

COMMON NIGHTWALKER

The defendant is charged with being a common nightwalker. Section 53 of chapter 272 of our General Laws provides that “common night walkers . . . shall be punished”

A common nightwalker is someone who is abroad at night, soliciting others to engage in unlawful sexual acts. Often it is a prostitute who solicits potential customers on the street.

In order to prove the defendant guilty of this offense, the Commonwealth must prove two things beyond a reasonable doubt:

***First:* That the defendant was walking the streets at night; and**

***Second:* That the defendant was attempting to solicit someone to engage in an unlawful sexual act, such as an act of prostitution.**

See Instruction 3.120 (Intent). For a definition of “nighttime,” see Instruction 8.100 (Breaking and Entering).

Commonwealth v. Boyer, 400 Mass. 52, 53 n.1, 507 N.E.2d 1024, 1025 n.1 (1987) (“common night walker” is “someone who is abroad at night and solicits others to engage in illicit sexual acts”); *Commonwealth v. King*, 374 Mass. 5, 13-14, 372 N.E.2d 196, 202 (1977) (solicitation inferable from circumstantial “time, place, and frequency” of defendant’s conduct); *Thomes v. Commonwealth*, 355 Mass. 203, 207, 243 N.E.2d 821, 824 (1969) (offense consists in being “abroad at night attempting to allure someone to illicit sexual intercourse,” and generally has “come to mean a prostitute who solicits [customers] on the street”; actual attempt at solicitation is required, not just intent to do so, and as so construed, statute is not unconstitutionally vague); *Commonwealth v. Proctor*, 22 Mass. App. Ct. 935, 493 N.E.2d 879 (1986) (solicitation inferable from defendant’s standing on corner frequented by prostitutes, speaking with a male motorist and getting into his auto, where defendant had regularly done so in the past; testimony of express soliciting conversation with prospective customer was not required).

NOTES:

1. **Selective prosecution of females.** The Massachusetts Equal Rights Amendment (art. 106 of the Articles of Amendment to the Massachusetts Constitution) requires that a common nightwalking charge against a female defendant be dismissed with prejudice upon an appropriate showing that the particular police department or prosecutor's office consistently prosecutes female nightwalkers but not their male customers. *Proctor*, 22 Mass. App. Ct. at 936, 493 N.E.2d at 881 (1986); *Commonwealth v. An Unnamed Defendant*, 22 Mass. App. Ct. 230, 233-236, 492 N.E.2d 1184, 1186-1188 (1986).

2. **Whether a continuing offense.** The statutory charging language for this offense suggests that it may be a continuing offense. G.L. c. 277, § 79 (sufficient form of complaint is "[t]hat A.B., during the three months next before the making of this complaint, was a common nightwalker, habitually walking in the streets in the night time for the purpose of prostitution"). Historically, cases of a similar nature have been viewed as continuing offenses. See *Commonwealth v. McNamee*, 112 Mass. 285 (1873) (common drunkard); *Commonwealth v. Gardner*, 73 Mass. 494 (1856) (common seller of spiritous and intoxicating liquor); *Stratton v. Commonwealth*, 51 Mass. 217 (1845) (common railer and brawler). This issue has not arisen in the nightwalking cases cited above.

3. **Conviction does not require multiple acts.** Conviction does not require past or multiple acts. *King, supra* (this "is not a statute directed against recidivism and does not require proof of past convictions for prostitution to sustain a conviction for common night walking"). See *Commonwealth v. Nellie Cruz*, 30 Mass. App. Ct. 1113, 571 N.E.2d 435 (No. 90-P-894, May 9, 1991) ("where, as here, there is direct evidence of solicitation to engage in illicit sexual acts, additional evidence of 'habitual' activity is not necessary to establish guilt") (unpublished opinion under Appeals Court Rule 1:28).