

MASSACHUSETTS Lawyers Weekly

Decision clarifies defense lawyers' duty to keep silent

But SJC ruling leaves unanswered questions, attorneys say

By: Eric T. Berkman September 2, 2022



Criminal defense lawyers say a recent Supreme Judicial Court decision clarifies an attorney's obligation to keep silent about evidence that incriminates a client but could raise complications in practice.

In 2014, a Rhode Island man, Will Tate, was convicted of second-degree murder for a shooting in Fall River.

Tate, who had not been given a Miranda warning, told police he threw the murder weapon from the Braga Bridge in Somerset after fleeing the scene. However, six months after the shooting, Tate's mother informed his trial counsel that she found the murder weapon in her basement.

The attorney told Tate's mother not to touch the gun. Then, after consulting other lawyers, he told Tate he was ethically bound to disclose the information to the state and had Tate sign a statement that he consented to the decision.

On appeal, Tate argued that he was entitled to a new trial based on ineffective assistance of counsel.

The SJC agreed, finding that the situation created a conflict of interest between what the attorney inaccurately thought were his ethical duties and his duties toward his client. By failing to present options other than disclosure, the SJC found, the attorney failed to secure Tate's informed consent.

The SJC also articulated a standard that lawyers who know the location of incriminating evidence violate no ethical rule by remaining silent so long as they do not attempt to possess, conceal or destroy the evidence.

Additionally, Justice Serge Georges Jr. wrote, "if, in light of the attorney's knowledge, the attorney believes that he or she would be unable zealously to represent the client and to provide 'thorough and competent representation,' or that there has been an irreconcilable breakdown in the attorney-client relationship, the attorney should seek to



withdraw well before trial.”

Tate’s appellate counsel, Matthew H. Feinberg of Boston, said the decision provides helpful clarification.

“This is, in my experience, a fairly common circumstance under which we all assume we have no obligation to disclose, but this establishes that as a principle,” he said.

At the same time, Boston lawyer Thomas F. Maffei, who teaches professional responsibility at Boston College Law School, said the decision leaves certain issues up in the air.



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— Thomas F. Maffei, Boston



“How does successor counsel handle this if the attorney withdraws?” he asked. “It’s really unclear that successor counsel is in any different position than this lawyer was in and, whether the first lawyer can even disclose the problem to the second lawyer, since by definition it’s confidential information.”

The Bristol County District Attorney’s Office, which handled the prosecution, did not respond to requests for comment.

The 35-page decision is *Commonwealth v. Tate*, Lawyers Weekly No. 10-108-22.

Incriminating information

On Jan. 4, 2014, Tate’s former co-worker, Jasmine Ward, told her brother, David Rodriguez, that she had plans to meet with Tate.

Rodriguez knew Tate had previously tried to establish a sexual relationship with Ward and insisted that she stay with him that night instead, which she agreed to do.

But Ward kept texting Tate, who arrived at Rodriguez’s Fall River apartment complex to meet with her.

Surveillance footage shows that, after midnight, Rodriguez left the elevator in the lobby of his building, walked toward the entrance, and motioned for someone to come inside.

When Tate entered, both men went into the laundry room for several minutes before leaving, at which point Tate exited the building.

Around the same time, Ward felt sick and went into the bathroom of Rodriguez’s apartment. When her brother returned, he did not know where she was.

Rodriguez left the apartment again, went down to the first floor, and saw Tate drive past the main entrance.

He ran outside with his cellphone in his hand, and as he did so Tate shot him twice. Rodriguez died before paramedics arrived. Tate later claimed he thought the phone was a firearm.

The morning after the shooting, Tate and his mother, who lived in Rhode Island, were driving to the Fall River police station, where he planned to turn himself in, when they were stopped by Rhode Island state troopers who arrested the defendant.

Without advising Tate of his rights, one of the troopers asked where the weapon was, and Tate said he threw it off the Braga Bridge.

Tate was subsequently charged with first-degree murder in Bristol Superior Court.

Six months after the shooting, Tate’s mother came across a suspicious locked box in her basement as well as the jacket Tate was wearing the night of the shooting.

Concerned, she contacted Tate’s trial attorney, Jack M. Atwood, who told her not to touch anything or open the box until he contacted her. He also suggested she retain her own counsel.



Atwood himself then sought advice from three attorney friends and the Board of Bar Overseers.

Based on those conversations, Atwood concluded he had an ethical obligation to disclose what he had learned to the commonwealth. He also apparently believed Tate's false statements about the location of the gun would hurt his theory of self-defense and that it was in Tate's best interest to acknowledge his lie and turn the items over to the prosecution.

When Atwood met with the defendant in jail, he discussed what he believed to be his ethical obligations, the impact the evidence would have on the case, and his opinion that the items had to be turned over to the authorities.

Tate signed a statement that he agreed with Atwood's position.

Atwood then notified the lead prosecutor about the discovery by Tate's mother. Police obtained the jacket and the box, which contained the murder weapon, pursuant to search warrants.

Tate was subsequently convicted of second-degree murder and weapons charges.

In September 2019, represented by new counsel, Tate moved for a new trial on grounds of ineffective assistance of counsel. Judge Renee P. Dupuis denied the motion.

Tate appealed, and the SJC took up the case on its own initiative.

Ethical obligation

The SJC vacated the lower court's ruling, ordering a new trial on ineffective assistance grounds.

In so doing, the court emphasized that the information received by trial counsel was confidential information governed by Rule 1.6 of the Massachusetts Rules of Professional Conduct and that his belief that he was obligated to disclose it was inaccurate, as he did not take possession of the evidence, alter it, or seek to hide it.

Meanwhile, the SJC continued, nondisclosure was a reasonable available alternative that Tate should have been advised to consider.

Georges pointed out that counsel should have discussed with Tate the potential impact of nondisclosure and the risks of pursuing such a strategy.

"Absent evidence of such a discussion, we cannot say that the defendant's consent was 'informed,'" Georges wrote. "Moreover, on this record, we are unable to conclude that the defendant's purported consent was voluntarily given. ... [A] choice cannot be voluntary if, in fact, it is not a choice."

'A delicate dance'

Boston attorney Paul M. Glickman, who handles criminal and professional disciplinary cases, said the decision is an important one.

"It really lays out the duties of an attorney, particularly in a criminal matter, regarding disclosure," he said. "I think it also should inform attorneys in civil matters because these types of conflicts come up regularly in various areas of law. In any particular case, an attorney might become aware of something he believes he needs to report to a court because of what he feels his ethical obligations may be. [But this may not] be in the best interest of the client."

In all such situations, the lawyer should consider whether there is a potential conflict, whether seeking informed consent makes sense, and whether the attorney should seek to withdraw or recommend the client seek alternative counsel, he said.

Daniel S. Medwed, a criminal law professor at Northeastern University School of Law, said the case highlights the conundrum defense attorneys face in that they need as much information as possible to put on an effective defense, but knowing too much can constrain their ability to raise particular defenses or put the defendant on the witness stand.

"It's a delicate dance," he said. "How much knowledge is too much is something every defense lawyer struggles with."

Medwed added that the defense attorney's obligations might be different under a slightly different set of facts.

Commonwealth v. Tate

THE ISSUE: Did a criminal defense lawyer's mistaken belief that he had a duty to disclose incriminating information to the commonwealth create a conflict of interest that amounted to ineffective assistance of counsel?

DECISION: Yes (Supreme Judicial Court)

LAWYERS: Stephen C. Nadeau Jr. of the Bristol County District Attorney's Office, New Bedford (commonwealth)



"[The defendant] says he threw the gun into the water," Medwed said. "But what if hypothetically he didn't kill the person but says he used the gun in self-defense and then threatened him down the road? Is the same information now something that could be part of a future crime? It gets complicated if the information goes not just to a past incident but a future incident."

Matthew H. Feinberg of Boston
(defense)

Feinberg said the ruling leaves unanswered questions.

For example, he said, the decision does not address the obligations of any attorney with whom the mother might have sought her own counsel.

"What if that attorney says, 'Don't do anything,' or she turns in the gun to that attorney?" Feinberg said. "He doesn't represent the defendant, but he has possession of what he knows to be incriminating evidence."

Additionally, Feinberg said, the SJC does not address what will happen at a new trial.

"It's my view that all this evidence should be excluded because it's tainted by [the original counsel's] breach of his ethical duties," he said.

Robert A. George, a criminal defense lawyer in East Dennis, said the SJC's ruling "kicks the can down the road" to the next attorney assigned to the case.

"The problem still exists, and a person accused of murder in the first degree facing life without parole is not concerned at all with the types of morals and codes the new attorney is still concerned about," George said. "The cherry on top will be whether the defendant takes the witness stand and testifies truthfully or insists on continuing to press a false narrative regarding the disposal of key incriminating evidence. That will be a very tough row to hoe for successor counsel. I don't envy that lawyer's task."

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