

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

PLYMOUTH, ss.

No. SJC-12518

COMMONWEALTH,
Appellant

v.

FRANCIS T. BRENNAN,
Appellee

Brief for the Defendant-Appellee on Appeal from an
Order of the Hingham Division of the District Court

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Date: February 12, 2018

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ISSUE PRESENTED

Whether a private citizen's lawful acts of placing a GPS device on another person's vehicle, mapping its location, and making a statement to a third party created probable cause to charge the defendant with two counts of criminal harassment?

STATEMENT OF THE CASE

The defendant agrees with the Commonwealth's Statement of the Case.

STATEMENT OF FACTS

A criminal complaint issued against the defendant on August 25, 2016 charging him with two counts of criminal harassment in violation of G.L. c. 265 § 43A. (C.R.A. 3)¹. The application for criminal complaint consisted of multiple police reports filed by the Hingham Police Department. (C.R.A. 9-27). The allegations against the defendant as detailed in the police reports were as follows:

On May 15, 2016, Officer Stockbridge of the Hingham Police Department spoke with James Daly (hereinafter "Daly") and his wife, Jillian Hession

¹The Commonwealth's Record Appendix will be cited as "(C.R.A. page)." The Commonwealth's brief will be cited as "(Comm. Br. page)."

(hereinafter "Hession"). (C.R.A. 11). Daly had brought his wife's Lexus in for service, where it was discovered that a tracking device had been placed underneath the vehicle in the wheel well area. (C.R.A. 11, 16). The officer informed Daly that while police would need a warrant to install a tracking device on someone's vehicle, a private company or an individual is allowed to use tracking devices. (C.R.A. 11). At the suggestion of the officer, Daly checked his other vehicle, a Jeep, and discovered a second GPS tracking device where the spare tire would be located. (C.R.A. 11, 16). Officer Stockbridge wrote in his report "[a]s no crime has been committed this is not a Police issue but I informed Daly that I would file a report." (C.R.A. 11-12).

On the next day, Officer Stockbridge and Detective Phillip Emmott followed up with Daly and Hession in an attempt to ascertain who may have placed the GPS tracking devices on their vehicles. (C.R.A. 16). Neither Daly nor Hession were able to provide any additional information. (C.R.A. 16).

Since Daly was a member of the United States Coast Guard, the GPS tracking devices were turned over to Special Agent Baldwin of the Coast Guard

Investigative Service Unit in an attempt to discover the owner's identity. (C.R.A. 16, 19). Through the issuance of a subpoena to Brickhouse Security, the company that manufactured the GPS tracking devices, Special Agent Baldwin identified the owner as the defendant, Francis Brennan, and discovered that the devices had been shipped to the address of the defendant's company. (C.R.A. 19).

On May 23, 2016, Detective Leary met Special Agents Baldwin and Basham at the defendant's home to interview him. (C.R.A. 19). In his report, Detective Leary recounted statements made by the defendant after the defendant asked him to step outside so he could speak to the agents in private. (C.R.A. 19). The statements attributed to the defendant were taken from Special Agent's Baldwin's report by Detective Leary. (C.R.A. 19). A copy of Special Agent Baldwin's report was not part of the Application for Criminal Complaint. (C.R.A. 9-27). The defendant made the following statements to Special Agent Baldwin: "lets just say things got a little out of hand due to some prior circumstances, its moral, its not anything other than that, his wife might want to start checking his phone," that "he was guarding the hen house," that his

"only stake in all this is to make sure somebody was not in the place that I'm in all the time," and that his "backyard was clear." (C.R.A. 19, 20). According to Detective Leary's report the defendant believed Daly was "stepping out" of his marriage from Hession and having an affair with the defendant's wife. (C.R.A. 20).

The defendant allegedly admitted to having an account with Brickhouse Security and monitoring the movements of Daly and Hession using the GPS tracking devices. (C.R.A. 20). The defendant also stated he used his iPhone and Apple laptop to log into the Brickhouse Security account and monitor the GPS tracking devices. (C.R.A. 20).

On May 31, 2016, a search warrant was issued for the defendant's iPhone and laptop. (C.R.A. 23). The laptop and iPhone were searched on June 3, 2016 and June 5, 2016 respectively. (C.R.A. 23). The search of the laptop provided negative results because there was no hard drive. (C.R.A. 23). A Celebrite Extraction Report was produced from the search of the iPhone. (C.R.A. 23).

History reports were provided by Brickhouse Security which included the date, time, location,

speed, and latitude and longitude coordinates of the tracking devices. (C.R.A. 24). In regards to the history report, according to Dan Sachs from Brickhouse Security,

"We (Brickhouse Security) really have no way of knowing when the user was looking at the tracking data. What you see on the report is where the device was in terms of time and location. Has nothing to do with who saw the data. Typically, the user does not look at the report you have. He/she logs into our website and looks at our map which can show where the device is in real-time. They can also pick a specific date and where device was by viewing the dots on the map."

(C.R.A. 24).

Detective Leary opined that based on this response, it was unclear how many times the defendant logged in and monitored the GPS tracking devices. (C.R.A. 24).

After outlining the approximate locations of the latitude and longitude coordinates which were mapped on the iPhone through Google, Detective Leary found that seventeen of the latitude/longitude coordinates from the GPS tracking devices were researched on the defendant's iPhone on the following dates: 5/8/16, 5/11/16, 5/13/16, 5/14/16, 5/15/16 and 5/17/16.

(C.R.A. 25-26). At times Daly and Hession drove each other's vehicles, and the report did not specifically

state which GPS tracking device was accessed each time. (C.R.A. 11, 25-26).

The police reports filed in support of the criminal complaint contain no information indicating that Daly and Hession had ever met the defendant before, nor was there any information that Daly and Hession had any interactions with the defendant at any time prior to the discovery of the GPS tracking devices, either in-person or by electronic means. (C.R.A. 10-27).

ARGUMENT

- I. THE APPLICATION FOR CRIMINAL COMPLAINT FAILED TO SUPPLY PROBABLE CAUSE TO CHARGE THE DEFENDANT WITH TWO COUNTS OF CRIMINAL HARASSMENT.

The motion judge correctly 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...." (C.R.A. 28). "After the issuance of a [criminal] complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate" Commonwealth v. Bell, 83 Mass. App. Ct. 61, 62 (2013) (quoting Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002) (internal citations omitted)). A "motion to

dismiss a criminal complaint for lack of probable cause is decided from the four corners of the complaint application, without evidentiary hearing." Bell, 83 Mass. App. Ct. at 62. (citations omitted).

"The complaint application must allege facts sufficient to establish probable cause as to each element of the offense charged." Commonwealth v. Ilya I., 470 Mass. 625, 627 (2015) (citing Commonwealth v. Moran, 453 Mass. 880, 884 (2009)). "After the issuance of a complaint, the defendant ... may challenge the probable cause finding by a motion to dismiss." Ilya I., 470 Mass. at 627 (citing DiBennadetto, 436 Mass. at 313). "As the issue of probable cause presents a question of law, [this Court will] review the motion judge's determination de novo." Ilya I., 470 Mass. at 627 (citing Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013)).

Pursuant to chapter 265 § 43A of the Massachusetts General Laws, a person is guilty of criminal harassment if he "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...." In order to establish probable cause for a complaint for criminal harassment to issue, the Commonwealth must prove

"that (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) (internal citation omitted).

In this case, the application for criminal complaint failed to set forth four of the five elements required for a complaint to issue pursuant to G.L. c. 265 § 43A. First, the application did not establish that "the defendant engaged in a knowing pattern of conduct or speech, or series of acts, on at least three separate occasions." See generally id. Second, the application failed to establish that the defendant intended to target Daly and Hession "with the harassing conduct or speech, or series of acts," on each of the three occasions. See generally id. Third, the application did not set forth sufficient

evidence "that 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." See generally id. Fourth, the application did not demonstrate that "the defendant committed the conduct or speech, or series of acts, willfully and maliciously." See generally id. The motion to dismiss the complaint was properly allowed.

A. There was no pattern of conduct or speech, or series of acts committed on three separate occasions by the defendant against the complainants.

The Commonwealth cannot establish that the defendant committed a pattern of conduct, or speech, or series of acts against Daly and Hession on three separate occasions.

First, the Commonwealth asserts that the act of placing one GPS tracking device on Daly's vehicle and another GPS tracking device on Hession's vehicle qualifies as two of the three required separate acts directed at Daly and Hession. (Comm. Br. 11). A private citizen's act of placing a GPS tracking device on another person's vehicle has not been specifically proscribed by statute. In fact, Officer Stockbridge

noted in his report "[a]s no crime has been committed this is not a Police issue...." (C.R.A. 11).

In an effort to demonstrate that the defendant committed three separate acts, the Commonwealth is attempting to criminalize the act of a private citizen placing a GPS tracking device on another person's vehicle. Such an act does not constitute a crime. If the legislature saw fit, it could have criminalized the placement of GPS tracking devices on another's vehicle. See, e.g., Commonwealth v. Robertson, 467 Mass. 371, 380 (2014) (despite "eminently reasonable" proposition that females have an expectation of privacy in not having a stranger secretly take photographs up their skirts, the statute, as written, failed to criminalize such conduct); Commonwealth v. Nascimento, 91 Mass. App. Ct. 665, 666, review denied sub nom. Commonwealth v. Nascimento, 477 Mass. 1110 (2017) (noting the Legislature amended the statute to cover the type of conduct that occurred in Robertson).

Assuming, arguendo, that the placement of a GPS tracking device on a vehicle did qualify as one act of harassment, it would count only as a single act against Daly and a single act against Hession, as Daly

drove one vehicle and Hession drove the other. The criminal harassment statute requires that each act be directed at a specific person, and not just someone who is in close contact with the person being targeted. Simply because two people are married does not mean an act perpetrated against one spouse automatically qualifies as an act perpetrated against the other. See Commonwealth v. Bigelow, 475 Mass. 554, 555-56, 565 (2016) (finding that even though five letters were mailed to the home of the husband and wife, and the first two letters were addressed to both husband and wife, only letters three, four, and five were specifically directed at or targeted the wife). Even though Daly and Hession are married, the act of placing a GPS tracking device on Daly's vehicle cannot count as an act of harassment against Hession, and the act of placing a GPS tracking device on Hession's vehicle cannot count as an act of harassment against Daly.

Next, contrary to the Commonwealth's argument, the defendant's statement to police that Daly was having an affair and "his wife might want to start checking his phone" also cannot be considered an act of harassment. (Comm. Br. 11). The police sought out

the defendant, went to his house, and questioned him. (C.R.A. 19-20). There was no evidence in the police reports that the defendant ever made that kind of statement directly to Daly, Hession, or anyone other than the police in response to their questions. (C.R.A. 10-27).

The statement is also protected speech under the First Amendment. U.S. Const. Amend. I. The legislature intended the criminal harassment statute to apply "solely to constitutionally unprotected speech." Bigelow, 475 Mass. at 559 (quoting Commonwealth v. Welch, 444 Mass. 80, 99 (2005)). The Court stated that "[s]hould the Commonwealth attempt to prosecute an individual for speech that is constitutionally protected, we would have no hesitation in reading into the statute such a narrowing construction to ensure its application only to speech that is accorded no constitutional protection." Bigelow, 475 Mass. at 559-60 (quoting Welch, 444 Mass. at 100). Here, the defendant's speech was constitutionally protected as it did not contain "fighting words," "true threats," "words that incite violence, obscenity, defamation, or fraudulent speech." See generally Bigelow, 475 Mass. at 566.

Finally, the Commonwealth argues the defendant's acts of Google mapping Daly and Hession's location seventeen times all qualify as distinct acts of harassment. (Comm. Br. 11). Google mapping a location in no way qualifies as a form of criminal harassment. In fact, Daly and Hession had no idea their locations had been Google mapped until the police told them, and there was no interaction between the defendant and Daly and Hession related to the Google Map searches. (C.R.A. 10-27). Contrast Commonwealth v. Paton, 63 Mass. App. Ct. 215, 216-218 (2005) (defendant appeared over twenty times at a bar where the victim was employed, each time he asked for her by name, remaining in the bar only if she was working; his demeanor changed from pleasant to uncommunicative, pacing, and staring; he looked inside her car, appeared in numerous places she frequented, but denied knowing her when confronted by police); Commonwealth v. Robinson, 444 Mass. 102, 108-09 (2005) (finding sufficient evidence to convict the defendant of criminal harassment where the defendant on separate occasions glared at the victim, blocked the road the victim was driving on, moved close to the victim with

clenched fists, stated he would "wipe the grin" off the victim's face, and followed the victim home).

The police reports also do not indicate whether the seventeen searches were related to the GPS tracking device on Daly's vehicle or Hession's vehicle. (C.R.A. 10-27). Daly admitted to driving Hession's vehicle. (C.R.A. 11). Daly and Hession also traveled to some of the locations mentioned in the police report together, so an inference cannot be drawn as to whether it was the GPS tracking device on Daly's vehicle or Hession's vehicle that was Google mapped. (C.R.A. 25-26).

The purpose of a GPS tracking device is to be able to determine the location of the device. As noted *supra*, the placement of a GPS device has not been proscribed by statute and therefore does not qualify as an act of harassment. It necessarily follows then that the act of Google mapping the locations similarly cannot count as an act or acts of harassment. For all of these reasons, the criminal complaint failed to establish probable cause that the defendant engaged in a pattern of conduct or speech, or series of acts on three separate occasions.

B. There was no evidence the defendant intended to target the complainants with harassing conduct or speech, or a series of acts.

Furthermore, there was no evidence that the defendant intended to specifically target Daly and Hession. The criminal harassment statute requires that the "pattern of conduct or series of acts" be "directed at a specific person." Welch, 444 Mass. at 90 abrogated on other grounds by O'Brien v. Borowski, 461 Mass. 415 (2012) (quoting (G.L. c. 265, § 43A (a))). "Moreover, the statute clarifies that the 'specific person' referred to is the victim – the person who is 'seriously alarm[ed]' by the harassment." Welch, 444 Mass. at 90. "In short, this provision, by its plain terms, requires the Commonwealth to establish, at the very least, that the defendant intended to target the victim with the harassing conduct on at least three occasions." Id.

In Commonwealth v. McDonald, 462 Mass. 236 (2012), the Supreme Judicial Court rejected the Commonwealth's argument that the defendant's conduct intended to target the complainant. In that case, the defendant on four occasions drove slowly down the complainant's street and stared at her. Id. at 242-43. In finding that there was no evidence that the

defendant's attention specifically focused on the complainant, nor that he intended that she be aware of his attention, the Court noted "[t]he act of regularly driving on a public street, looking at people in their driveways or on their porches, or at their dogs and gardens, cannot alone support conviction of a wilful and malicious act directed at a specific person." Id. at 243.

In the instant case, similarly, there was no evidence presented to the clerk magistrate that the defendant's attention was directed specifically at Daly or Hession. (C.R.A. 9-27). There was also no evidence that the defendant wanted Daly and Hession to be aware of the GPS tracking devices or of his Google mapping the locations. (C.R.A. 9-27). Rather, the police reports reveal that the GPS tracking devices were surreptitiously placed and discovered accidentally only after Daly brought one of the vehicles in for service. (C.R.A. 11, 16). Further, Daly and Hession only became aware that the locations of the vehicles had been Google mapped after the police investigation concluded. (C.R.A. 10-27).

There was also no evidence in the police reports that the defendant ever did anything more than look up

the coordinates of the GPS devices, which is no different than driving down the street looking at a person's home and taking pictures. See McDonald, 462 Mass. at 243; (C.R.A. 10-27). Just as it was legal for the defendant in McDonald to drive up and down the street looking at an individual's home and taking pictures of dogs in the yard, it was legal for the defendant as a private citizen to place GPS devices on the vehicles of Daly and Hession and to research the locations of the devices.

Further, there was no relationship between the parties. (C.R.A. 10-27). There was no apparent or inferential animus between the parties; in fact, Daly and Hession had no idea who the defendant was. (C.R.A. 10-27). C.f. Demayo v. Quinn, 87 Mass. App. Ct. 115, 117-19 (2015)² (vacating harassment prevention order against the defendant where there was insufficient evidence to conclude the defendant's actions were directed against the complainant, who did not know the defendant).

² Although Demayo involved a harassment prevention order, the Court applied the same elements of G.L. c. 265 § 43A to define the portion of the civil criminal harassment statute that is "aimed at a specific person." Demayo, 87 Mass. App. Ct. at 117.

Simply put, there can be no harassing conduct when there has been zero interaction between the parties. The criminal application lacked any evidence that the defendant intended to specifically target Daly and Hession with harassing conduct or speech, or series of acts on three separate occasions.

C. The conduct or speech, or series of acts, were not of such a nature that they would cause a reasonable person to suffer substantial emotional distress.

It is not enough that Daly and Hession conveyed to the police that they were in fact seriously alarmed by the defendant's conduct³. The Commonwealth must also prove that a reasonable person in the victim's position would suffer substantial emotional distress. See G.L. c. 265 §43A. See also McDonald, 462 Mass. at 240 (setting forth the five required elements for criminal harassment). C.f. Commonwealth v. Walters, 472 Mass. 680, 694 (2015) (in stalking case, noting the standard is not only the subjective reaction of the victim, but rather whether victim's fear was reasonable).

³ The defendant does not contest the fact that the evidence was sufficient to meet the element of the statute requiring that the victims themselves be seriously alarmed.

Here, the defendant's conduct or speech or series of acts would not have caused a reasonable person to suffer substantial emotional distress. "Substantial" emotional distress has been defined as distress that is "considerable in amount, value, or worth."

Commonwealth v. Paton, 63 Mass. App. Ct. at 221

(quoting from Webster's Third New Int'l Dictionary 2280 (3d ed. 2002)). "In addition, Black's Law Dictionary 1428 (6th ed. 1990) states that 'substantial' is '[s]ynonymous with material.'" Id. "'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.'" Id. (quoting Black's Law Dictionary 563 (8th ed. 2004)).

In Paton, the defendant engaged in conduct that had an "ominous, menacing, or even sinister quality," id. at 220, where he repeatedly showed up not only to the bar where she worked, but appeared unexpectedly at other locations where she was present such as the mall, a coffee shop, and the gym. Id. at 216-17. The defendant in that case engaged in a menacing pattern of conduct.

In contrast, here there is no evidence the defendant was ever even in the same vicinity as the complainants. There is nothing to suggest that he ever followed them or appeared at places they frequented. A reasonable person in Daly and Hession's position would not suffer substantial emotional distress as a result of the lawful placement and mapping of the GPS tracking devices. A person may be unhappy about it, but it would not cause considerable anguish, grief, fright, humiliation, or fury, especially when there is no reason to believe the defendant held any ill will towards Daly and Hession as demonstrated by the complete lack of interaction between the parties, either before or after the placement of the GPS devices. (C.R.A. 10-27).

In this case, there is no pattern of conduct or separate and distinct acts that would cause a reasonable person substantial emotional distress. All the Commonwealth alleged in its complaint application was that the defendant, unbeknownst to Daly and Hession, Googled mapped a few locations from two GPS tracking devices. Unlike the defendant in Paton, here there was no pattern of conduct, and Google mapping a location without more - such as showing up to the

location - is not harassing conduct. As noted *supra*, Daly and Hession were not even aware that any locations were Google mapped until the police told them, nor should it have come as a surprise since the very purpose of a GPS device is to see where the device is located. (C.R.A. 10-27).

This case is far more similar to Commonwealth v. Clemens, in which the Court held that "[w]hile the complainant may have justifiably felt some discomfort at the unwanted advances of the defendant, those actions did not amount to criminal behavior." 61 Mass. App. Ct. 915, 915 (2004). In Clemens, the defendant's conviction was reversed because four of the five encounters between the defendant and complainant were innocuous; the defendant would go to the victim's work and talk to her. Id. The Court found that only the last encounter qualified as one act of harassment under the statute because it was not until after the fourth encounter that the defendant was put on notice by the police that his interactions with the victim were unwelcome. Id. After the police told the defendant to leave the victim alone, the defendant showed up at her work again; it was this act that was considered to be an act of harassment under the

statute. Id. While the Court found the fifth encounter to be harassment, the Court held that the other four encounters could not be transformed into acts of harassment merely because the fifth encounter counted as an act of harassment. Id.

Similarly here, the defendant was never placed on notice that tracking Daly and Hession's vehicles made them uncomfortable until the police came to speak with him. Once the defendant was placed on notice by the police that his actions made Daly and Hession uncomfortable, there were no further allegations that the defendant ever used the GPS tracking devices again or engaged in any conduct, innocent or malicious, toward the complainants. (C.R.A. 10-27).

Additionally, the Court went on to state in Clemens that it believed the judge used the term "relatively harmless" to describe the first four encounters with the defendant because even though they were "'disconcerting' to the complainant, they were not malicious in intent and were of a casual type that would not be alarming to an objective observer." Id. at 915 fn. 1.

Even though it may have been "disconcerting" to Daly and Hession that GPS tracking devices were placed

on their vehicles, that fact does not make the defendant's actions criminal nor does it qualify as harassment. Just because the act may be "disconcerting" to the individual, it does not necessarily follow that it would alarm a reasonable objective observer, nor does it make it a crime. Therefore, the criminal application lacked sufficient evidence that the conduct, or series of acts, were of such a nature that they would cause a reasonable person to suffer substantial emotional distress.

D. The conduct, speech, or series of acts was not committed willfully and maliciously.

There was no evidence in the criminal application that the defendant committed three separate acts directed at Daly and Hession willfully and maliciously. "The criminal harassment statute proscribes '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.'" McDonald, 462 Mass. at 242 (quoting G.L. c. 265, § 43A (a)). "Wilful conduct is that which is 'intentional rather than accidental'; it requires no evil intent, ill will, or malevolence." Id. (citation omitted). "A 'malicious act,' as defined in Black's Law Dictionary

1043 (9th ed. 2009), is an 'intentional, wrongful act done willfully or intentionally against another without legal justification or excuse.'" Id. (citations omitted). "Conduct is wilful when the actor intends both the conduct and its harmful consequences [and] may be wilful and malicious although its harmful consequences are neither substantial nor highly likely." Id. (citations omitted).

The purpose of harassment, in general, is to make the victim aware of the harassment and for the harassment to cause the victim emotional distress. The criminal harassment statute's intent, therefore, is to protect people from the willful and malicious conduct of another person.

As articulated in McDonald, the

"act of regularly driving on a public street, looking at people in their driveways or on their porches, or at their dogs and gardens, cannot alone support conviction of a wilful and malicious act directed at a specific person. Even direct advances such as striking up a conversation, asking that a person go out for a drink, or suggesting that a woman ask her boss for time off, which justifiably might engender feelings of discomfort, do not, in the absence of evidence of malicious intent, amount to criminal behavior."

McDonald, 462 Mass. at 243-44.

The police reports in this case show only that the defendant placed a GPS tracking device on the vehicles of Daly and Hession. (C.R.A. 10-27). Even though the reports mention that the defendant Google mapped some of the locations of the GPS tracking devices, there is absolutely no mention of the defendant ever going to any of those locations, nor have Daly or Hession claimed to have seen the defendant at any of the places he Google mapped. (C.R.A. 10-27). There was no evidence in the police reports that the defendant ever intended for Daly and Hession to know about the GPS tracking devices or that he was tracking the devices. (C.R.A. 10-27). Rather, it was the police that made them aware of it. (C.R.A. 25-26). There was no evidence in the criminal application that the defendant willfully and maliciously committed three separate acts of harassment directed at Daly and Hession which would cause a reasonable person to suffer substantial emotional distress and therefore, this Court should affirm the orders of the District Court.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Honorable Court affirm the District Court's allowance of the defendant's Motion to Dismiss and denial of the Commonwealth's Motion to Reconsider Dismissal.

Respectfully submitted,

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Date: February 12, 2018

ADDENDUM

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M.G.L. c. 265, § 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.

U.S. Constitution Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(6) (pertinent findings or memorandum of decision);
Rule 16(e) (references to the record);
Rule 16(f) (reproduction of statutes, rules, regulations);
Rule 16(h) (length of briefs);
Rule 18 (appendix to the briefs); and
Rule 20 (typesize, margins, and form of briefs and appendices).

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Date: February 12, 2018

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on 12th day of February 2018, I have made service of this Brief upon the attorney of record for each party by the Electronic Filing System on:

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