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in partnership with

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## November 2011 Bulletin

### ***Clothing as evidence***

***Police may search and seize clothing removed by hospital personnel to render treatment.***

*Comm. v. Fortuna*, 80 Mass. App. Ct. 45 (2011): A Boston detective responded to the hospital after receiving a report that a gunshot victim was on his way. There, the detective interviewed Patrick Fortuna, who said he had been shot in the leg walking home. He did not know how it happened because the shooter was far away.

Hospital personnel had already cut off Fortuna's clothing to treat his wound. When the detective saw gunshot residue on Fortuna's clothes, he knew that the shooter had been close, or that the wound was self-inflicted. He confronted Fortuna with the inconsistency. Fortuna's reply: "Go fuck yourself."

The detective asked hospital staff to bag each article of clothing separately to prevent contamination, and he assisted with the process. The detective did not have a warrant, and Fortuna neither consented nor objected to the seizure.

- **No search.** No "search" occurred because Fortuna lost his *expectation of privacy* in his clothing once it was ripped off him during medical treatment.
- **Justified seizure.** While Fortuna neither abandoned his clothes nor consented to the police taking them, the detective had become aware of their incriminating nature (not only as evidence of the shooting but also as evidence of the defendant's effort to mislead police). This allowed the detective to seize the clothes under the *plain view* doctrine.
- **Different situation when clothing taken for safekeeping.** The situation in *Fortuna* was different from the one in *Comm. v. Williams*, 76 Mass. App. Ct. 489 (2010) – a case we studied last year in in-service training. Williams' clothes were not yanked from his body during treatment. His clothes were taken and stored for safekeeping when he prepared to receive treatment.

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In the court's view, Williams, unlike Fortuna, retained an expectation of privacy in his belongings, which he expected to get back after treatment. This meant police had to have a legal basis to seize Williams' clothes – a warrant, exigent circumstances or consent – but not Fortuna's. The practical distinction between these cases is reflected in the chart below.

| <b>Police Protocol for Seizing Clothing as Evidence at a Hospital</b>        |  |
|--|--|
| <b>Situation</b>   | <b>Response</b>  |
| <b><i>Hospital staff removes clothes during the course of treatment.</i></b> | Patient loses expectation of privacy in his or her clothing. Examine it and, if it constitutes evidence, take it in plain view. <i>Comm. v. Fortuna</i> , 80 Mass. App. Ct. 45 (2011).   |
| <b><i>Hospital holds clothes for safekeeping prior to treatment.</i></b>     | Police need a legal reason to seize the clothing because the patient still has an expectation of privacy in it.<br><br>Officers must get a warrant (preferred), or obtain the suspect's consent, or make the case that exigent circumstances exist to dispense with the warrant requirement (which is tough to argue once the clothing has been secured by the hospital). <i>Comm. v. Williams</i> , 76 Mass. App. Ct. 489 (2010). |

***Another issue from the Fortuna case: There was sufficient evidence that he committed two crimes involving false reports to police.***

- **Misleading an officer.** Based on expert testimony that Fortuna was shot from a distance of no more than 1½ feet, he must have lied to officers with the intent to mislead them about their criminal investigation. This was enough for a felony conviction under G.L. c. 268, § 13B.<sup>1</sup>

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<sup>1</sup> The court did not decide whether § 13B requires that an officer *actually* be fooled, or that a reasonable officer would be fooled, because Fortuna's lie satisfied either standard. Even though the detective figured it out, the initial responding officers believed Fortuna's story and spent time looking for the unknown offender and vehicle.

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- **False report.** Fortuna was also charged with G.L. c. 269, §13A<sup>2</sup>, which requires that the defendant provide a substantially inaccurate account of a crime -- not just an untrue detail about it. The most obvious false report would be about a crime that the speaker knew never occurred. Less obvious, but still sufficient, would be reporting a crime that occurred, but intentionally misidentifying the culprit.

In this case, it was hard to pinpoint Fortuna's lie. Was he was trying to cover up the circumstances of how a third party shot him? Or was he covering up his self-inflicted wound and his unlawful possession of the gun that caused it? Under either theory, his account was substantially inaccurate and sufficient for a § 13A conviction.

Furthermore, the court rejected the defendant's argument that only a person *who initiates contact* with the police may be convicted. This crime turns on "the substance of the misinformation the defendant provided to police, not on which party initiated the dialogue." The fact that Fortuna did not call 911, but lied in response to a police inquiry did not affect the result.

- **Both convictions upheld.** The Appeals Court also decided that a defendant could be convicted of *both* misleading a police officer under G.L. c. 268, § 13B and filing a false report about a crime under G.L. c. 269, § 13A. Both offenses have slightly different elements so being convicted of both does not violate the constitutional prohibition against double jeopardy. Fortuna was properly charged and punished with both offenses!

### ***Question of the month***

***Is anything happening with the Quinn bill?***<sup>3</sup> Yes! Chapter 85 of the Acts of 2011 established a special commission to study the "police career incentive pay program" (affectionately known as the "Quinn Bill"). The commission features eight members – four appointed legislators, the secretary of EOPSS, and representatives from the Massachusetts Chiefs of Police Association, Coalition of Police, and Municipal Association. The commission's report is due by April 30, 2012.

On the judicial front, the SJC just heard oral arguments in *Daniel Adams v. City of Boston* SJC-10861. In this case, all sworn Boston officers (through their associations) contend that the city must pay their complete Quinn bill allotment even though the state has reduced its portion. In short, the officers maintain that their educational stipend, which is grounded in a statute<sup>4</sup>, may not be abridged by any provisions of their collective bargaining agreements. Stay tuned. This case will have far reaching consequences for municipal officers throughout the Commonwealth.

Hope this bulletin helps you on the street . . . ***John Sofis Scheft***

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<sup>2</sup> In contrast to § 13B, conviction under § 13A draws a maximum penalty of only 1 year in the house of correction.

<sup>3</sup> This constant question comes from officers too numerous to mention!

<sup>4</sup> G.L. c. 41, § 108L.