

## ■ SUPREME JUDICIAL COURT

### **Criminal**

#### **Confession - Voluntariness - Lack Of Recording**

Where a defendant was convicted of burning a dwelling house, the defendant is entitled to a new trial because his confession to the police was not shown by the commonwealth to have been voluntary and thus should have been suppressed.

"We also take this occasion to announce that, henceforth, the admission in evidence of any confession or statement of the defendant that is the product of an unrecorded custodial interrogation, or an unrecorded interrogation conducted at a place of detention, will entitle the defendant, on request, to a jury instruction concerning the need to evaluate that alleged statement or confession with particular caution."

#### **Majority's Analysis**

"... It is undisputed that, in an effort to obtain his confession, the interrogating officers resorted to trickery, falsely suggesting to [defendant Valerio] DiGiambattista that his presence at the scene of the fire had been captured on videotape, while simultaneously expressing sympathy for his actions and opining that he needed counselling for his alcoholism. In his subsequent confession, DiGiambattista's version of how and where he started the fire was completely contrary to the forensic evidence, and other details of his confession were ultimately shown to be impossible. ... [W]e conclude that the defendant's confession should have been suppressed, and we therefore reverse the defendant's conviction and remand the case for further proceedings.

"... Here, the combination of trickery and implied promises, a combination that we have recognized as potentially coercive to the point of making innocent people confess to crimes, ... is such that the Commonwealth cannot meet its burden of proof on the issue of voluntariness. With all deference to the motion judge's factual findings, we find error in the application of constitutional principles to those facts, and therefore reverse the order denying the defendant's motion to suppress. ...

"[W]hen the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a

place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.

#### **Dissenting-In-Part Opinion**

Greaney, J., joined by Spina and Cowin, JJ. "I agree with the court's conclusions that: it is unnecessary to require corroboration beyond that required in *Commonwealth v. Forde*, 392 Mass. 453, 458 (1984), to sustain a confession; and recording of defendants' statements, at the risk of their exclusion in evidence, should not be mandated. I join with Justice Spina, however, in concluding that the defendant's motion to suppress was correctly denied and in his observations and conclusions with respect to maintaining, without change, the current totality of the circumstances test. I also agree with his observations and conclusions as to the need for recording of statements to which I add the following. If the latter is to be considered at all by the court, it should be done so only after study by a representative committee (like the study now being conducted in New Jersey, see *State v Cook*, 179 N.J. 533, 562 [2004]), where all interested parties can be heard and as many issues as possible identified and resolved in advance. Otherwise, the pronouncement of a mandatory rule without guidelines and exceptions could lead to a quagmire of litigation (with defendants seeking to gain advantage at every opportunity) over a multiplicity of issues. Experience with the criminal rules of procedure demonstrates that practices that have been studied and codified in rules and exceptions work the best. The Legislature, of course, may act at any time, and that body is uniquely suited to conduct the type of study necessary

to fashion a workable procedure. I hope they will address the matter.

"I do not agree with the remedy proposed by the court, more specifically, the form of instructions mandated (on request). ...

"[T]he proposed instructions are far too intrusive on the Commonwealth's rights and of a nature that will tend to 'dynamite' a jury into concluding that a defendant's statement should be rejected. ..."

#### **Dissenting Opinion**

Spina, J., joined by Greaney, J., and joined in part by Cowin, J. "I do not oppose the electronic recording of custodial interrogations. I do not even oppose instructing the jury, on the defendant's request, that they should consider the Commonwealth's decision not to record as one factor when deciding voluntariness of a confession — an instruction that was *not* given (or apparently requested) in this case. What I oppose is the court's decision to override the traditional totality of the circumstances test ... with a new rule permitting an automatic determination of involuntariness based solely on the lack of a recording. ... No other factor is given such great weight in the assessment of the totality of the circumstances, and I see no compelling reason to single this one out. There is no record from which this court can conclude that the Commonwealth has a widespread problem of investigators obtaining false confessions. Because I discern no sufficient justification for displacing the traditional analysis of the voluntariness of a confession, I respectfully dissent."

*Commonwealth v. DiGiambattista* (Lawyers Weekly No. 10-156-04) (44 pages) (Sosman, J.) (Greaney, J., joined by Spina and Cowin, JJ., concurring in part and dissenting in part) (Spina, J., joined by Greaney, J., and joined in part by Cowin, J., dissenting) (SJC) A Pretrial motion to suppress evidence heard by Spurlock, J.; following review by the Appeals Court, further findings of fact regarding the defendant's motion to suppress made by him; case was tried before Cowin, J., in Superior Court. John A. Baccari and William J. Barabino for the defendant; Kevin J. Curtin and Alexandra T. Camp for the commonwealth; the following submitted briefs for amici curiae: David M. Siegel for Suffolk Lawyers for Justice, Inc., and another; Carlo Obligato and Marco Rechenberg for Committee for Public Counsel Services; Thomas F. Reilly, Cathryn Neaves and Robert J. Bender for Attorney General and others (Docket No. SJC-09155) (Aug. 16, 2004).