

Commonwealth Of Massachusetts

THE APPEALS COURT



MASSACHUSETTS SCHOOL OF LAW
Andover, MA



Massachusetts School of Law
ANDOVER

November 7, 2019

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THE APPEALS COURT

The sitting of the Massachusetts Appeals Court scheduled for Tuesday, November 7, 2019 shall be held at 9:30 a.m. at Massachusetts School of Law, Andover.

Presiding Justices for this session are as follows:

Peter W. Agnes, Jr., Associate Justice, Panel Chief

Mary T. Sullivan, Associate Justice

Amy L. Blake, Associate Justice

The Appeals Court is conducting this off-site sitting at the Massachusetts School of Law as part of a continuing effort to broaden public awareness, understanding, and accessibility of the Massachusetts court system. The Justices will hear oral arguments in cases on appeal at the John Adams Courthouse the remainder of the week.

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MEET THE PANEL

JUSTICE AGNES



Peter W. Agnes, Jr. grew up in Somerville, Massachusetts. He graduated *cum laude* from Boston University in 1972 and from Suffolk University Law School, *cum laude*, in 1975. He became a law clerk to New Hampshire Supreme Court Justice Edward Lampron in 1975. He then served as an Assistant District Attorney, first in Middlesex County where he became Chief of the Appellate Division, and then in Norfolk County, from 1976 through 1982. From 1986 to 1989 he was both the Assistant Secretary for Public Safety and Acting Director of the Massachusetts Criminal Justice Training Council and then served as Chief of Operations for Governor Michael Dukakis until 1991.

He began his judicial career as First Justice of the Charlestown District Court in 1991, advanced to the Superior Court in 2000, eventually becoming a Regional Administrative Justice in the Superior Court, where he was sitting at the time of his appointment to this court. Justice Agnes is a past president of the Massachusetts Judge's Conference and has served on and chaired a number of Supreme Judicial Court Advisory Committees and Massachusetts Bar Association Task Forces.

He is very active as an educator for both the courts and the bar, assisting organizations like the Flaschner Judicial Institute, MCLE, CPCS and various bar associations. He has also taught at the Massachusetts School of Law as an adjunct professor for the last 20 years. Appointed to the Appeals Court by Governor Deval Patrick, Justice Agnes joined the court in 2011.

Justice Agnes has chaired or served as a member of several Supreme Court Committees. He was appointed as the first chair of the SJC Standing Committee on Dispute Resolution in 1994 which was the first time a district court judge was appointed to chair an SJC Committee. In 2006 Justice Agnes was appointed as a member of the SJC Advisory Committee of the Law of Evidence. In 2015 he was appointed as the chair of that committee and as the editor-in-chief of the Massachusetts Guide to Evidence which has been published annually since 2008. In 2017, Justice Agnes was appointed the chair of the SJC Committee on Archives and Records Conservation. One of that committee's recommendation led to an agreement between the SJC and the Secretary of the Commonwealth which enables the SJC to store the judiciary's most historic permanent paper records in vault space at the state archives. In 2018, Justice Agnes served as a member of the SJC Committee on Best Practices before the Grand Jury. In 2019, Justice Agnes was appointed chair of the SJC Advisory Committee on Archives and Records.

JUSTICE SULLIVAN



Born in Cambridge, Massachusetts, Mary Thomas Sullivan graduated from the University of Massachusetts at Amherst in 1975. After graduation she became an Assistant Director of Girls' Services in the Department of Youth Services before attending Northeastern University School of Law, from which she graduated in 1981. She served as a law clerk to Chief Judge Shane Devine of the United States District Court of New Hampshire from 1981 to 1983. She then joined the firm of Segal, Roitman, LLP., where she became a partner in 1991 and practiced there until her appointment to this court.

Admitted to practice in state and federal courts in Massachusetts and New Hampshire, she maintained an active employment discrimination practice, and also represented jointly trusteed health, welfare and pension funds, apprenticeship and training funds and labor organizations throughout Massachusetts and New England. Justice Mary Thomas Sullivan has also been very active in bar education, professional and community service. She is a former Chair of the Massachusetts Bar Association's Labor and Employment Law Section and the former Co-Chair of the Boston Bar Association Labor and Employment Law Section. She served on the Governor's Juvenile Justice Advisory Committee and the Commonwealth of Massachusetts Apprenticeship Counsel. She has served as Trustee of the Public Library of Brookline, and also been active in varied municipal and civic affairs. Appointed to the Appeals Court by Governor Deval Patrick, Justice Mary Thomas Sullivan joined the court on December 9, 2011.

JUSTICE BLAKE



Justice Amy Lyn Blake graduated from the University of Rochester, New York, in 1987. She attended New England Law School and graduated, *cum laude*, in 1992. While in law school she was named a New England Scholar and awarded the Amos L. Taylor Award for Excellence In Achievement.

Admitted to the bar in 1992, she served as an Assistant District Attorney until 1994, prosecuting cases in the District Court bench and six person jury sessions while supervising the District Attorney's Office in two district courts. From 1994 to 2008 she focused her private practice on domestic relations law with the firms of White, Inker & Aronson, Yasi & Yasi and Casner & Edwards, rising from associate to partner. She represented parties in all aspects of domestic relations proceedings. As part of her practice, she filled the roles of Guardian ad Litem, discovery master, attorney for the child and conciliator. She also served on the compensation and long term planning committees. She currently serves on the Board of Editors of the Boston Bar Journal, and as an associate editor of the Massachusetts Law Review.

In 2008 Governor Deval Patrick appointed her to the Family & Probate Court, where she was named "Distinguished Jurist" in 2013 by the Massachusetts Association of Women Lawyers. In 2017, she received the Jurist of the Year Award by the Middlesex County Bar Association. Justice Blake is also a lecturer in Law at New England Law Boston.

Appointed to the Appeals Court by Governor Patrick, Justice Blake joined the Court on September 9, 2014.

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The Appeals Court was established in 1972 to serve as the Commonwealth's intermediate appellate court. It is a court of general jurisdiction that hears criminal, civil, and administrative matters. All appeals from the Trial Court (with the exception of first-degree murder cases) are thus initially entered in the Appeals Court. Similarly, the court receives all appeals from the Appellate Tax Board, the Industrial Accident Review Board, and the Employee Relations Board.

Although the Appeals Court is responsible for deciding all such appeals, every year a small number are taken up by the Supreme Judicial Court for direct appellate review.

After a case is decided by the Appeals Court, the parties may request further review by the Supreme Judicial Court, but such relief is granted in very few cases. The Appeals Court is thus the court of last resort for the overwhelming majority of Massachusetts litigants seeking appellate relief.

By statute, the Appeals Court has a chief justice and 24 associate justices. The justices of the court sit in panels of three (3) with the composition of judicial panels changing each month.

In addition to its panel jurisdiction, the Appeals Court also runs a continuous single justice session, with a separate docket. The single justice may review interlocutory orders and orders for injunctive relief issued by certain Trial Court departments, as well as requests for review of summary process appeal bonds, certain attorney's fee awards, motions for stays of civil proceedings or criminal sentences pending appeal, and motions to review impoundment orders.

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THE APPEALS COURT

CONTACT INFORMATION

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Commonwealth Of Massachusetts

THE APPEALS COURT

Chief Justice

Mark V. Green

Justices

Ariane D. Vuono

William J. Meade

Peter J. Rubin

Gabrielle R. Wolohojian

James R. Milkey

E. Sydney Hanlon

Peter W. Agnes, Jr.

Mary T. Sullivan

Diane L. Maldonado

Amy L. Blake

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Joseph M. Ditkoff

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John C. Englander

Kathryn E. Hand

Court Administrator

Gina L. DeRossi, Esq.

Clerk

Joseph F. Stanton, Esq.

Commonwealth Of Massachusetts

THE APPEALS COURT

NOVEMBER 7, 2019

DOCKET

NOTICE: The following summaries of the cases being argued are drawn from the papers filed with the Appeals Court by the parties to the cases. They are intended to serve as background information for those who are attending the arguments, and not as comprehensive summaries of the cases. They do not necessarily describe all of the facts and issues raised by the parties nor do they reflect any thoughts or judgments of the Justices.

Commonwealth v. Angel Santos

2018-P-0534

The defendant, Angel Santos, was convicted of armed assault with intent to murder, assault and battery causing serious bodily injury, intimidation of a witness, and a number of firearms offenses, arising from a shooting outside of a party at an apartment complex in Lowell. There was evidence that in the early morning hours a quarrel began in the kitchen area when a man at the party brandished a handgun. That person was told to leave the party, and others followed. Once outside, there was evidence that the man with the handgun shot Luiz Gonzalez, who had been at the party, and then stood over him and tried to shoot him several more times. In response to the shooting, a number of other individuals attacked the shooter, beating and striking him. Emergency responders brought the shooter and Gonzalez to Lowell Hospital. The two men were in the same room at the hospital, but divided by a curtain, and the shooter allegedly said "don't say anything" before they were interviewed by police officers. A witness, testifying under a grant of immunity, identified the shooter as the defendant.

On appeal, the defendant argues that the judge should not have permitted the witness to give an in-court identification of the defendant as the shooter where that witness (1) did not participate in an earlier out-of-court identification procedure, (2) had never seen the defendant before the night of the shooting, and (3) gave earlier grand jury testimony suggesting that he did not see the shooter's face. The defendant also argues that his convictions improperly rested on uncorroborated testimony from immunized witnesses, and that the judge failed to properly instruct the jury about the need for corroborating evidence to support such testimony. Finally, the defendant argues that the evidence was insufficient to convict him of intimidation of a witness.

Commonwealth v. Charles Normil

2018-P-0908

Following a jury trial, the defendant, Charles Normil, was convicted of home invasion, assault and battery by means of a dangerous weapon, and larceny over \$250. His defenses at trial were misidentification and inadequate police investigation.

On the morning of December 14, 2012, an intruder who was wearing a mask entered the victim's apartment holding a gun. When the victim got out of the shower, the intruder asked her "where the money was." When the victim directed him to a drawer in the bedroom containing only a few dollars, the intruder said "that can't be it," and he hit the victim above her left eye with his gun. The blow blinded the victim in that eye. The intruder then took the victim to her living room where he stole several video games, roughly half an ounce of marijuana, and about ten dollars in cash before leaving.

At trial, the Commonwealth offered testimony that the defendant told a friend details of the theft later the same evening, that a co-defendant subsequently left a bag containing the stolen video games at the same friend's house, and that, while incarcerated, the defendant told two other prisoners details of the alleged home invasion. The defendant argued that his friend's account was uncorroborated and inadequately investigated, and that the other prisoners fabricated stories about the defendant to get out of prison.

On appeal, the defendant contends that (1) the testimony stating that he had been in jail and the introduction of letters allegedly from the defendant to his co-defendant were unfairly prejudicial; (2) a police officer's testimony identifying the defendant as the suspect from surveillance video was improper; and (3) a detective's testimony that the defendant refused to go to the police station for an interview was impermissible refusal evidence that amounted to compelled self-incrimination.

Commonwealth v. Abu Jalloh

2019-P-0155

The defendant is appealing from his convictions of assault and battery by means of a dangerous weapon and carrying a firearm without a license.

On December 18, 2012, the defendant was involved in an altercation with a family member, A.J., at A.J.'s home where he lived with his wife, mother-in-law, and children. When A.J. got out of bed that morning, he walked past the defendant in the dining room, and the defendant "pounced" on him, banging his head against a wall, and stated that he would kill A.J. A.J.'s mother-in-law broke up the altercation, and A.J. called the police. Initially, the defendant left, but returned and requested entry back into the home so that he could retrieve a bag from one of the children's rooms. When officers arrived, the defendant fled without the bag. Thereafter, A.J. requested that an officer obtain the bag from the room. The officer that picked up the bag felt that it was "weighted," and he opened the bag and discovered a firearm inside a sock.

The defendant's trial counsel did not move to suppress the firearm that was seized after a warrantless search of the backpack, and he was convicted of carrying a firearm without a license. Subsequently, the defendant filed a motion for a new trial, asserting that his counsel's failure to move to suppress the firearm amounted to ineffective assistance of counsel. His motion was denied, which he now appeals along with an appeal from the underlying convictions. The Commonwealth argues that even if the defendant showed that there was a viable basis for a motion to suppress, he has not shown a likelihood of prevailing on the motion or that the warrantless search was unconstitutional.

Kenneth R. Couture & another v. Ian Moore & another.

2018-P-1534

The defendants, Ian Moore and Amanda Sloan, were tenants in a property owned and operated by the plaintiffs, Kenneth R. Couture and Lanford II LLC. In October 2017, the defendants contacted the Northbridge Board of Health to inspect the apartment after a water leak. During the inspection, the health agent noted at least twelve sanitation code violations in the defendants' apartment. That same month, the plaintiffs informed the defendants that they would not be renewing the defendants' lease when it expired at the end of November 2017. After the lease expired and the defendants did not vacate the apartment, the plaintiffs brought an eviction action in the Housing Court. In response, the defendants filed counterclaims against the plaintiffs alleging retaliation, defective conditions, failure to pay interest on rent received at the start of the lease for the last month of the tenancy, and interference with quiet enjoyment.

A judge awarded possession of the property to the plaintiffs, but found that they breached the implied warranty of habitability, breached the covenant of quiet enjoyment, and violated G. L. c. 186, § 15B(2)(a), by failing to credit the defendants with interest on their advance payment of the last month's rent. The judge awarded the defendants \$21,792.50 in damages, plus reasonable attorney's fees. The plaintiffs then filed a motion for reconsideration, arguing that the amount was improperly calculated because, among other reasons, the judge abated rent for months when the defendants did not pay their rent. The judge reduced the award by the amount of unpaid rent, but otherwise found the plaintiffs' arguments for reconsideration unpersuasive.

On appeal from the amended judgment, the plaintiffs argue that the damages and attorney's fees awarded are incorrect because (1) there was no evidence of willful or intentional acts that breached the defendants' right to quiet enjoyment; (2) the evidence established only minor housing code violations; (3) such code violations did not exist during all of the months in which rent was abated; (4) rent was abated for months when no rent was actually paid; and (5) damages related to the defendants' payment of the last month's rent were improper because no interest was actually received by the plaintiffs.

Town of Dracut v. Dracut Firefighters Union, IAFF Local 2586

2019-P-0014

The Town, which operates three fire stations, and the Union are parties to a collective bargaining agreement. On April 6, 2016, the Dracut Fire Chief issued a new policy preventing on-duty firefighters assigned to the two outlying fire stations from attending monthly Union meetings at the Central Station. Before that time, on-duty firefighters from the Town's two outlying fire stations routinely attended such meetings with the approval of the Fire Department's officer in charge. The Union filed a grievance over the Chief's new policy. After it was denied, the Union filed a petition for arbitration. An arbitrator ruled that the Chief's decision to prohibit on-duty firefighters from travelling to and participating in Union meetings at the Central Station violated the parties' collective bargaining agreement and their past practice. The arbitrator ordered the Chief to continue to permit firefighters in the outlying stations to attend the Union meetings.

The Town filed a complaint in the Superior Court to vacate the arbitration award on the ground that the arbitrator exceeded the scope of his authority. The Town argued that the arbitrator's award infringed on the Fire Chief's nondelegable authority with respect to the assignment of personnel and delivery of services for the protection of public safety under G. L. c. 48, § 42. The nondelegable authority doctrine holds that, in public sector employment, certain managerial decisions can be made only by the employer to whom the Legislature has conferred authority, and that an arbitrator cannot usurp this authority by issuing an award with respect to those matters. The Town then filed a motion for judgment on the pleadings. A judge allowed the Town's motion and vacated the arbitration award because it infringed on the Chief's nondelegable authority. The Union has appealed, raising essentially the same arguments that were presented to the trial court.

Solomon Carter Fuller Mental Health Center v. J.D.

2018-P-1338

The Appellant, J.D., appeals from an Appellate Division decision that dismissed his appeal from a District Court order for civil commitment. The District Court order was entered pursuant to G. L. c. 123, §§ 7-8, which allows for civil commitment of dangerous persons. J.D. argues that the evidence was insufficient to show that failure to retain J.D. in strict custody would create a likelihood of serious harm.

The relevant events began around the time that a June 12, 2014, Judgment of Divorce Nisi entered between J.D. and his ex-wife, L.D. A child was born to L.D. the month before the Judgment of Divorce Nisi issued, and the Probate and Family Court adjudicated another individual, C.F., as father of that child. J.D. refused to credit genetic marker tests and believed that the Probate and Family Court and others involved in performing the genetic marker tests were conspiring against him. His conduct throughout the proceedings, which included threats of physical harm and threats to take the child, resulted in L.D. and C.F. both obtaining abuse prevention orders against J.D. After violating one of the abuse prevention orders, the defendant was arrested and admitted to the Solomon Carter Fuller Mental Health Center (Center) for evaluation and determination of whether J.D. was competent to stand trial. Thereafter, the Center petitioned for J.D.'s commitment, pursuant to G. L. c. 123, §§ 7-8.

At the commitment hearing, a psychiatrist who had been treating J.D. opined that J.D. was suffering from delusional disorder, which he described as "a disorder of thought and perception that impairs a person's judgment and behavior." J.D.'s primary delusion was that he was the biological father of L.D.'s child. Further, J.D. did not have proper insight into his mental health, and even after admitting that the child was not his, he stated that he would still try to gain custody of the child. The psychiatrist could not opine on whether J.D. posed a substantial risk of serious physical harm to L.D., C.F., or the child at the time of the commitment hearing. L.D. testified that she was in fear of J.D. because of his threats. Other evidence at the hearing showed that J.D. "expressed beliefs that his phone and computers ha[d] been tracked or tampered with" and "that the FBI ha[d] been intercepting his mail." J.D. moved for a ruling that the Center's evidence was insufficient to show that he posed a substantial risk of harm to others. His motion was denied, and an order entered committing J.D. to the Center for six months. J.D. appealed to the Appellate Division, arguing that the petitioners did not produce sufficient evidence of the likelihood of serious harm. The Appellate Division affirmed the commitment, from which J.D. now appeals.