MASSACHUSETTS Lawyers Weekly

SJC weighs case said to involve 'sandbagging' by defense attorney

Criminal defense bar rejects characterization

By: Kris Olson September 9, 2022

At a readiness conference before the trial of a man charged with violating an abuse prevention order, the prosecutor notes that the order itself will be an exhibit and that she does not intend to call the police officer who served it.

Defense lawyer: case is 'no brainer'

Turning to the attorney representing the defendant, the District Court judge asks: "Is there any problem with service?"

The defense attorney knows that the most candid answer to the question is "yes." The prosecution had given him an abuse prevention order bearing a date that post-dated the alleged violation of the order.

Without rectifying the mistake, the prosecutor would be unable to establish at trial an essential element of the crime: that the defendant had notice that he was the subject of a valid order before he allegedly violated it.

So instead, the defense attorney replies simply — but not untruthfully — "I've been provided discovery."

What the attorney's response ought to have been is part of the crux of a case argued before the Supreme Judicial Court on Sept. 7, *Commonwealth v. Edwards*.

In its invitation for amicus briefs, the court sketched out three possibilities: that the Rules of Professional Conduct may have either prohibited or required the defense lawyer to divulge his intention to raise the service issue at trial, or that he was permitted but not obligated to make the disclosure.

Given that the attorney had waited to raise the issue until after the trial was underway, two other issues are before the SJC: Did the judge go too far in dismissing the complaint with prejudice, and does the prohibition against double jeopardy bar a retrial under the circumstances in *Edwards*?

At least to members of the defense bar, the answers to those questions are obvious. No, the defense attorney did not have the option to divulge his trial strategy, and yes, jeopardy had attached, rendering a new trial not an option.

But one word in the invitation for amicus briefs gives those same attorneys pause: "sandbagging." The court's apparent endorsement of that characterization of the defense attorney's actions has evoked some mild concern about what may have prompted the court to accept review of *Edwards*.

The arguments

District Court Judge Patrick S. Sabbs had sanctions available to him short of dismissing the complaint with prejudice and abused his discretion by not imposing one of those lesser sanctions, the Hampden County District Attorney's Office argues in *Edwards*.

The DA's Office notes that its mistake in providing a copy of the wrong abuse prevention order was both inadvertent and easily correctable. Moreover, the defendant suffered no prejudice, as the correct date of the service had been included in a police report produced in discovery.

The sanction of dismissal should be reserved primarily for cases of prosecutorial misconduct such as the purposeful withholding of evidence, the DA's Office suggests, which Sabbs expressly found was not present in *Edwards*.

A more appropriate sanction, according to the DA's Office, would have been to exclude the certificate of service from being entered into evidence while allowing the DA to call to the stand the police officer who served the order.

Sabbs called that remedy "fundamentally unfair," but the DA's Office disagrees.

"It is not fundamentally unfair to restrict the Commonwealth to presenting evidence to which the defendant was on notice from the police report," the DA argues, noting that the judge also could have given the defendant more time to prepare.

But the defendant argues that no amount of additional prep time would have overcome the "irremediable prejudice" he would have suffered by having such a potent defense eliminated if the prosecution was allowed to correct its mistake.

"The Commonwealth's violation [of the discovery rules] deprived Mr. Edwards of establishing his main defense that the abuse prevention order was invalid and would force him to formulate a new defense from scratch," the fendant's attorney, Joseph N. Schneiderman of West Hartford, Connecticut, writes in his brief.

The issuance of an order terminating a trial on grounds unrelated to guilt or innocence, as happened in *Edwards*, "functions as a mistrial," Schneiderman notes in his brief.

Unless the defendant consents to or requests a mistrial, double jeopardy prohibits retrial unless there is "manifest necessity" for one, the brief continues.

Arguably, the commonwealth has forfeited any claim that manifest necessity exists by failing to preserve the issue, the brief argues. But if the court does address the merits of whether there is a manifest necessity for retrial, it will find that a balancing of the equities favors the defendant, and that the dismissal order should stand.

> ***"While the defendant did not move to dismiss the complaint, his strategy was to exploit the discovery failure to obtain a dismissal or a not guilty verdict. He did not object to the dismissal."***
>
> ***— Hampden DA Anthony D. Gulluni's office***

The DA's position is that the prohibition against double jeopardy does not bar a retrial because jeopardy did not terminate in an acquittal, and the defendant gave his implied consent to the dismissal, which opens the door to retrial.

"While the defendant did not move to dismiss the complaint, his strategy was to exploit the discovery failure to obtain a dismissal or a not guilty verdict," the DA's Office argues. "He did not object to the dismissal."

But Schneiderman notes that the defendant never affirmatively said, "I want a dismissal or a mistrial." Instead, the

judge acted on his own, and the defendant's actions thereafter "do not equate to consent or an invitation to cause a mistrial."

At oral argument, Justice Serge Georges Jr. pressed Schneiderman about the implications, if a review of the state's case law indicates that a defendant has an affirmative obligation to do something other than remaining mum when given an opportunity to object to dismissal.

"Don't you lose on the consent issue?" Georges asked.

Defense bar concerns

The focus of the oral arguments may provide some comfort to criminal defense attorneys who feared that the court was about to upend what they believed to be a bedrock principle undergirding their role in the criminal justice system: that their first duty is to their clients.

"In my view, it would clearly have been inappropriate for [the defense attorney] to have answered [the judge's question]," said Thomas J. Carey Jr. of Hingham, chair of the Massachusetts Bar Association's Amicus Curiae Committee. "Arguably, it was inappropriate for the judge to have asked the question."

"This is a no-brainer," agreed Chauncey B. Wood, co-author on behalf of the Massachusetts Association of Criminal Defense Lawyers of an amicus brief to which the Committee for Public Counsel Services and ACLU of Massachusetts also signed on.

Specifically, as outlined in that joint brief, the defense attorney's actions in *Edwards* comported with what was required of him under Rule 1.6 of the Massachusetts Rules of Professional Conduct, which defines the duty of confidentiality that attorneys owe their clients.

A plain reading of the rule reveals that information regarding flaws in the prosecution's case meets the definition of 'confidential information': it is gathered 'during' the representation, 'relating to the representation' and it is 'likely to be … detrimental to the client if disclosed' to a prosecutor who could then use the information to salvage their case against the defendant," the amicus brief reads.

Carey, a former appellate attorney for the Major Violators Division of the Suffolk County DA's Office, said he "never for a moment believed" defendants had any obligation to betray their clients and help the commonwealth in such a manner.

Moreover, Mass. R. Prof. C. 3.3, which imposes a duty of candor toward the tribunal, "does not counsel a different result," MACDL, CPCS and the ACLU argue.

Indeed, members of the defense bar credited the defendant's attorney for devising on the spot a way to thread the needle and meet his obligations under both rules.

If the defense attorney had answered the judge's question forthrightly, he may well have found himself facing a severe sanction or even disbarment for violating his duties of loyalty and confidentiality to his client, Wood said.

"It's crucial for the public to understand that the defense counsel did not have a choice," he added. "He had an ethical obligation, if he wanted to continue to make a living practicing law."

Wood noted that the word "sandbagging" does not, to his knowledge, appear in the record below, and he is unsure how the issue came to be framed as such.

"The question assumes there was sandbagging, and that is frankly a problem," Wood said.

Only in limited circumstances — when they are planning on defenses that include alibi, mental health issues or license — are defense attorneys mandated to give the prosecution advance notice of their intended trial strategy, said Boston criminal appeals attorney Patricia A. DeJuneas.

"Only one party has the burden of production and proof" in criminal cases, she noted.

Were the prosecution to be given a chance to fix its error in *Edwards*, "I'm not sure where that slope ends," DeJuneas added.

Cambridge criminal defense attorney Derege Demissie said he hopes that the SJC's interest in *Edwards* is confined to a narrow question regarding a defense attorney's obligation when asked a direct question by a judge, rather than a more general duty on defense attorneys to disclose trial strategy.

While criminal defense attorneys must stay within the confines of the Rules of Professional Conduct, zealous advocacy means "you are duty bound to get close to the line," Demissie said.

The government's role in criminal cases is to comply with all the discovery rules and present sufficient evidence as to each element of the crime charged, Demissie noted.

"Defense lawyers are not supposed to help them make their case," he said. "They can choose the appropriate time to make an objection to maximize the benefit to their clients," he said.

Berkshire DA's brief mystifies

Berkshire DA Andrea C. Harrington, who lost her bid for reelection on Sept. 6, raised some eyebrows in the defense community with her amicus brief in support of her counterpart in Hampden County.

While the Hampden DA's argument focused on the trial judge's exercise of discretion and the double jeopardy issue, Harrington's office zeroed in on defense attorneys' obligations, arguing that the Rules of Professional Conduct require defense lawyers to disclose their intention to raise an issue at trial.

The "essence" of Mass. R. Prof. C. 3.4 and Mass. R. Crim. P. 14 is to abolish unfair surprise for either party, the Berkshire DA posits.

Mass. R. Prof. C. 3.8 does establish special ethical responsibilities for prosecutors, the brief acknowledges.

"However, just because prosecutors are specifically held accountable in the professional rules does not mean defense counsel advocacy is without limits," the brief continues.

Edwards is one of many cases in which defense counsel has blurred the line between zealous advocacy and unfair surprise, the DA suggests.

"Just as the Commonwealth has obligations to share discovery, defense counsel should not be permitted to 'wait in the weeds' with discovery issues or to engage in 'trial by ambush,'" Harrington's office argues.

But to the defense bar, Harrington's argument misses the mark.

"There are reasons grounded in the Constitutions and our traditions of justice why the commonwealth is not entitled to make its case out of the mouths of the defendant or his counsel," Carey said.

DeJuneas added that Harrington filing the brief "seems to be contrary to what a progressive prosecutor would do."

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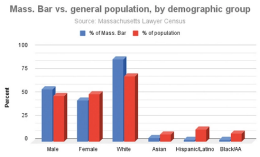

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