

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

SUPREME JUDICIAL COURT
NO. SJC-12518

COMMONWEALTH,
Appellant

VS.

FRANCIS T BRENNAN,
Appellee

ON APPEAL FROM JUDGMENTS OF
THE HINGHAM DISTRICT COURT

BRIEF FOR THE COMMONWEALTH

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ISSUE PRESENTED

I. Whether the complaint application supplied probable cause to charge the defendant with two counts of criminal harassment?

STATEMENT OF THE CASE

On September 27, 2016, the defendant, Francis Brennan, was arraigned on Hingham District Court docket #1658CR1376 and charged with two counts of Criminal Harassment. (CRA 4). On March 13, 2017, the defendant filed a Motion to Dismiss, asserting that the application for complaint failed to establish probable cause to support the charges against him. (CRA 28). The Motion to Dismiss was opposed by the Commonwealth and argued before Hon. Judge Julianne Hernon on March 27, 2017, and it was taken under advisement. (CRA 7). On March 30, 2017, Judge Hernon allowed the Motion to Dismiss with the following notation: "After hearing and review, as the application for criminal complaint does not allege three qualifying acts to support a charge of criminal harassment as to either named victim, the motion to dismiss is allowed." (CRA 28).

On the subsequent status date of April 24, 2017, the Commonwealth filed a Motion to Reconsider Dismissal, and the defendant filed a written opposition. (CRA 46, 50). The Motion to Reconsider Dismissal was argued before Judge Hernon on May 31, 2017, and taken under advisement. (CRA 7). On June 5, 2017, Judge Hernon denied the Motion to Reconsider Dismissal. (CRA 7).

On June 6, 2017, the Commonwealth timely filed a notice of appeal challenging the court's allowance of the Motion to Dismiss and denial of the Motion to Reconsider. (CRA 7).

STATEMENT OF THE FACTS

On August 24, 2016, a magistrate at Hingham District Court found probable cause to issue a complaint against the defendant for two counts of Criminal Harassment under G.L. c. 265, § 43A. (CRA 9). The complaint application was based upon 18 pages of police reports filed by the Hingham Police Department. (CRA 10-27). The allegations against the defendant contained in those police reports are summarized as follows:

On May 15, 2016, James Daly and Jillian Hession entered the Hingham Police Station to report that Daly

discovered a tracking device attached to the undercarriage of the Lexus vehicle his wife Hession drives. (CRA 11, 16). The officer told Daly to check his own Jeep vehicle, and later that day he discovered a tracking device on the underside of that vehicle as well. (CRA 11, 16). Daly was concerned, and he could not think of anyone that would be monitoring their locations. (CRA 11). The police interviewed Daly and Hession at length, together and separately, and questioned them about subjects such as finances and infidelity. (CRA 16).

On May 16, 2016, Special Agent Baldwin of the U.S. Coast Guard obtained a subpoena for information from the manufacturer of the tracking devices, BrickHouse Security. (CRA 19). BrickHouse informed Agent Baldwin that the owner of the devices was the defendant, Francis Brennan, to whom they were shipped on December 29, 2015. (CRA 19).

Investigators spoke to the defendant at his home on May 23, 2016. (CRA 19). He initially denied knowing who placed the trackers on Daly's and Hession's vehicles. (CRA 19). The defendant stated, "Let's just say things got a little out of hand due to some prior circumstances, it's moral, it's not

anything other than that, his wife might want to start checking his phone." (CRA 19-20). The defendant made statements suggesting that Daly was having an affair on his wife and that the defendant was concerned about it.¹ (CRA 20). He admitted to having an account with BrickHouse and monitoring the movements of Daly and Hession using the tracking devices, which he accessed with his iPhone and laptop. (CRA 20).

On May 27, 2016, police interviewed Daly again and informed him of the defendant's accusations of Daly having an affair. (CRA 20-21). Daly adamantly denied those accusations, and he consented to a search of his cell phone by the Coast Guard investigators. (CRA 20-21).

Police searched the defendant's iPhone after obtaining a search warrant, and they created a forensic extraction report. (CRA 23). The 264 web history entries included BrickHouse log-in pages, Daly's twitter page, and 53 Google Map searches of various latitude and longitude coordinates. (CRA 23).

¹ Defendant stated he was "guarding the hen house"; "my only stake in all this is to make sure somebody was not in the place that I'm in all the time;" that he believed Daly was "stepping out" of his marriage and having an affair; that he wanted to make sure his "backyard was clear." (CRA 20).

Police spoke with Daly again to learn the locations he had traveled between May 13 and May 14: Weymouth, MA; Foster, RI; Eagle Ridge, NJ; and Staten Island, NY. (CRA 25). Using the forensic data from the iPhone, police confirmed 17 separate incidents when the defendant researched the locations of Daly's and Hession's vehicles. (CRA 25). These incidents were listed by date, time, and location. (CRA 25). They included one incident on 5/8/16; one incident on 5/11/16; four incidents on 5/13/16; nine incidents on 5/14/16; one incident on 5/15/16; and one incident on 5/17/16. (CRA 25-26).

Throughout the police investigation, Daly and Hession expressed concern for their safety. (CRA 26). Hession has been having difficulty sleeping, and Daly had to change his work schedule so he can be home with her during the nighttime hours. (CRA 26). They installed security cameras at their residence. (CRA 26). They also sought an emergency harassment prevention order against the defendant on May 27, 2016. (CRA 26).

ARGUMENT

I. THE COMPLAINT APPLICATION SUPPLIED PROBABLE CAUSE TO CHARGE THE DEFENDANT WITH TWO COUNTS OF CRIMINAL HARASSMENT.

The standard of probable cause to authorize a criminal complaint is the same as the standard that governs the grand jury's decision to indict.

Commonwealth v. Bell, 83 Mass. App. Ct. 61, 63 (2013).

"[A]t the very least the grand jury must hear sufficient evidence to establish the identity of the accused ... and probable cause to arrest him."

Commonwealth v. Gallant, 453 Mass. 535, 540 (2009),

quoting Commonwealth v. O'Dell, 392 Mass. 445 (1984).

All that is required to establish probable cause is

"reasonably trustworthy information ... sufficient to warrant a prudent man in believing that the defendant had committed ... an offense." Id. It does not

require the same type of specific evidence of each element of the offense as would be required to support a conviction. Id. at 541. The standard of review is

"de novo." Commonwealth v. Humberto H., 466 Mass.

562, 566 (2013).

Criminal harassment is defined as "willfully and maliciously engag[ing] in a knowing pattern of conduct or series of acts over a period of time directed at a

specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress..." G.L. c. 265, § 43A(a). The elements are "(1) the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions; (2) the defendant intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion; (3) the conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim; (4) the conduct or speech, or series of acts, were of such a nature that they would cause a reasonable person to suffer substantial emotional distress; and (5) the defendant committed the conduct or speech, or series of acts, 'willfully and maliciously.'" Commonwealth v. McDonald, 462 Mass. 236, 240 (2012).

The motion judge found that "the application for criminal complaint does not allege three qualifying acts to support a charge of criminal harassment as to either named victim..." (CRA 28). For the reasons below, the application did supply probable cause to charge the defendant with two counts of criminal harassment.

The defendant engaged in a pattern or series of acts on at least three separate occasions. Two of the separate acts were the defendant placing a GPS monitoring device on Daly's car and placing a GPS monitoring device on Hession's car. (CRA 11, 16). The defendant tracked their vehicles' locations 17 times, which took place on six different days. (CRA 25). The defendant told the police and Coast Guard that he believes Daly is having an affair and that "his wife might want to start checking his phone." (CRA 19-20). Each of these events was a discrete act fitting into a pattern of conduct. See Commonwealth v. Valentin, 91 Mass. App. Ct. 515, 522-23 (2017) (acts may occur on the same day, need only be "separate, distinct, and separated by some interval [of time]").

The defendant intended to target Daly and Hession on each occasion. He placed the tracking devices on Daly's and Hession's cars, he tracked their locations, and he accused Daly of having an affair. (CRA 11-20). These actions were plainly "directed at" Daly and Hession. See Commonwealth v. Welch, 444 Mass. 80, 90 (2005) (the "specific person" at whom the conduct must be directed is the victim - the person who is

"seriously alarm[ed]" by the harassment), abrogated on other grounds by O'Brien v. Borowski, 461 Mass. 415, 425 n.7 (2012). Contrast Demayo v. Quinn, 87 Mass. App. Ct. 115, 118 (2015) ("...there is insufficient evidence in this case to conclude that the defendant's acts were directed specifically at the plaintiff, or at a specific person at all.").

The defendant's acts seriously alarmed Daly and Hession. Their reactions included "concern for their safety," "fear of retaliation," and "a difficult time sleeping." (CRA 26). Daly installed security cameras and changed his work schedule so that Hession would not be alone at night. (CRA 26). They also sought protection from the court by requesting a harassment prevention order. (CRA 26). Their reactions were the product of multiple separate discoveries of the defendant's conduct: the first tracking device; the second tracking device; the accusation of an affair; and the tracking of their vehicles over ten days. Although their alarm was experienced after all of the defendant's conduct occurred, there is no requirement that a victim's alarm accompany each separate act of the defendant. See Commonwealth v. Johnson, 470 Mass.

300, 314 (2014)²; Commonwealth v. Walters, 472 Mass. 680, 699 (2015) ("Although these two incidents, taken alone, might seem somewhat innocuous, the Commonwealth was required to prove only that the cumulative effect of the defendant's pattern of conduct 'seriously alarm[ed]' the victim, not that each individual incident was alarming.") (citing Johnson).

The defendant's actions would cause a reasonable person to suffer substantial emotional distress. The phrase "substantial emotional distress" is applied in the context of criminal harassment according to its dictionary definition. Commonwealth v. Paton, 63 Mass.App.Ct. 215, 220-21 (2005).³ A reasonable person

² As for whether serious alarm must be shown for each individual act or may be measured cumulatively, we conclude that the statute's wording ties the requirement to the over-all pattern of conduct. The statutory language of § 43A (a) requires that the "pattern of conduct" or "series of acts" "seriously alarms." As a general rule of statutory construction, "words importing the plural number may include the singular." G.L. c. 4, § 6, Fourth. Accordingly, "acts" might refer to a single act as well as multiple acts. However, the rules of grammar and proper subject-verb agreement instruct a reading of "alarms" to modify the singular noun of one "pattern" or one "series," rather than the noun "acts."

Id.

³ Dictionary definitions are sufficient to interpret substantial emotional distress. "Substantial" is defined as "considerable in

in both Daly's and Hession's position would suffer such a reaction upon discovering a tracking device on one's own car and one's spouse's car, upon being accused of having infidelity in one's marriage, and upon discovering the tracking of their vehicles' movements over the course of ten days.

The defendant committed these acts willfully and maliciously. "Wilful" simply means intentional conduct, as opposed to accidental conduct.

Commonwealth v. O'Neil, 67 Mass. App. Ct. 284, 290-91 (2006). "Malice" does not require hatred, spite, grudge, or an intent to cause the harm that results from one's conduct. Id. at 291-92. Rather, conduct can be malicious if it is intentional and without justification, and any reasonably prudent person would

amount, volume, or worth." Webster's Third New Intl. Dictionary 2280 (3d ed.2002). In addition, Black's Law Dictionary 1428 (6th ed.1990) states that "substantial" is "[s]ynonymous with material." "Emotional distress" is defined as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct...." Black's Law Dictionary 563 (8th ed.2004).

Id. at 221. See also Commonwealth v. O'Neil, 67 Mass. App. Ct. 284, 294 (2006) (substantial emotional distress "must be markedly greater than that commonly experienced as part of ordinary living," quoting Commonwealth v. Robinson, 444 Mass. 102 (2005)).

have foreseen the actual harm that resulted. Id. at 293.⁴ The defendant acted intentionally, not accidentally, toward Daly and Hession, and he had no justification for doing so. Any reasonably prudent person would have foreseen that Daly and Hession might discover the tracking devices, learn that they were being tracked, and become seriously alarmed. Likewise, the defendant should have foreseen, upon being confronted by the police and attempting to justify his conduct by accusing Daly of having an affair (stating "his wife might want to start checking his phone"), that this accusation would be relayed to Daly and Hession by the police. Even if the defendant did not intend for Daly or Hession to learn of his conduct, he is still liable under the definition of this element.

Accordingly, this complaint application supplied

⁴ "Typically, stalking behaviors involve obsessional attractions to victims and are not necessarily intended to harm or frighten them. It is unlikely that the Legislature would have expected a specific intent to alarm or harm the victim under these circumstances." Id. (internal citations omitted). Prior to O'Neil, the model jury instruction included a hostility requirement under the definition of malice. Massachusetts Model Jury Instruction 6.640, "Criminal Harassment" (Rev. Jan. 2013), note 2.

probable cause to support each essential element of the offense of criminal harassment. The information presented did warrant the magistrate's reasonable belief that the defendant had committed that offense against both Daly and Hession. This Court should therefore reverse the orders of the District Court and reinstate the complaint.

CONCLUSION

For the above stated reasons, the Commonwealth respectfully requests that this Court reverse the orders of the District Court allowing the defendant's Motion to Dismiss and denying the Commonwealth's Motion to Reconsider Dismissal.

Respectfully submitted,

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District Attorney

/s/ David Cutshall
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Dated: April 19, 2018

COMMONWEALTH'S ADDENDUM

1. G.L. c. 4, § 6.....18
2. G.L. c. 265, § 43A.....19

Section 6: Rules for construction of statutes

Section 6. In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, The repeal of a statute shall not revive any previous statute, except in case of the repeal of a statute, after it has become law, by vote of the people upon its submission by referendum petition.

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

Sixth, Wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

Seventh, Wherever action by more than a majority of a city council is required, action by the designated proportion of the members of each branch thereof, present and voting thereon, in a city in

which the city council consists of two branches, or action by the designated proportion of the members thereof, present and voting thereon, in a city having a single legislative board, shall be a compliance with such requirement.

Eighth, Wherever publication is required in a newspaper published in a city or town, it shall be sufficient, when there is no newspaper published therein, if the publication is made in a newspaper with general circulation in such city or town. If a newspaper is not published in such city or town and there is no newspaper with general circulation in such city or town, it shall be sufficient if the publication is made in a newspaper published in the county where such city or town is situated. A newspaper which by its title page purports to be printed or published in such city, town or county, which has a circulation therein, shall be deemed to have been published therein.

Ninth, Wherever a penalty or forfeiture is provided for a violation of law, it shall be for each such violation.

Tenth, Words purporting to give three or more public officers or other persons authority to adopt, amend or repeal rules and regulations for the regulation, government, management, control or administration of the affairs of a public or other body, board, commission or agency shall not be construed as authorizing the adoption of a rule or regulation relative to a quorum which would conflict with the provisions of clause Fifth in the absence of express and specific mention therein to that effect.

Eleventh, The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

G.L. c. 265, § 43A

Section 43A: Criminal harassment; punishment

Section 43A: (a) Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of

criminal harassment and shall be punished by imprisonment in a house of correction for not more than 2 1/2 years or by a fine of not more than \$1,000, or by both such fine and imprisonment. The conduct or acts described in this paragraph shall include, but not be limited to, conduct or acts conducted by mail or by use of a telephonic or telecommunication device or electronic communication device including, but not limited to, any device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications.

(b) Whoever, after having been convicted of the crime of criminal harassment, commits a second or subsequent such crime, or whoever commits the crime of criminal harassment having previously been convicted of a violation of section 43, shall be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than ten years.

CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I, David Cutshall, do hereby certify that the
Commonwealth's brief in the case of Commonwealth v.
Francis T. Brennan, Supreme Judicial Court No. SJC-
12518, complies with Mass. R. App. P. 16(k).

/s/ David Cutshall

David Cutshall
Assistant District Attorney
For the Plymouth District
BBO # 684891

Date: April 19, 2018

CERTIFICATE OF SERVICE

I, David Cutshall, hereby certify that I have
this date, April 19, 2018, served a copy of the
Commonwealth's brief RE: Commonwealth v. Francis T.
Brennan, Supreme Judicial Court No. SJC-12518, on
counsel for the defendant by mailing to the office of
Sabrina Bonanno, Esquire, Sweeney & Associates, 225 W.
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Signed under the pains and penalties of perjury.

/s/ David Cutshall
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