

COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss.

Superior Court
Criminal Action
No. 08-056

Commonwealth

vs.

Jason Vassell

A TRUE COPY
ATTEST


CLERK MAGISTRATE

Further Findings and Order

October 7, 2009

Procedural Background

On December 29th, 2008, the defendant filed a Motion to Dismiss for Selective Prosecution. On February 10th, 2009, the defendant filed a Motion for Discovery pursuant to Mass. R. Crim. P. 14 in connection with his Motion to Dismiss. In his Motion for Discovery, the defendant made 25 separate requests for discovery. On February 18th, 2009, a hearing was held on the Defendant's Motion for Discovery. On February 26th, 2009, I issued a Memorandum and Order requiring the Commonwealth to supply the defendant with:

- (1) all police reports, witness statements, and Grand Jury minutes in the case of *Commonwealth v. Demian Vennell*,¹ Eastern Hampshire Dist. Ct. No. 0698CR1237;
- (2) any and all documentation showing the number of cases charged in Hampshire County in the past five years of assault and battery, assault and battery with a dangerous weapon, and aggravated assault and battery with a dangerous weapon, where the accused(s) and named victim(s) were of different racial backgrounds; and
- (3) any and all documentation concerning the number of cases reported to the Northwest District Attorney in the last five years of civil rights violations or hate crimes, including cases where no formal charges resulted.

¹The record contains a variety of spellings of Mr. Vennell's first and last names. The Court adopts the spelling used by Mr. Vennell's counsel.

On July 8th, 2008, a Single Justice of the Supreme Judicial Court (Cowin, J.) ordered me to make further findings in order to ascertain whether I applied the proper legal standard to my Order and whether there was sufficient evidence to support the Order.

On August 21, 2009, the Commonwealth filed a "Notice of Objection, on the Ground of Authentication, to 'Exhibits' Attached to Defendant's Appendix to Memorandum of Law in Support of Defendant's Motion to Dismiss and Referenced in the Defendant's Motion for Discovery Pursuant to Mass. R. Crim. P. 14" (hereinafter referred to as Notice of Objection). In the Notice of Objection, the Commonwealth challenges the authenticity of 62 of the 79 attachments to the defendant's Motion to Dismiss, which had been filed nearly eight months earlier. The Commonwealth does not challenge the authenticity of some witness statements which were adopted by the grand jury testimony of the declarants, including those of Barbara Rutman and Lindsey Topper. Nor does the Commonwealth object, on the ground of authentication, to some other exhibits, such as the video and audio recordings of statements of witnesses (including those of the defendant, his friend Vishan Chamanlal, Jonathan Bosse [Bosse] and John Bowes [Bowes]) or to a DVD of security camera footage of the altercation in this case, to the extent that these recordings are complete.

Legal Standard

The Court treats the defendant's motion for discovery as one under Mass. R. Crim. P. 14(a)(2), which permits defendants to move for the discovery of materials and relevant evidence not required to be produced pursuant to Mass. R. Crim. P. 14(a)(1).²

²The defendant does not assert that he is entitled to automatic mandatory discovery under Mass. R. Crim. P. 14(a)(1). Contrast *Commonwealth v. Betances*, 451 Mass. 457, 460 (2008) (defendant's motion for production of information that might support a motion to suppress on basis that the stop of his vehicle was made with an impermissible discriminatory motive [racial profiling] was presumed by the Supreme Judicial Court to be under Mass. R. Crim. P. 14(a)(1), because the defendant asserted that he was entitled to automatic mandatory discovery of information he sought).

"[A] defendant seeking to compile the appropriate statistical information to support a claim of selective prosecution may move under [Mass. R. Crim. P.] 14(a)(2) for 'material and relevant' pretrial discovery from the Commonwealth. . . . The request must be properly supported, and it may not impose undue burdens on the Commonwealth."

Commonwealth v. Bernardo B., 453 Mass. 158, 174 (2009), citing *Commonwealth v. Betances*, 451 Mass. 457, 461, 462 n. 6 (2008) (instructing that motions for automatic mandatory discovery under Mass. R. Crim. P. 14(a)(1) should be reasonable as to time period and should seek material only in the Commonwealth's possession, custody or control).

To be entitled to discretionary discovery under Rule 14(a)(2), the defendant need not raise a reasonable inference, based on credible evidence, that he was selectively prosecuted. See *Commonwealth v. Bernardo B.*, 453 Mass. at 168 (rejecting Commonwealth's argument that defendant's burden to obtain discovery under Rule 14(a)(2) is to raise a reasonable inference based on credible evidence that the defendant had been selectively prosecuted). Compare *Commonwealth v. Betances*, 451 Mass. at 461-462 (defendant was not entitled to automatic mandatory discovery under Rule 14(a)(1), the test of which was not whether the information sought was material and relevant to the defense, but whether the defendant had made a preliminary showing by offering "reliable information in affidavit form demonstrating a reasonable basis to infer that [racial] profiling, and not a traffic violation alone, may have been the basis for the vehicle stop").

To make a threshold showing of relevance for discretionary discovery pursuant to Mass. R. Crim. P. 14(a)(2), the information which the defendant seeks must be material and relevant to his claim of race-based selective prosecution. See Mass. R. Crim. P. 14(a)(2). The Supreme Judicial Court recently framed the question of relevancy and materiality in one selective prosecution case as whether the defendant's conduct was so dissimilar to that of the others involved "in nature, kind and degree as to nullify the possibility that his discovery request might yield information relevant to a claim of selective prosecution." See *Commonwealth v. Bernardo*

B., 453 Mass. at 169, 173 (where videotaped and transcribed interviews of three females involved in statutory rape case showed that all of the children--one male and three females--mutually agreed to sexual activity and that all were under the age of consent, but only the boy was charged, the boy had "sufficiently met the threshold showing required under rule 14(a)(2) that the discovery he seeks is relevant to his claim of selective prosecution, and that the Commonwealth has failed to advance any persuasive reason that it cannot, or should not, be required to meet its obligation of production"). Moreover, a motion under Rule 14(a)(2) should be accompanied by at least one affidavit containing relevant information, such as factual allegations, to establish the relevance of the information sought. See *Commonwealth v. Betances*, 451 Mass. at 462 n.6.

Subsidiary Findings of Fact

The initial issue is to determine to what extent the Court may rely on materials attached to the Motion to Dismiss in ruling on the discovery motion. Among those attachments are an affidavit by defense counsel, Attorney Luke Ryan;³ witness statements by Rutman and Toper (both of which, as noted above, were adopted by the grand jury testimony of these two declarants); and a DVD of security camera footage of the lobby of the defendant's dormitory, which was copied and provided by the Commonwealth to the defendant as discovery in this case. The Commonwealth does not object, on the ground of authentication, to the Court's consideration of these exhibits (7, 8, and 78, among some others) in ruling on the defendant's

³The defendant has actually submitted two affidavits from his defense counsel, Attorney Luke Ryan. In the affidavit filed on December 29, 2008, in support of the Motion to Dismiss, Attorney Ryan described the significance of the *Vennell* case and the related exhibits, and identifies each of the exhibits with their sources. In a separate sworn affidavit filed several days later, on January 2, 2009, in connection with the defendant's Motion for Rule 17 Subpoenas, Attorney Ryan summarizes the events of February 2, 2008, the injuries sustained by the persons involved, and the charges against the defendant and Bowes. Although this affidavit was not filed with the Motion to Dismiss, its contents further support, but are not essential to, the defendant's showing on his Motion for Discovery.

Motion for Discovery.⁴

I find that these materials set out a series of events that might show that in the early morning hours of February 3rd, 2008, two men, Jonathan Bosse (Bosse) and John Bowes (Bowes), both white, who were not students at the University of Massachusetts, were outside Mackimmie Hall looking into the defendant's dormitory room window and using racial slurs against the defendant, who is an African American. The accounts in the statements by Rutman and Toper, who were, like the defendant, residents of Mackimmie Hall, are that Bosse and Bowes told the defendant to come out and fight them, but the defendant refused, and either Bowes or Bosse smashed the defendant's window. According to Rutman's account, Bosse and Bowes were waiting for the defendant at the front of the building where they were "aggressively banging, pulling, and punching the door." The defendant telephoned a friend, Vishan Chamalal (Chamanlal), and asked him to come over and "get his back." The security camera footage shows that at approximately 5 a.m., Chamanlal, Bosse and Bowes entered the lobby of

⁴The Commonwealth provided the defendant with University of Massachusetts Police reports by Lt. Robert Thrasher, Off. Damian DeWolf, Off. Luis Antomarchi, Sergeant Jessica Moore, Off. Jason Minich, Off. Brian Kellogg, Det. Daniel Hagan Off. Brian Green and Det. Lisa Kidwell. Witness statements prepared by the University of Massachusetts Police Department are of Barbara Rutman, Lindsey Toper and Jennifer Rogacz.

In its Notice of Objection, the Commonwealth objects, "on the ground of authentication, to the use of any 'statement,' as defined by Mass. R. Crim. P. 14, on substantive grounds that is identified within the document that is not signed, sworn or attested from the declarant." The Commonwealth implies that the unsworn and unsigned witness statements to police (other than those of Rutman and Toper) are not reliable. There is nothing in the record that leads me to conclude that the police reports and the statements of the witnesses in both this case and the *Vennell* case, compiled by the officers of the University of Massachusetts Police Department, are not sufficiently reliable to support a discovery request under Mass. R. Crim. P. 14(a)(2). If an evidentiary hearing is ordered on the issue of selective prosecution, then the defendant will have to produce live evidence, subject to cross examination, in order to establish the allegations made. It seems to me, however, that it places an undue burden on the defendant at this early juncture, and uses valuable Court time, to have to engage in an evidentiary hearing as to the authentication of documents which have been provided by the Commonwealth in discovery in this case. While not essential to my conclusion, I find that these documents are sufficiently reliable to be considered by me as I determine whether the defendant has met his initial burden to show that he is entitled to discovery under Rule 14(a)(2) and to an evidentiary hearing on the substantive merits of his claim. In any event, I find that the Rutman and Toper statements, the security camera video recording in this case, and the affidavits of Attorneys Polk and Ryan provide ample reliable material upon which to conclude that the defendant has established grounds for ordering discretionary discovery under Mass. R. Crim. P. 14(a)(2).

Mackimmie Hall. Bosse and Bowes appear to be threatening the defendant. The verbal altercation became physical. According to Rutman's statement, the defendant pulled out a knife and told Bosse and Bowes that he did not want to use it and that they should leave, but that Bosse and Bowes continued to threaten the defendant and that one of the white males (later determined to be Bowes) punched the defendant in the face, while the other white male (later determined to be Bosse) joined in and attacked the defendant before the defendant used his knife. Bosse and Bowes were stabbed by the defendant. The defendant was also injured in the altercation, sustaining a broken nose. According to Tooper, the defendant left the lobby area and went into an interior locked hallway, while Bosse and Bowes told the defendant to come out and fight more, but the defendant did not do so.⁵ The dormitory security camera footage (with no audio portion) shows Bosse banging and kicking on the door, but, according to Tooper, it was locked and he and Bowes could not enter. The security camera footage in exhibit 78 does not capture the entire physical confrontation in the lobby of the dormitory, as the four men left the camera's view for brief periods, but in the parts showing the four males' presence, the defendant was mostly backing away while Bowes and Bosse were advancing on him. The exception to this is when, after Bowes and Bosse followed and appeared to chase the defendant (with Chamalal behind him) part of the way around the lobby, the four men disappeared from the camera's view and when they reappeared, the defendant raised the knife to stab one of the white males.

The defendant was indicted on two counts of aggravated assault and battery with a dangerous weapon (G.L. c. 265, § 15A(c)). Bosse was not charged. Bowes was originally charged on February 7, 2008, in Eastern Hampshire District Court with (1) a civil rights violation with injury (G.L. c. 265, § 37B), (2) assault and battery to intimidate, with bodily injury (G.L. c. 265, § 39D), and (3) disorderly conduct (G.L. c. 272, § 53F). In the statement of police officer Luis Antonmarchi attached to the application for a criminal complaint against Bowes, Officer

⁵According to Tooper, the white male later determined to be Bosse "was telling [the defendant] to come outside and fight him and that he was a [racial slur] who was scared. [The defendant] was saying nothing back to the two boys. They were banging on the window and door of the basement floor but the doors lock automatically so they couldn't get in."

Antonmarchi wrote, *inter alia*, “Bowes is seen in the video breaking over Chamanlal and striking Vassell in the face breaking his nose. At this point Vassell draws his knife and attacks the two men, stabbing Bosse 5 times and Bowes 4 times.” On April 1, 2008, the Commonwealth successfully moved to amend the assault and battery charge against Bowes by striking the words “with injury.”⁶

I find that the witness statements depicting Bowes and Bosse as the initial aggressors, although contradicted by the statements given by Bowes and Bosse, are nonetheless sufficiently reliable due to the significant corroboration among them and by what appears on the security camera tape, and for present purposes only, to supply the requisite support for the defendant’s discovery motion under Rule 14(a)(2).

The defendant has also attached to the Motion to Dismiss, and asks the Court to consider, numerous documents that tend to impeach the character of Bosse and Bowes. I do not find these documents relevant as they pertain to the defendant’s discovery requests. Rather, I have limited my consideration for purposes of the discovery requests to what I conclude is reliable and relevant. I am cognizant that the allegations of selective prosecution are just that - allegations.

Also included as attachments to the defendant’s Motion to Dismiss are an affidavit of Attorney Lisa Polk, who represented Demian Vennell (Vennell) relative to an incident that took place in a parking lot at the University of Massachusetts on May 7th, 2006. The affidavit, together with several witness statements,⁷ reveal an allegation that Vennell, who is African American, was

⁶The Commonwealth has attached a transcript of the trial in Eastern Hampshire District Court wherein Bowes was acquitted. The defendant argues that the prosecution of Bowes by the same District Attorney’s office is further evidence of selective prosecution and alleges that the Commonwealth did not vigorously pursue its case against Bowes because the decision had already been made to give priority to the prosecution of Vassell. While the alleged conflict is troubling, I do not consider the outcome of the *Bowes* case, nor the testimony therein as relevant to my decision, as these events took place after my order of February 26th, 2009.

⁷In the *Vennell* case, the University of Massachusetts Police Department took witness statements from Katharina McCarty, Jacqueline Castilero, Rene Chagnon, and Diana Campana.

attempting to aid another African American man, David Gern, who was being beaten by several white men. Attorney Polk states in her affidavit that (1) a surveillance camera videotaped the attack on Gern and shows Vennell pulling persons away from the crowd, and (2) the white person allegedly struck by Vennell with a flashlight was highly intoxicated and told paramedics that he sustained the injury from a fall. Four arrests were made that night, and three of the four charged were black, including Vennell, while none of his alleged assailants were ever charged.⁸ The Commonwealth supplemented the record by including an affidavit of Officer Brian Davies of the University of Massachusetts Police Department, stating that Gern declined to give police a statement. Nothing in Officer Davies' affidavit changes my view that the allegations in the *Vennell* case are relevant to and support the defendant's motion for discovery. I find that Attorney Polk's affidavit and the statements of three witnesses to that incident are sufficiently reliable and contain relevant factual allegations to be considered in determining whether the defendant has met Rule 14(a)(2)'s threshold requirement of establishing the relevance and materiality of the information sought. See *Commonwealth v. Bernardo B.*, 453 Mass. at 174; *Commonwealth v. Betances*, 451 Mass. at 462 n. 6.

Ultimate Findings of Fact

I further find that the defendant has supported his request for discovery with reliable materials concerning this case which show that his behavior was sufficiently similar to that of Bowes and Bosse "in nature, kind and degree" to demonstrate the possibility that his discovery requests might yield information relevant to his claim of selective prosecution. See *Commonwealth v. Bernardo B.*, 453 Mass. at 169, 173. Although Vassell used a knife in the altercation, the facts described in Rutman's and Topper's witness statements and as seen in portions of the security camera footage could be viewed as showing that Bosse and Bowes instigated the fight and incited Vassell to fight (possibly to defend himself), by first using racial slurs against Vassell, breaking his dormitory room window, and urging him to go outside to fight

⁸Vennell was charged with aggravated assault and battery with a dangerous weapon (a flashlight), assault and battery with a dangerous weapon, and disorderly conduct.

them. These accounts and the videotape also could be viewed as showing that once the four men confronted each other in the dormitory lobby, Bowes and Bosse first pursued and then attacked Vassell after Vassell told them to leave, and that Vassell sustained injuries. In this context, the fact that Vassell is alleged to have committed aggravated assault and battery against Bosse and Bowes with a knife, while the witnesses' accounts and the camera footage portray Bosse and Bowes as committing assault and battery upon Vassell with their fists, resulting in a broken nose, does not alter my conclusion that Bowes' and Bosses' conduct was sufficiently similar to that of Vassell's to conclude that Vassell has made a threshold showing based on credible evidence that he is entitled to discovery under Rule 14(a)(2) to investigate his claim of selective prosecution. See *Commonwealth v. Bernardo B.*, 453 Mass. at 173.

Vassell was charged with serious offenses in the Superior Court, while Bowes was only charged with arguably less serious offenses which were significantly reduced on motion by the Commonwealth. The Commonwealth's decision not to proceed against Bosse at all, and to reduce the charges against Bowes, despite the evidence against them, while pursuing far more serious charges against Vassell, further supports the relevance and materiality of the discovery sought by Vassell. See *Commonwealth v. Bernardo B.*, 453 Mass. at 173 (District Attorney affirmatively declined to bring charges against female children in statutory rape case).

The defendant has also demonstrated that his discovery request for materials regarding the *Vennell* case might yield information relevant and material to his claim of selective prosecution based on race. *Commonwealth v. Bernardo B.*, 453 Mass. at 173. The affidavits of counsel and the witness statements in this case and in the *Vennell* case support a view that these altercations share significant characteristics. Both appear to have arisen out of racially motivated attacks initiated by white males against one or more black males at the University of Massachusetts Amherst campus. The Commonwealth's arguably harsher prosecution, in both instances, of the black males compared to the white males involved, in light of the evidence and the similarities in the nature and motivation of the attacks, raises the possibility that the

defendant's discovery request for more materials in the *Vennell* case might yield information relevant and material to his claim of selective prosecution here.

On the basis of the defendant's showing, I therefore find that the three categories of materials listed in my Order allowing the defendant's Motion for Discovery are both relevant and material to his claim of selective prosecution. See Mass. R. Crim. P. 14(a)(2). The defendant's discovery requests are narrowly tailored to obtain data relevant to his investigation into his claim of race-based selective prosecution. If the materials sought provide evidence indicative of race-based selective prosecution, the defendant could generate objective and useful statistical analysis to present a prima facie case of discriminatory selective prosecution based on race. See *Bernardo B.*, 453 Mass. at 174.

The Commonwealth has not shown that the production of any of the requested materials, including data going back five years concerning specific relevant types of crimes charged as well as those reported which did not result in formal charges being filed, would place an undue burden on the resources of the District Attorney's office. Cf. *Commonwealth v. Bernardo B.*, 453 Mass. at 174-175 (it would be a "relatively uncomplicated matter" for the Commonwealth to produce documents in response to requests for information concerning the gender of complainants and accuseds under the age of sixteen in statutory rape cases in Plymouth County over a five year period). My Order seeks the production of materials generated within a reasonable time period and which are in the Commonwealth's possession, custody or control.

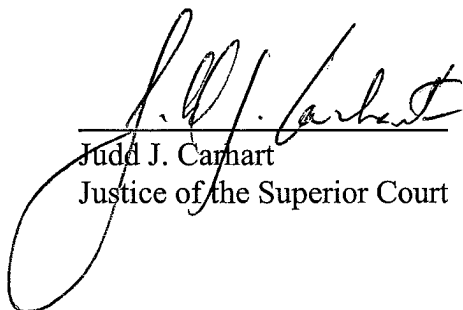
It is established law that prosecutions enjoy a presumption of regularity. *Commonwealth v. Lora*, 451 Mass. 425, 437 (2008). Indeed, Courts ought to give deference to prosecutorial decisions because such decisions entail policy considerations and are ill-suited to judicial review. *Commonwealth v. Bernardo B.*, 453 Mass. at 167. The decision to prosecute, however, is not unlimited. *Id.* at 168. Here, a very serious allegation has been made by the defendant. In support of his allegation, he seeks discovery that may aid him in his attempt to show selective

prosecution. The Commonwealth must be given every opportunity to rebut this serious allegation, but to deprive the defendant of information that may support his claim does not appear to be the correct course of action. My discovery Order should not be construed as an indication of the viability of the Motion to Dismiss. Rather, I find that the materials presented with respect to this case and that of Demian Vennell entitle the defendant to a limited amount of discovery in order that he might investigate his claim of selective prosecution.

The Commonwealth has not offered any persuasive reason that it cannot or should not be ordered to fulfill its obligation of production. See *Commonwealth v. Bernardo B.*, 453 Mass. at 173-174. Accordingly, and mindful of the presumption of regularity in prosecutorial decisions, I believe that the defendant should have access to the three categories of materials requested, as set forth in my Order, to assess the viability of his claim.

Conclusion

Consequently, I find and rule that the defendant has met his burden of showing that the evidence which I directed the Commonwealth to produce in my Order dated February 26, 2009, is material and relevant to his claim of race-based selective prosecution. Mass. R. Crim. P. 14(a)(2); *Commonwealth v. Bernardo B.*, 453 Mass. at 173.


Judd J. Carnart
Justice of the Superior Court