

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

COMMONWEALTH OF MASSACHUSETTS

v.

PHILIP CHISM

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ESCR No. 2013-1446
2013-1447
2014-109

APPEARANCES:

KATE MACDOUGALL, DAVID O'SULLIVAN, MELISSA
WOODARD, ASSISTANT DISTRICT ATTORNEYS, On Behalf of
the Commonwealth.

DENISE REGAN, ESQUIRE AND SUSAN OKER, ESQUIRE,
On Behalf of the Defendant, Philip Chism.

January 21, 2015
Before: Lowy, J.
Salem, Massachusetts

KATHLEEN L. CANTY
Official Court Reporter
Essex County Superior Court
56 Federal Street
Salem, Massachusetts 01970
978.825.4837

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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(No Witnesses)

EXHIBITS

NUMBER	PAGE
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(No Exhibits)

PROCEEDINGS

COURT OFFICER: All rise. Court is now in session, please be seated.

THE CLERK: Back on the record, Your Honor, Commonwealth Vs. Philip Chism. Would counsel identify themselves for the record, please.

MS. MACDOUGALL: Good morning, Your Honor, Kate MacDougall for the Commonwealth, with me are Assistant District Attorneys David O'Sullivan and Melissa Woodard.

MS. REGAN: Denise Regan and Susan Oker for Mr. Chism and we have waived his presence.

THE COURT: All right. Thank you. Good morning, to all counsel. I will ask the court reporter, Ms. Canty, to provide a transcript of the Court's Rulings on the Motion to Impound as so as she is able to today.

The defendant Philip Chism's Motion to Impound the contents of the video taped interrogation and transcript of his interrogation at the Danvers Police Station on October 23, 2013 is denied. The transcript has been marked "A" for Identification, and the

videotape as Exhibit No. 18.

"An order of impoundment may be entered by the court, after hearing, for good cause shown and in accordance with applicable law. In determining good cause, the Court shall consider all relevant factors, including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, and the extent of the community interest and reason(s) for the request." The Court quotes to Rule 7 of the Uniform Rules of Impoundment Procedure.

The Court quotes from Boston Herald, Inc. Vs. Sharpe, "Only the most extreme situations, if at all, may a State Court constitutionally forbid a newspaper (Or anybody else) to report or comment on happenings, which have been held in open court; and a similar rule would apply to court files otherwise restricted."

"It is desirable that [judicial proceedings] should take place under the public eye because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and

1 that every citizen should be able to satisfy
2 himself with his own eyes as to the mode in
3 which the public duty is performed. Consistent
4 with this principle, Massachusetts has long
5 recognized the common-law right of access to
6 judicial records." The Court Quotes from
7 Republican Company Vs. The Appeals Court, 442
8 Mass. 218, 222 a 2004 case.

9 Now Mr. Chism has raised important
10 issues as to whether he asserted his right to
11 remain silent, whether his mother's request for
12 an attorney constituted an invocation of the
13 right to counsel by Mr. Chism, whether Mr.
14 Chism was denied an actual opportunity to
15 consult with his mother concerning the decision
16 to waive his right to remain silent and to have
17 an attorney present during questioning, whether
18 an emergency exception applies as to a portion
19 of the interview, and finally whether Mr.
20 Chism's statement was voluntary. There are
21 numerous other issues involving the stop of Mr.
22 Chism by the Topsfield Police and statements he
23 made to the Topsfield Police that will also
24 need to be addressed by the Court relative to
25 the Court's ruling on the Defendant's Motion to

1 Suppress the interview.

2 Quoting from Globe Newspaper, "The
3 criminal trial historically has been open to
4 the press and general public. At the time when
5 our organic laws were adopted, criminal trials
6 were presumptively open. And since that time,
7 the presumption of openness has remained
8 secure."

9 The Court's reason for denial fo the
10 Motion to Impound is straightforward. The
11 defendant seeks to impound exhibits, which,
12 once entered, are court documents. Under our
13 common law, judicial records are presumptively
14 available to the public. And the presumption
15 has not been revised.

16 Whether the Motion to Suppress the
17 Defendant's Statement early in the morning
18 hours of October 23, 2013, at the Danvers
19 Police Station, is allowed or denied in whole
20 or in part will inevitably involve the
21 discussion of statements the defendant seeks to
22 suppress, which will likely be revealed at oral
23 argument. They are probative on the issue of
24 voluntariness. The issue of voluntariness will
25 be reached regardless of the Court's rulings on

1 whether the Commonwealth has or hasn't proven
2 that the defendant waived his Miranda Rights
3 beyond a reasonable doubt. Therefore, if the
4 motion to impound were allowed, the Court would
5 either have to hear argument on the important
6 issue of whether the Commonwealth has met its
7 burden of proving voluntariness beyond a
8 reasonable doubt at the side bar and impound
9 the record of that portion of the argument, or
10 speak in such cryptic terms that it would
11 impair a robust discussion and leave the public
12 distrustful of the process. Whatever the
13 Court's decision on suppression might be, the
14 public's right to understand that decision is
15 of constitutional dimension and central to the
16 maintenance of our social compact.

17 Further, at this early stage of the
18 proceedings, it is the Court's sense, and only
19 a sense, that the contents of the statement
20 that the defendant moves to impound will
21 ultimately become the subject of motions in
22 limine relative to expert testimony whether or
23 not the Motion to Suppress is allowed or
24 denied. In short, it is the Court's sense that
25 the statements would become public prior to

1 impanelment regardless of the Court's ruling on
2 the Motion to Suppress. Given the size of the
3 community, there is no concern that pretrial
4 publicity, even pervasive, would inevitable
5 lead to a tainted jury pool or an unfair trial.
6 The Commonwealth is cognizant of Commonwealth
7 Vs. Toolan, 460 Mass. 452, 463 a 2011 case. And
8 the manner in which concerns raised by the
9 defendant all legitimate may be mitigated.

10 Release of the transcript and the
11 video tape necessarily involves divulging
12 inflammatory content. Denial of the Motion to
13 Impound will mean that the selection of a fair
14 and impartial jury will be more challenging.
15 This Court is confident, however, that twelve
16 indifferent jurors will decide the facts of
17 this case according to the law and the
18 evidence. Furthermore, the Court is equipped
19 to ensure the Defendant's Sixth Amendment Right
20 to a fair trial is preserved and to minimize
21 any prejudicial impact on the defendant as
22 recognized in Boston Herald Vs. Sharpe.

23 The First Amendment poses challenges
24 everyday for countless people and institutions.
25 It poses a challenge for this Court today in

1 protecting the defendant's right to a fair
2 trial. But the First Amendment was not
3 intended to make life easy. To paraphrase
4 Thomas Jefferson, The First Amendment is
5 intended to allow democracy to thrive. When a
6 Court considers suppression of evidence under
7 the Constitution, just as when it engages in
8 judicial review and strikes down legislation, a
9 Court's decision, by its nature, is insulated
10 from the immediate crucible of the democratic
11 process. The exacting scrutiny of the press
12 in those circumstances in covering the courts
13 and providing an unobstructed view of the
14 proceedings, therefore, remains at the core of
15 protecting the concept of ordered liberty, the
16 rule of law, and ultimately not just democracy,
17 but constitutional democracy itself.

18 For those reasons the Motion to
19 Impound is denied and the Motion to Stay is
20 allowed.

21 Anything further on this issue from
22 the Commonwealth or the defendant.

23 MS. MACDOUGALL: No, Your Honor.

24 MS. REGAN: Your Honor, I'd ask that
25 the order be stayed until Tuesday, the 27th.

1 And if we decide not to go to the Single
2 Justice, I'll notify the Court immediately.

3 THE COURT: Okay. The motion to stay
4 until that date is allowed.

5 MS. REGAN: Thank you.

6 THE COURT: Thank you. All right the
7 Court will be in recess.

8 COURT OFFICER: All rise. Court will
9 be in a brief recess.

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CERTIFICATE

I, Kathleen L. Canty, Official Court Reporter, do hereby certify that the foregoing pages, 1-11, inclusive, represent a true and accurate record of the proceedings held concerning the aforementioned matter before Justice Lowy On January 21, 2015, to the best of my knowledge, skill, and ability.

KATHLEEN L. CANTY

OFFICIAL COURT REPORTER

PLEASE NOTE: The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.