massachusetts Law”, § 2-7(a)(2) (discussing burden of proof not articulated pursuant to Massachusetts constitution).

# Burden of Proof – Search Warrants

- The defendant must prove by a preponderance of the evidence that the affidavit did not establish probable cause
  - Nexus, staleness

Commonwealth v. Coriveau, 396 Mass. 319. 334  
(1985)

# Burden of Proof – Search Warrants

## Frank's Hearing

- Defendant has initial burden to make a substantial preliminary showing that the statement was false, or that there was a material omission
  - No hearing if defendant fails to meet this burden
- If defendant meets initial burden, then the defendant must prove by a preponderance of the evidence that a material statement was false, or made with reckless disregard for the truth

Franks v. Delaware, 438 U.S. 154 (1978); Commonwealth v. Nine Hundred & Ninety-Two Dollars, 383 Mass. 764, 767 (1981); see Commonwealth v. Ramos, 72 Mass. App. Ct. 733, 778 (2008) (discussing material omissions).

# Burden of Proof - Statements

- The defendant has the initial burden to prove custody

Commonwealth v. Larkin, 429 Mass. 426, 432 (1999)

- If the defendant was in custody, then the Commonwealth must prove, beyond a reasonable doubt, that the defendant knowingly and voluntarily waived their right to remain silent

Commonwealth v. Newson, 471 Mass. 222, 229 (2015)

# Burden of Proof Statements - Voluntariness

- Defendant has initial burden to produce evidence tending to show their statement was not voluntary
- If defendant meets burden, then the burden shifts to the Commonwealth to prove voluntariness beyond a reasonable doubt

Commonwealth v. Tremblay, 460 Mass. 199, 206  
(2011)

# Burden of Proof - Identification

- Defendant must prove by a preponderance of the evidence, “that the witness was subjected by the State to a pretrial confrontation so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant due process of law [internal quotations and omissions omitted].”

Commonwealth v. Silva-Santiago, 453 Mass. 782, 794-795 (2009).

# The Exclusionary Rule

- As a sanction for a constitutional violation, the Court will prohibit the Commonwealth from introducing suppressed evidence in its case in chief
- The exclusionary rule, however, “is not an individual right and applies only where it ‘results in appreciable deterrence.’”

Herring v. United States, 555 U.S. 135, 141 (2009) *citing* United States v. Leon, 468 U.S. 897, 909 (1984).

- Where none of the purposes of the exclusionary rule are met, “rigid adherence to the exclusionary rule only can frustrate the public interest in admitted the evidence obtained.”

Commonwealth v. Lett, 393 Mass. 141 (1984).

# Motions to Dismiss



# What is a Motion to Dismiss?

- A request by the defendant that the Court dismiss the case over the Commonwealth's objection
- It can be based on either legal issues with the charges, or as a sanction

# DiBennadetto Motion

- Motion to dismiss the complaint for lack of probable cause or otherwise alleging a defect in the issuance of the complaint
- The issue is whether:
  - The four corners of the complaint application establish probable cause for the crimes charged;  
or
  - There was some defect in the process in which the complaint issued

# Rule 36

- Mass. R. Crim. P. 36 requires a defendant to be brought to trial within one year from the return date in the court that the matter is pending
  - The return date is the arraignment date

Commonwealth v. Polanco, 92 Mass. App. Ct. 764, 766 (2018) *review denied* 480 Mass. 1102 (2018).
- The Court must factor the excludable periods pursuant to Mass. R. Crim. P. 36(b)(2) to determine how much time has run

# Rule 36(c)

- Even if defendant is not entitled to a dismissal because one year has not run, the court may dismiss the case if:
  1. The conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence; and
  2. This conduct has resulted in prejudice to the defendant

# Speedy Trial

- Independent of Rule 36, a defendant has a constitutional right to a speedy trial
- The defendant has the initial burden to demonstrate that there has been presumptive prejudice by the delay in going to trial
- If defendant meets burden, the Court applies the Barker test

Commonwealth v. Butler, 464 Mass. 706, 710  
(2013)

# Barker Four Factor Test

1. The length of the delay
  2. The reasons for the delay
  3. The defendant's assertions of his speedy trial right, and
  4. The prejudice to the defendant
- The Court weighs all four factors to determine if the defendant's due process rights have been violated

# Rule 36 vs. Speedy Trial

## Rule 36

- Case management tool
- Starts at arraignment
- Time between dismissal and new charges may be included

## Speedy Trial

- Constitutional right
- Starts when criminal proceedings commence, arrest or indictment
- Time between dismissal and new charges not included

Important cases: Commonwealth v. Butler, 464 Mass. 76 (2013); Commonwealth v. Denehy, 466 Mass. 723 (2014); Commonwealth v. Polanco, 92 Mass. App. Ct. 764, 766 (2018) *review denied* 480 Mass. 1102 (2018).

# Discovery violations

- As a sanction for non compliance with a discovery order, the court may dismiss the charges

Mass. R. Crim. P. 14(c)

- Dismissal based on discovery violations is a sanction of last resort and is appropriate only when there is egregious prosecutorial or police misconduct

Commonwealth v. Washington W., 462 Mass. 204 (2012).



# Words of Advice

- Create a record
- Narrow the issues
- READ!!!

# Questions?

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