

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH

v.

TIMOTHY RODERICK

DEFENDANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

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REQUEST FOR DIRECT APPELLATE REVIEW

The defendant, Timothy Roderick, requests that the Supreme Judicial Court (SJC) consider his appeal on direct appellate review. As grounds therefore, the defendant asserts that his appeal raises a number of important questions that remain unresolved in the wake of the SJC's decision in *Commonwealth v. Feliz*, 481 Mass. 689 (2019). In *Feliz*, the SJC considered the constitutionality of G. L. c. 265, s. 27. *Id.* at 690. This statute required "judges to impose global positioning system (GPS) monitoring as a condition of probation for individuals convicted of most sex offenses." *Id.* The Court concluded that the "[m]andatory, blanket imposition of GPS monitoring on probationers, absent individualized determinations of reasonableness, is unconstitutional." *Id.* at 700. The Court further explained that an individualized determination of reasonableness involves a balancing test that asks "whether the government's interest in imposing GPS monitoring outweighs the privacy intrusion occasioned by GPS monitoring." *Id.* at 701. Applying this test to the circumstances of the defendant, the Court concluded that the balance weighed in his favor because the Commonwealth failed

to present "evidence sufficient to indicate that this defendant poses a threat of reoffending or otherwise violating the terms of his probation." *Id.* at 705-706.

Though the analysis conducted by the Court in *Feliz* provides a framework for how to properly conduct an individualized determination of reasonableness, a number of questions remain unresolved. First, it remains unclear as to which party bears the burden of proof. *Feliz* is silent on this important question. Second, there is the question of how to weigh the underlying facts of the offense when assessing the defendant's risk of recidivism. It is unclear how the underlying facts should be weighed when they have no link to an increased rate of recidivism. Lastly, there is the question as to whether the defendant's classification as a level two sex offender, standing alone, is sufficient to establish that he poses a threat of reoffending.

The instant case presents these three questions for resolution. It is the defendant's position that (1) it is the Commonwealth's burden to prove the reasonableness of GPS monitoring, (2) the underlying facts must be linked to an increased rate of recidivism before these facts can be relied upon to

support a finding of reasonableness, and (3) the defendant's classification as a level two sex offender cannot provide the sole basis for concluding that he poses a threat of reoffending.

STATEMENT OF PRIOR PROCEEDINGS

The defendant, Timothy Roderick, was indicted in the Plymouth County Superior Court on two counts of rape and three counts of indecent assault and battery.¹ (R. 1-2). The defendant's jury trial took place over the course of three days. (R. 3). The defendant moved for a required finding of not guilty after the Commonwealth presented its case. (R. 6). The trial judge allowed the motion with respect to the three counts of indecent assault and battery, but denied it with respect to the two counts of rape. (R. 6). The jury found the defendant guilty on both remaining counts. (R. 6). The trial judge sentenced the defendant to four years in state prison on the first count and three years of probation on the second count. (R. 6). The judge ordered the defendant to wear a GPS monitoring device as a condition of his probation in accordance with G. L. c. 265, s. 47. (R.

¹ The appendix to this application will be cited by page number as (R.).

6). The defendant challenged his convictions on appeal, but the Appeals Court affirmed the convictions in an unpublished decision. (R. 7, 19-26).

The defendant subsequently filed a motion under Mass. R. Crim. Pro. 30(a) to vacate GPS monitoring as a condition of his probation in accordance with the SJC's decision in *Commonwealth v. Feliz*, 481 Mass. 689 (2019). (R. 7, 9-14). The Commonwealth opposed the defendant's motion. (R. 7, 15-17). After a hearing, the trial judge ruled that GPS monitoring remained a constitutionally valid condition of the defendant's probation. (R. 8, 18). The defendant filed a timely notice of appeal. (R. 8).

STATEMENT OF FACTS

The facts underlying the defendant's convictions are taken from the trial transcripts. Other relevant facts are taken from the documents submitted in support of the defendant's motion to vacate GPS monitoring as a condition of his probation.

A. The Defendant's Offenses.

The victim and the defendant met in the winter of 2016.² (Tr. II/70). The victim was homeless at the

² The trial transcripts will be cited by volume and page number as (Tr. __/__).

time. (Tr. II/35). The defendant invited the victim to stay at his residence in Wareham. (Tr. II/70). The victim stayed with the defendant from the end of February into the first week of March. (Tr. II/70). The relationship was platonic. (Tr. II/39). The defendant repeatedly told the victim that he wanted to be more than friends, but the victim rebuffed him every time. (Tr. II/39). As noted above, the victim left the defendant's residence in the first week of March. (Tr. II/70).

The victim returned to the defendant's residence on May 27th. (Tr. II/36). The defendant and the victim got into an argument on the first day of June. (Tr. II/71). As a result, the victim left the defendant's residence. (Tr. II/71). The victim went to stay with a friend who lived nearby. (Tr. II/43-44). On the evening of June 2nd, the victim and her friend decided to walk to a bar in the neighboring town of Onset. (Tr. II/44). As they walked on the side of the road, the defendant passed them in a car. (Tr. II/44-45, 71). The defendant pulled over and offered to drive them to the bar. (Tr. II/44-45). The victim and her friend accepted the defendant's offer. (Tr. II/45).

Upon arriving, all three individuals entered the bar together. (Tr. II/45).

The victim drank three beers at the bar. (Tr. II/45). She had taken a prescription medication for anxiety prior to consuming any alcohol. (Tr. II/45). Combining this medication with alcohol made the sedative effect of the medication "much stronger." (Tr. II/38-39). At some point in the night, the victim and the defendant went outside together to smoke cigarettes. (Tr. II/45-46). After finishing their cigarettes, the victim and the defendant departed in the defendant's car intending to return to his residence. (Tr. II/46). The victim threw up on herself during the ride. (Tr. II/72).

Upon arriving home, the defendant helped the victim clean herself up. (Tr. II/72). The victim's clothes were put into the washing machine and the defendant gave the victim one of his shirts to wear. (Tr. II/47). The two then went upstairs to the defendant's bedroom. (Tr. II/48-50). The victim fell asleep on the floor in the defendant's bedroom while the defendant was seated across the room on his bed. (Tr. II/50).

The defendant twice had sex with the victim while she was asleep. (Tr. II/50). The defendant confessed this fact to the victim when she woke up the following morning. (Tr. II/51). The victim immediately walked to a nearby hospital. (Tr. II/53). Hospital staff examined the victim and found male sperm inside her. (Tr. II/80). The Wareham police were henceforth notified and they opened an investigation into the incident. (Tr. II/68). They eventually arrested the defendant and charged him with two counts of rape and three counts of indecent assault and battery on a person over 14 years old. (R. 1-2). The defendant was convicted of both counts of rape and acquitted on the three counts of indecent assault and battery. (R. 6).

The trial judge sentenced the defendant to four years in state prison on the first rape count and three years of probation on the second rape count. (R. 6). The judge ordered the defendant to wear a GPS monitoring device as a condition of his probation in accordance with G. L. c. 265, s. 47. (Tr. III/45). The judge noted that he was statutorily required to impose this condition. (Tr. III/45).

B. The Defendant's Motion to Vacate GPS Monitoring as a Condition of his Probation.

As the defendant approached the end of his committed sentence, he filed a motion to vacate GPS monitoring as a condition of his probation. (R. 7, 9-14). He relied upon the SJC's decision in *Commonwealth v. Feliz*, 481 Mass. 689 (2019), to support his motion. (R. 9-14). In *Feliz*, the SJC concluded that the mandatory imposition of GPS monitoring as a condition of probation under G. L. c. 265, s. 47, is unconstitutional. *Id.* at 700. The Court held that a sentencing judge must conduct an individualized determination of reasonableness before imposing GPS monitoring as a condition of probation. *Id.*

The defendant argued that GPS monitoring is not reasonable as a condition of his probation because he had never previously been convicted of a crime, no history of committing sexual offenses, and no diagnosis of a psychiatric disorder indicating a compulsion towards sexually deviant activity. (R. 11-12). He also highlighted his adherence to the conditions of release that were imposed upon him prior to trial. (R. 12). He abided by these conditions without issue for 27 months from his arraignment until

trial. (R. 12). The defendant acknowledged that the Sex Offender Registry Board (SORB) classified him as a level two sex offender, but argued that this factor alone could not justify the imposition of GPS monitoring. (R. 12-13). Considering the balance of factors, the defendant argued that he did not pose a sufficient threat of reoffending to warrant the imposition of GPS monitoring as a condition of his probation. (R. 12-13).

The Commonwealth opposed the defendant's motion. (R. 15-17). The Commonwealth argued that GPS monitoring is a reasonable condition of the defendant's probation because he committed a contact offense and SORB classified him as a level two sex offender. (R. 15-16).

The trial judge denied the defendant's motion in a margin endorsement. (R. 8, 18). He concluded that GPS monitoring is a reasonable condition of the defendant's probation in light of the facts of the underlying case, the defendant's classification as a level two sex offender, and the value of GPS monitoring to enforce the condition requiring the defendant to stay away from the victim. (R. 8, 18).

ISSUES OF LAW RAISED BY THE APPEAL

As noted above, the defendant's appeal raises a number of questions about how to properly conduct an individualized determination of reasonableness in accordance with *Commonwealth v. Feliz*, 481 Mass. 689 (2019). These questions are as follows:

1. What side bears the burden of proof when a sentencing judge conducts an individualized determination of reasonableness?
2. What weight should be given to the underlying facts of the offense in the absence of evidence linking these facts to an increased rate of recidivism?
3. Can the defendant's classification as a level two sex offender provide the sole basis for concluding that the defendant poses a threat of reoffending?

These issues are properly preserved for appeal. The defendant specifically argued in the lower court that his classification as a level two sex offender could not provide the sole basis for concluding that he poses a threat of reoffending. The question of how to weigh the underlying facts of the offense stems from the judge's decision, as the judge relied on the underlying facts to justify GPS monitoring even though there was no evidence linking these facts to an increased rate of recidivism. Finally, the threshold question of where the evidentiary burden lies is

inherently raised in every case involving an individualized determination of reasonableness.

ARGUMENT IN SUPPORT OF THE DEFENDANT'S POSITIONS

I. THE COMMONWEALTH BEARS THE BURDEN OF PROVING THAT GPS MONITORING IS REASONABLE AS A CONDITION OF THE DEFENDANT'S PROBATION.

In *Commonwealth v. Feliz*, 481 Mass. 689 (2019), the SJC concluded that GPS monitoring can only be imposed as a condition of probation after "an individualized determination of reasonableness." *Id.* at 690. The Court did not expressly state that the Commonwealth bears the burden of proving reasonableness. However, this conclusion is inescapable upon a close reading of the decision. A critical part of the Court's analysis involved consideration of whether GPS monitoring constitutes a search in the constitutional sense. *Id.* at 696-698. The Court concluded that GPS monitoring constitutes a warrantless search. *Id.* at 696-700. It is well-established that the government bears the burden of establishing the reasonableness of a warrantless search. See *Commonwealth v. Antobenedetto*, 366 Mass. 51, 57 (1974) ("It is our conclusion that where . . . the search is without a warrant the burden of establishing its reasonableness is on the

Commonwealth."); *Commonwealth v. Forde*, 367 Mass. 798, 800 (1975) ("When searches are conducted without a warrant, the burden is on the government to show that a particular search falls within a narrow class of permissible exceptions."); *see also United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("[T]he burden is on those seeking the exemption [to the warrant requirement] to show the need for it."); *United States v. Carbajal*, 956 F.2d 924, 930 (9th Cir. 1992) ("The burden is on the government . . . to show the reasonableness of a warrantless search.").

Because GPS monitoring constitutes a warrantless search, it is the Commonwealth's burden to establish reasonableness. Under the framework set forth in *Feliz*, satisfaction of this burden requires the Commonwealth to introduce "evidence sufficient to indicate that th[e] defendant poses a threat of reoffending or otherwise violating the terms of his probation." 481 Mass. at 705-706.

II. THE UNDERLYING FACTS OF THE CASE CANNOT BE RELIED UPON TO SUPPORT A FINDING OF REASONABLENESS UNLESS THERE IS A LINK BETWEEN THESE FACTS AND AN INCREASED RATE OF RECIDIVISM.

The judge ruled that GPS monitoring is reasonable "in light of [the] facts of [the] underlying case."

(R. 8, 18). However, neither the Commonwealth nor the judge attempted to draw any connection between the underlying facts of the case and the defendant's risk of recidivism. As the SJC made clear in *Feliz*, it is the threat of recidivism that justifies the imposition of GPS monitoring. If the underlying facts of the case are to be relied upon to support imposition of GPS monitoring, there has to be some link drawn between the facts and the defendant's risk of reoffending. Without such a link, the underlying facts of the case are irrelevant to the analysis.

The decision by the North Carolina Court of Appeals in *State v. Griffin*, 840 S.E.2d 267 (N.C. Ct. App. 2020), is instructive on this point. The defendant in *Griffin* was convicted of first-degree sexual offense with a child. *Id.* at 269. The underlying facts were that the defendant engaged in digital and penile penetration of his girlfriend's minor daughter over the course of three years. *Id.* The sentencing judge concluded that GPS monitoring was reasonable. *Id.* To support this conclusion, the judge relied on the fact that the defendant exploited his position of trust in the victim's household. *Id.* at 270. On appeal, the court dismissed the relevance of

this fact because the judge failed to explain how the defendant's "betrayal of [the victim's] trust . . . increased his likelihood of recidivism." *Id.* at 275. This logic is directly applicable here. The judge concluded that GPS monitoring is reasonable in light of the underlying facts of the case, but failed to explain how these facts increased the defendant's risk of recidivism.

This is not to say that the underlying facts of the case can never be relied upon to support GPS monitoring. The Commonwealth is certainly free to introduce evidence showing that people who commit certain types of sexual offenses have higher rates of recidivism.³ There will also be cases in which the underlying facts logically speak to a heightened risk of recidivism. For example, if the underlying facts involve numerous sexual offenses over an extended

³ The Department of Justice has conducted a number of studies compiling data on the recidivism rates of sex offenders. See Alper & Durose, *Recidivism of Sex Offenders Released From State Prison: A 9-year Follow-Up*, U.S. Dept. of Justice, pg. 5 (May 2019) (7.7% of prisoners released after serving time for rape or sexual assault were rearrested for rape or sexual assault within nine years of release); Langan, Schmitt, & Durose, *Recidivism of Sex Offenders Released From Prison in 1994*, U.S. Dept. of Justice, pg. 24 (Nov. 2003) (5.3% of released sex offenders were rearrested for a new sex crime within three years of release).

period of time or some other type of compulsive sexual behavior, it would be logical to conclude that the defendant poses a threat of reoffending. See *Commonwealth v. Torres*, 99 Mass. App. Ct. 1117 (unpublished decision) (GPS monitoring reasonable because defendant had history of committing sexual offenses).⁴ The underlying facts at issue here do not lead to such a conclusion. The evidence at trial established that the defendant and the victim went home together after a night of heavy drinking. The defendant had sex with the victim after she passed out in his bedroom. This was surely a reprehensible act. However, nothing about these facts inherently indicates that the defendant poses a risk of reoffending.

The purpose of GPS monitoring cannot simply be to punish the defendant for the crime that he has committed. Yet that is exactly what is invited when sentencing judges are allowed to rely on the underlying facts of the case to justify GPS monitoring without linking these facts to an increased risk of recidivism. There will be an inclination to impose GPS

⁴ A copy of this unpublished decision is included in the appendix to this application. (R. 27-35).

monitoring based solely on the underlying offense with no consideration of whether the defendant poses a threat to reoffend. GPS monitoring is reasonable if it "advances the Commonwealth's interests in rehabilitation of the probationer and protection of the public." *Feliz*, 481 Mass. at 701. It is not reasonable if it serves only to punish the defendant for the crime that he has committed.

III. THE DEFENDANT'S CLASSIFICATION AS A LEVEL TWO SEX OFFENDER CANNOT PROVIDE THE SOLE BASIS FOR CONCLUDING THAT THE DEFENDANT POSES A RISK OF REOFFENDING.

The judge relied upon one factor that was truly relevant to the defendant's risk of recidivism: SORB's classification of the defendant as a level two sex offender.⁵ Such a classification is appropriate "if the risk of reoffense is moderate." *Doe, Sex Offender Registry Bd. No. 972 v. Sex Offender Registry Bd.*, 428

⁵ The judge also reasoned that GPS monitoring was justified because of its value in enforcing the condition requiring the defendant to stay away from the victim. (R. 8, 18). However, at the motion hearing, the Commonwealth acknowledged that it did not know whether the victim had a stable home address. GPS monitoring is useless as a tool for enforcing the stay away condition without a stable address to put an exclusion zone around. See *Feliz*, 481 Mass. at 709 (GPS monitoring not useful to enforce condition requiring defendant to stay away from parks, schools, and daycare centers without exclusion zones around these areas).

Mass. 90, 93 (1998). The defendant's classification as a level two sex offender is certainly relevant to his likelihood of reoffending and is therefore an appropriate consideration when assessing the reasonableness of GPS monitoring. However, this factor cannot be solely dispositive of the issue. See *Feliz*, 481 Mass. at 701, quoting *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) ("Because reasonableness depends 'on the totality of the circumstances,' no one factor will be dispositive in every case."). The SJC highlighted a bevy of factors that should be considered in the reasonableness analysis. *Feliz*, 481 Mass. at 705-707. There would be no need to consider any of these factors if the Commonwealth could meet its burden by simply relying upon the defendant's classification as a level two sex offender. This is not what the SJC envisioned when it held that Art. 14 "requires individualized determinations of reasonableness in order to impose GPS monitoring as a condition of probation." *Id.* at 700.

An individualized determination of reasonableness should consider "the totality of the circumstances." *Feliz*, 481 Mass. at 701, quoting *Grady*, 135 S. Ct. at 1371. Under this type of analysis, all of the factors

relevant to the defendant's risk of recidivism should be considered. Simply relying on the defendant's classification as a level two sex offender is not an analysis that considers the totality of the circumstances. Taken to its logical extent, all probationers classified as level two sex offenders would be required to submit to GPS monitoring as a condition of their probation. This blanket imposition of GPS monitoring on a large group of individuals is exactly what the SJC found to be unconstitutional in *Feliz*.⁶

To comport with *Feliz*, the individualized determination of reasonableness must consider all of the factors related to the defendant's risk of reoffending. The defendant's SORB classification level should be considered in the reasonableness analysis, but it cannot be the sole factor relied upon to justify GPS monitoring. Some additional evidence

⁶ The situation might be different if the defendant were classified as a level three sex offender. In *Feliz*, the Court noted that mandatory GPS monitoring "has been deemed reasonable where it is applicable only to individuals assigned to the 'most severe' risk assessment tier, who have committed crimes such as rape and sexual abuse of a child under age thirteen." 481 Mass. at 707, citing *Doe v. Coupe*, 143 A.3d 1266, 1270, 1279 (Del. Ch. 2016).

indicating that the defendant poses a threat of reoffending is necessary.

WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

In the wake of *Feliz*, GPS monitoring cannot be imposed as a condition of probation absent an individualized determination of reasonableness. This ruling has opened a door to potential relief for all probationers who had GPS monitoring mandatorily imposed as a condition of their probation pursuant to G. L. c. 265, s. 27. Like the defendant here, these probationers are entitled to a hearing at which the sentencing judge must conduct an individualized determination of reasonableness. It is critically important that the SJC provide some additional guidance as to how these hearings should be conducted. As of right now, it remains unclear as to which party bears the burden of proof on the question of reasonableness. Uncertainty also exists about the extent to which a finding of reasonableness can be based on the underlying facts of the offense when nothing links these facts to an increased rate of recidivism. Similar uncertainty exists about the extent to which a finding of reasonableness can be based on the defendant's classification as a level two

sex offender. These are questions that are certain to repeatedly arise as more probationers seek relief pursuant to *Feliz*. The SJC should take this opportunity to answer these important questions.

CONCLUSION

For the reasons set forth above, the Court should allow the defendant's application for direct appellate review.

Respectfully Submitted,
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By His Attorney,

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Dated: 10/14/21

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1683CR00424 Commonwealth vs. Roderick, Timothy M

- Case Type: Indictment
- Case Status: Open
- File Date: 12/30/2016
- DCM Track: C - Most Complex
- Initiating Action: RAPE c265 §22(b)
- Status Date: 02/15/2017
- Case Judge:
- Next Event:

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

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Party Charge Information

- **Roderick, Timothy M**
- Defendant
- Charge # 1:
265/22/A-1 - Felony RAPE c265 §22(b)
- Original Charge
- 265/22/A-1 RAPE c265 §22(b) (Felony)
- Indicted Charge
- Amended Charge
-

Charge Disposition
Disposition Date
Disposition

R. 1

09/19/2018
Guilty Verdict

- **Roderick, Timothy M**
- - Defendant
- Charge # 2:
265/22/A-1 - Felony RAPE c265 §22(b)

- Original Charge
- 265/22/A-1 RAPE c265 §22(b) (Felony)
- Indicted Charge
-
- Amended Charge

Charge Disposition

Disposition Date
Disposition
09/19/2018
Guilty Verdict

- **Roderick, Timothy M**
- - Defendant
- Charge # 3:
265/13H-2 - Felony INDECENT A&B ON PERSON 14 OR OVER c265 §13H

- Original Charge
- 265/13H-2 INDECENT A&B ON PERSON 14 OR OVER c265 §13H (Felony)
- Indicted Charge
-
- Amended Charge

Charge Disposition

Disposition Date
Disposition
09/18/2018
Not Guilty Finding

- **Roderick, Timothy M**
- - Defendant
- Charge # 4:
265/13H-2 - Felony INDECENT A&B ON PERSON 14 OR OVER c265 §13H

- Original Charge
- 265/13H-2 INDECENT A&B ON PERSON 14 OR OVER c265 §13H (Felony)
- Indicted Charge
-
- Amended Charge

Charge Disposition

Disposition Date
Disposition
09/18/2018
Not Guilty Finding

- **Roderick, Timothy M**
- - Defendant
- Charge # 5:
265/13H-2 - Felony INDECENT A&B ON PERSON 14 OR OVER c265 §13H

- Original Charge
- 265/13H-2 INDECENT A&B ON PERSON 14 OR OVER c265 §13H (Felony)
- Indicted Charge
-
- Amended Charge

Charge Disposition

Disposition Date
Disposition
09/18/2018
Not Guilty Finding

Events

Date	Session	Location	Type	Event Judge	Result
02/08/2017 09:00 AM	Criminal 1	Brockton	Arraignment		Not Held
02/15/2017 09:00 AM	Criminal 1	Brockton	Arraignment		Held as Scheduled
04/06/2017 09:00 AM	Criminal 1	Brockton	Pre-Trial Conference		Not Held

R. 2

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/11/2017 09:00 AM	Criminal 1 Brockton		Pre-Trial Conference		Not Held
06/08/2017 09:00 AM	Criminal 1 Brockton		Pre-Trial Conference		Held as Scheduled
06/08/2017 09:00 AM	Criminal 1 Brockton		Pre-Trial Hearing		Not Held
09/15/2017 09:00 AM	Criminal 3 Plymouth		Evidentiary Hearing on Suppression	Pasquale, Hon. Gregg J	Canceled
09/15/2017 09:00 AM	Criminal 4 Plymouth		Evidentiary Hearing on Suppression		Not Held
10/18/2017 09:00 AM	Criminal 4 Plymouth		Trial Assignment Conference	Gordon, Hon. Robert B	Held as Scheduled
02/08/2018 09:00 AM	Criminal 4 Plymouth		Final Pre-Trial Conference		Rescheduled
02/20/2018 09:00 AM	Criminal 4 Plymouth		Jury Trial		Rescheduled
03/05/2018 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference	Davis, Hon. Brian A	Rescheduled
03/26/2018 09:00 AM	Criminal 4 Plymouth		Jury Trial	Davis, Hon. Brian A	Rescheduled
05/11/2018 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference		Rescheduled
06/04/2018 09:00 AM	Criminal 4 Plymouth		Jury Trial		Rescheduled
09/05/2018 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference	Hallal, Hon. Mark A	Rescheduled
09/14/2018 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference		Held as Scheduled
09/17/2018 09:00 AM	Criminal 4 Plymouth		Jury Trial		Held as Scheduled
09/18/2018 09:00 AM	Criminal 4 Plymouth		Jury Trial		Held as Scheduled
09/19/2018 09:00 AM	Criminal 4 Plymouth		Jury Trial		Held as Scheduled
06/14/2021 02:30 PM	Criminal 4 Plymouth		Motion Hearing		Held as Scheduled

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	02/15/2017	08/14/2017	180	09/14/2018
Final Pre-Trial Conference	02/15/2017	01/26/2018	345	09/14/2018
Case Disposition	02/15/2017	02/09/2018	359	09/19/2018

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref</u>	<u>Image Avail. Nbr.</u>
12/30/2016	Indictment(s) returned	1	Image
02/08/2017	Event Result: The following event: Arraignment scheduled for 02/08/2017 09:00 AM has been resulted as follows: Result: Not Held Reason: Not reached by Court		
02/15/2017	Defendant arraigned before Court.		
02/15/2017	Attorney appearance On this date Timothy J Kelliher, Esq. added as Private Counsel for Defendant Timothy M Roderick	2	
02/15/2017	Plea of not guilty entered on all charges.		
02/15/2017	Bail warnings read		
02/15/2017	Released on Personal Recognizance with the following conditions: Stay away from Victim and no contact with victim		
02/15/2017	Case assigned to: DCM Track C - Most Complex was added on 02/16/2017	3	
02/15/2017	Case continued to April 6,2017 for pre-trial conference and June ,2017 for pre-trial hearing (Kelley Brown,J) J Russo court reporter		
03/08/2017	Defendant 's Assented to Motion to change date	4	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref</u>	<u>Image Avail. Nbr.</u>
03/10/2017	Endorsement on Motion to change date, (#4.0): ALLOWED by agreement (Patrick W Creedon Asst Clerk) copies mailed March 13, 2017		
03/13/2017	Event Result: The following event: Pre-Trial Conference scheduled for 04/06/2017 09:00 AM has been resulted as follows: Result: Not Held Reason: Joint request of parties		
05/05/2017	Defendant 's Motion to change date	5	
05/09/2017	Endorsement on Motion to change date, (#5.0): ALLOWED (Yessayan,J) copies mailed May 10 ,2017		
05/10/2017	Event Result: The following event: Pre-Trial Conference scheduled for 05/11/2017 09:00 AM has been resulted as follows: Result: Not Held Reason: Request of Defendant Case continued to June 8, 2017 for pre-trial conference		
06/08/2017	Pre-trial conference report filed	7	
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06/09/2017	CASE SENT TO PLYMOUTH		
09/07/2017	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 09/15/2017 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
09/07/2017	Case sent to Brockton		
09/14/2017	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 09/15/2017 09:00 AM has been resulted as follows: Result: Canceled Reason: Joint request of parties		
09/14/2017	Joint motion to reschedule event Applies To: Plymouth County District Attorney (Prosecutor); Roderick, Timothy M (Defendant)	8	
09/14/2017	Joint motion to reschedule event (Paper #8) is allowed	9	
09/14/2017	Endorsement on Motion to continue, (#8.0): ALLOWED continued to October 18,2017 (Pasquale,J)		
09/14/2017	CASE SENT TO PLYMOUTH		
10/18/2017	All parties present, Case is pretried. Case put over with agreement to 2/9/18 @ 9:00am for trial. 2/8/18 @ 9:00am for Final Pre Trial Judge: Gordon, Hon. Robert B		
10/18/2017	Endorsement on Motion to obtain Criminal Records of Witness, (#11.0): ALLOWED Judge: Gordon, Hon. Robert B		
10/18/2017	Pre-trial conference report filed Pretrial Motions will be filed by 1/2/18	10	
10/18/2017	Defendant 's Motion to obtain Criminal Records of Witness	11	
10/19/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Timothy J Kelliher, Esq. Attorney: Amanda Fowle, Esq.		
10/19/2017	Document: Notice to Appear for Final Pretrial Sent On: 10/19/2017 10:37:29		
02/05/2018	Notice to counsel of trial scheduled for March 26, 2018 in the 4th criminal session Judge: Davis, Hon. Brian A	12	

<u>Docket</u>	<u>Docket Text</u>	<u>File Ref</u>	<u>Image Avail. Nbr.</u>
02/08/2018	Case continued to March 5, 2018 at 2:00pm by agreement for final pre-trial conference Judge: Davis, Hon. Brian A		
02/08/2018	Notice to counsel of final pre-trial conference scheduled for 3/5/18 at 2:00 PM	13	
03/05/2018	Defendant comes into court with Attorney Kelliher; Commonwealth failed to appear. Case continued to May 11, 2018 at 2:00 p.m. for final pre-trial conference and June 4, 2018 at 9:00 a.m. for jury trial, (Davis, J.). Judge: Davis, Hon. Brian A		
03/05/2018	Event Result: Judge: Davis, Hon. Brian A The following event: Jury Trial scheduled for 03/26/2018 09:00 AM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
03/05/2018	Document: Notice to Appear for Final Pretrial Sent On: 03/05/2018 14:54:04	14	
03/05/2018	Notices sent to all parties for Jury Trial scheduled for June 4, 2018 at 9:00 a.m.	15	
04/09/2018	Notices mailed to counsel of trial scheduled for September 17, 2018 in the 4th criminal session Judge: Moriarty, II, Hon. Cornelius J	16	
04/09/2018	Event Result: Judge: Moriarty, II, Hon. Cornelius J The following event: Final Pre-Trial Conference scheduled for 05/11/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
09/05/2018	Event Result:: Final Pre-Trial Conference scheduled on: 09/05/2018 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Mark A Hallal, Presiding Appeared: Staff:		
09/14/2018	Attorney appearance On this date Katelyn Kelliher, Esq. added as Limited Appearance Counsel for Defendant Timothy M Roderick	16.1	
09/14/2018	Pre-trial conference report filed	17	
09/14/2018	Event Result:: Final Pre-Trial Conference scheduled on: 09/14/2018 02:00 PM Has been: Held as Scheduled Hon. Jeffrey A Locke, Presiding Appeared: Staff:		
09/17/2018	Commonwealth's Motion in limine to admit phone call	18	
09/17/2018	Defendant's Motion in limine for voir dire of officer Kelsch to determine which photograph she recalls being shown on June 3, 2016; after hearing denied (Locke,J)	19	
09/17/2018	Defendant's Motion in limine to exclude at trial the content of a telephone call to Detective Sergeant Michael Smith as unauthenticated hearsay	20	
09/17/2018	Jury of 14 members impanled and sworn M.LaPlante, court reporter Judge: Locke, Hon. Jeffrey A	21	
09/17/2018	The Court conducts a voir dire of witness Michael Smith, Wareham Police Department Judge: Locke, Hon. Jeffrey A		
09/17/2018	Endorsement on Commonwealth's motion in limine to admit phone call, (#18.0): ALLOWED after voir dire Judge: Locke, Hon. Jeffrey A		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref</u>	<u>Image Avail. Nbr.</u>
09/17/2018	Endorsement on Defendant's Motion in limine to exclude at trial the content of a telephone call to Detective Sergeant Michael Smith as unauthenticated hearsay, (#20.0): DENIED after voir dire of Det Sgt Smith. There are sufficient circumstances to authenticate statements by telephone to the defendant Judge: Locke, Hon. Jeffrey A		
09/18/2018	Commonwealth's Motion in limine regarding late discovered evidence	22	
09/18/2018	Defendant's Motion to sequester witnesses; filed and allowed (Locke,J)	23	
09/18/2018	Trial continues before Locke,J and jury M. LaPlante, court reporter Judge: Locke, Hon. Jeffrey A		
09/18/2018	Defendant oral motion motion for a required finding of not guilty at the close of commonwealth's case; Denied as to offense #'s 001 & 002 Allowed as to Offense # 003, 004 & , 005 (Locke,J)		
09/18/2018	Offense Disposition:: Charge #3 INDECENT A&B ON PERSON 14 OR OVER c265 §13H On: 09/18/2018 Judge: Hon. Jeffrey A Locke By: Jury Trial Not Guilty Finding Charge #4 INDECENT A&B ON PERSON 14 OR OVER c265 §13H On: 09/18/2018 Judge: Hon. Jeffrey A Locke By: Jury Trial Not Guilty Finding Charge #5 INDECENT A&B ON PERSON 14 OR OVER c265 §13H On: 09/18/2018 Judge: Hon. Jeffrey A Locke By: Jury Trial Not Guilty Finding		
09/18/2018	Defendant oral motion for a required finding of not guilty at the close of all the evidence; Denied (Locke,J)		
09/19/2018	Trial continues before Locke, J and Jury M. LaPlante, court reporter Judge: Locke, Hon. Jeffrey A		
09/19/2018	Offense Disposition:: Charge #1 RAPE c265 §22(b) On: 09/19/2018 Judge: Hon. Jeffrey A Locke By: Jury Trial Guilty Verdict Charge #2 RAPE c265 §22(b) On: 09/19/2018 Judge: Hon. Jeffrey A Locke By: Jury Trial Guilty Verdict	24	
09/19/2018	Defendant sentenced:: Sentence Date: 09/19/2018 Judge: Hon. Jeffrey A Locke Charge #: 1 RAPE c265 §22(b) State Prison Sentence Not Less Than: 4 Years, 0 Months, 0 Days Not More Than: 4 Years, 0 Months, 1 Days Committed to MCI - Cedar Junction (at Walpole)		
09/19/2018	Issued on this date: Mitt For Sentence (First 6 charges) Sent On: 09/19/2018 12:18:08	25	
09/19/2018	Defendant sentenced:: Sentence Date: 09/19/2018 Judge: Hon. Jeffrey A Locke Charge #: 2 RAPE c265 §22(b) Probation: Administrative Supervision Duration: 3 Years, 0 Months, 0 Days To Commence upon release from incarceration Conditions:1) Wear GPS 2) Register as a Sex offender and comply with all conditions of the sex offender registry board 3) stay away and no contact directly or indirectly with victim 4) Abide by the exclusionary zone of : stay at least 1/2 mile away from victim's residence and victim's employment		
09/19/2018	Defendant notified of right of appeal to the Appeals Court within thirty (30) days. Judge: Locke, Hon. Jeffrey A		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
09/19/2018	Defendant notified of right of appeal to the Appelate Division of the Superior Court within ten (10) days. Judge: Locke, Hon. Jeffrey A		
09/19/2018	DNA fee of \$110 to be paid by defendant. Judge: Locke, Hon. Jeffrey A		
10/12/2018	Notice of appeal filed. 26 Applies To: Roderick, Timothy M (Defendant)	26	
10/19/2018	Court Reporter FTR is hereby notified to prepare one copy of the transcript of the evidence of 09/17/2018 09:00 AM Jury Trial, 09/18/2018 09:00 AM Jury Trial, 09/19/2018 09:00 AM Jury Trial 27	27	
11/05/2018	Court Reporter Marc LaPlante is hereby notified to prepare one copy of the transcript of the evidence of 09/17/2018 09:00 AM Jury Trial, 09/18/2018 09:00 AM Jury Trial, 09/19/2018 09:00 AM Jury Trial 28	28	
11/05/2018	Other Katelyn Kelliher, Esq.'s Motion to withdraw 29	29	
11/05/2018	Defendant 's Motion for the appointment of appellate counsel and motion for withdrawal of counsel (sent to Judge Locke) 30	30	
11/08/2018	Endorsement on Attorney K. Kelliher's motion to withdraw as counsel for the defendant, (#29.0): ALLOWED Judge: Locke, Hon. Jeffrey A		
11/08/2018	Endorsement on Defendant's motion for appointment of counsel and motion for withdrawal of counsel, (#30.0): ALLOWED CPCS to appoint appellate counsel Judge: Locke, Hon. Jeffrey A		
11/08/2018	Attorney appearance On this date Katelyn Kelliher, Esq. dismissed/withdrawn as Limited Appearance Counsel for Defendant Timothy M Roderick		
11/08/2018	Attorney appearance On this date Timothy J Kelliher, Esq. dismissed/withdrawn as Private Counsel for Defendant Timothy M Roderick		
11/08/2018	Attorney appearance On this date . CPCS Boston Office added as Appointed - Appellate Action for Defendant Timothy M Roderick		
02/11/2019	Notice of assignment of counsel On this date Edward Crane, Esq. added as Appointed - Appellate Action for Defendant Timothy M Roderick 31	31	
02/22/2019	CD of Transcript of 09/17/2018 09:00 AM Jury Trial, 09/18/2018 09:00 AM Jury Trial, 09/19/2018 09:00 AM Jury Trial received from Mark E. Laplante. 3 (paper copies)		
03/14/2019	Docket Note: Notice of appearance filed by Edward Crane, Esq. on behalf of the defendant 32	32	
03/15/2019	Certified copies of docket entries, original and copy of transcript, copy of exhibit list and list of documents, and copy of the notice of appeal, each transmitted to clerk of appellate court. 33	33	
03/15/2019	Notice of completion of assembly of record sent to clerk of the Appeals Court and attorneys for the Commonwealth and defendant. 34	34	
03/19/2019	Appeal entered in Appeals Court on 03/18/2019 docket number 2019-P-0402 35	35	Image
08/05/2020	Rescript received from Appeals Court; judgment AFFIRMED . 36	36	Image
10/02/2020	Defendants Motion to Revise or Revoke Sentence (COVID19) 37	37	
10/05/2020	Endorsement on Motion to revise and revoke , (#37.0): DENIED After review and consideration, DENIED (Locke,J) Judge: Locke, Hon. Jeffrey A	38	
06/02/2021	Defendant 's Motion to vacate GPS monitoring as a condition of his probation; record appendix in support; certificate of service 38	38	Image
06/14/2021	Habeas Corpus for defendant issued to Massachusetts Treatment Center - Bridgewater returnable for 06/14/2021 02:30 PM Motion Hearing. PLEASE HAVE DEFENDANT APPEAR VIA ZOOM ZOOM ID 160 4848 5585 39	39	
06/14/2021	Commonwealth 's Memorandum in opposition to defendant's motion to vacate GPS condition 40	40	Image

<u>Docket</u>	<u>Docket Text</u>	<u>File</u>	<u>Image</u>
<u>Date</u>		<u>Ref</u>	<u>Avail.</u>
		<u>Nbr.</u>	
06/14/2021	Endorsement on Defendant's motion to vacate GPS monitoring as a condition of his probation, (#38.0): Other action taken After hearing, Court reconsidered GPS condition pursuant to Comm v Feliz; after hearing, Court imposes GPS requirement in light of the facts of underlying case, defendant's Level II SORB registration, and value of GPS in monitoring/enforcing no contact/ stay away/ exclusion zone order. Defendant may move to vacate GPS after 18 months if there has been successful compliance Judge: Locke, Hon. Jeffrey A		
06/14/2021	Event Result: Motion Hearing scheduled on: 06/14/2021 02:30 PM Has been: Held as Scheduled Hon. Jeffrey A Locke, Presiding		
07/06/2021	Notice of appeal filed (from denial of defendant's motion to vacate GPS monitoring as a condition of probation) Applies To: Roderick, Timothy M (Defendant)	41	Image
07/08/2021	Notice sent to DA and defense counsel re: notice of appeal filed	42	
07/08/2021	Case sent to Plymouth Superior - PLYMOUTH Location.		
08/03/2021	Probation Transfer Notice Received	43	Image
08/04/2021	Docket Note: financials checked and indictments scanned		
08/04/2021	Probation Transfer Review Complete		
08/06/2021	Case sent to Plymouth Superior - BROCKTON Location.		
08/12/2021	CD of Transcript of 06/14/2021 02:30 PM Motion Hearing received from Anita Lamothe.		

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Disposed by Jury Verdict	09/19/2018	

6-2-21

38

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF THE COMMONWEALTH

Plymouth, ss.

Plymouth County Superior Court
No. 1683CR00424

COMMONWEALTH)
v.)
TIMOTHY RODERICK)

)

FILED
COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPT. OF THE TRIAL COURT
PLYMOUTH COUNTY

JUN 2 2021

DEFENDANT'S MOTION TO VACATE GPS MONITORING
AS A CONDITION OF HIS PROBATION

Conrad
Clerk of Court

The defendant, Timothy Roderick, moves pursuant to Mass. R. Crim. Pro. 30(a) to vacate GPS monitoring as a condition of his probation. After the defendant was convicted at trial, the trial judge mandatorily imposed this condition pursuant to G. L. c. 265, s. 47. However, in *Commonwealth v. Feliz*, 481 Mass. 689 (2019), the SJC ruled that the mandatory imposition of GPS monitoring as a condition of probation is unconstitutional.¹ The defendant asks this Court to vacate GPS monitoring as a condition of his probation in accordance with *Feliz*.

1. Procedural Background.

The defendant was indicted on two counts of rape and three counts of indecent assault and battery.² The defendant went to

¹ The defendant has filed a documentary appendix in support of this motion. It will be cited by page number as (R. __). A copy of the *Feliz* decision is included in the appendix. (R. 1-23).

² A copy of the docket report is included in the appendix. (R. 24-31).

trial on these charges over the course of three days. The defendant moved for a required finding of not guilty after the Commonwealth presented its case. The trial judge allowed the motion with respect to the three counts of indecent assault and battery, but denied it with respect to the two counts of rape. The jury found the defendant guilty on both remaining counts. The trial judge sentenced the defendant to four years in state prison on the first count and three years of probation on the second count. The judge imposed GPS monitoring as a condition of the defendant's probation because he was mandatorily obligated to do so pursuant to G. L. c. 265, s. 47.³

The defendant's committed sentence is set to end in July 2021. Upon his release, the defendant will begin his three-year probationary sentence.

2. The Impact of the *Feliz* Decision.

In *Commonwealth v. Feliz*, 481 Mass. 689 (2019), the SJC considered whether the mandatory imposition of GPS monitoring as a condition of probation is constitutional. *Id.* at 690-691. The SJC concluded that it is not, ruling that "[m]andatory, blanket imposition of GPS monitoring on probationers . . . is unconstitutional under the Massachusetts Declaration of Rights." *Id.* at 700. Having rejected the mandatory imposition of GPS

³ A copy of the sentencing transcript is included in the appendix. (R. 32-79).

monitoring, the Court stated that such a condition is only permissible if the judge has conducted "an individualized determination of reasonableness." *Id.* at 690. This individualized determination must weigh "the Commonwealth's need to impose GPS monitoring against the privacy invasion occasioned by such monitoring." *Id.* at 691. The Court noted that the weighing of these interests "depends on a constellation of factors." *Id.* at 701. Some of the factors that should be considered include the nature of the defendant's sexual offense, the defendant's criminal history, the existence of a psychiatric disorder indicating a compulsion towards sexually deviant activity, the defendant's history of probation violations or terms of pretrial release, and the defendant's classification level by the Sex Offender Registry Board. *Id.* at 703-707.

3. Application to the Instant Case.

Applying the balancing test in this case, it is clear that the defendant's privacy interest outweighs any governmental interest that would be served by GPS monitoring. The defendant has no prior history of committing sexual offenses.⁴ In fact, he had never been convicted of a crime prior to this case. Nor do the facts of this case suggest that the defendant is likely to reoffend. The evidence at trial established that the defendant

⁴ A copy of the defendant's criminal record is included in the appendix. (R. 80-88).

and the victim went home together after a night of heavy drinking. The defendant had sex with the victim after she passed out in his bedroom. The defendant made a horrible mistake in doing what he did, but this mistake was not part of a larger pattern of sexual misconduct. With respect to the defendant's psychiatric history, he has never been diagnosed with a disorder indicating a compulsion towards sexually deviant activity. He also abided by the terms of his release prior to trial. The defendant was originally arraigned in Wareham District Court in June 2016.⁵ He posted bail and was required to wear a GPS monitoring device as a condition of his release. He complied with this condition without issue until he was indicted and arraigned in Superior Court in February 2017. This Court released the defendant on personal recognizance and, unlike the District Court, did not require the defendant to wear a GPS monitoring device. The defendant subsequently appeared at every court date for the next 19 months until his trial in September 2018. See *Feliz*, 481 Mass. at 706-707 (factor weighed in favor of defendant because he was on pretrial supervision for sixteen months without any issues).

The only factor that appears to weigh in favor of the need for GPS monitoring is the defendant's classification as a level

⁵ Copies of the docket and the terms of pretrial release from Wareham District Court are included in the appendix. (R. 89-93).

two sex offender.⁶ This factor alone cannot justify the imposition of GPS monitoring. See *Feliz*, 481 Mass. at 701 ("[N]o one factor will be dispositive in every case."). In *Feliz*, the SJC reasoned that the defendant's classification as a level one sex offender cut against the Commonwealth's need for GPS monitoring. *Id.* at 706. It does not automatically follow that a defendant's classification as a level two sex offender weighs heavily in favor of the Commonwealth. While it would certainly be logical to give such weight to a level three classification, a level two classification carries less significance. This classification alone does not outweigh the factors detailed in the previous paragraph; each of which suggests that the defendant is unlikely to reoffend.

4. The Need for a Hearing.

The probation condition requiring the defendant to submit to GPS monitoring must be vacated because this condition was mandatorily imposed pursuant to G. L. c. 265, s. 47. If this condition is to be reimposed, it can only be done after the Court conducts an individualized determination of reasonableness. This determination need only be made if the Commonwealth believes that GPS monitoring is a necessary condition of the defendant's probation. If the Commonwealth

⁶ A copy of the defendant's registration with the Sex Offender Registry Board is included in the appendix. (R. 94).

believes this to be true, a hearing must be held so that the parties can introduce evidence on the question of whether it is reasonable to require the defendant to submit to GPS monitoring. If the Commonwealth does not see the need for GPS monitoring, no hearing is necessary and the Court should simply vacate the condition in accordance with *Feliz*.

Respectfully Submitted,
TIMOTHY RODERICK,
By his Attorney,



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Dorchester, MA 02122
617-851-8404
Attyedwardcrane@gmail.com

Date: 6/2/21

COMMONWEALTH

V.

Timothy Roderick

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S
MOTION TO VACATE GPS CONDITION

Now comes the Commonwealth and respectfully requests this court to DENY the Defendant's motion to vacate the GPS condition.

The Defendant brings this motion before the court in light of the decision in Commonwealth v. Feliz, 481 Mass. 689 (2019) which discussed the balancing test of the need for the GPS monitoring. In Feliz, the Defendant was convicted of possession of Child pornography and he was classified as a level 1 sex offender upon release. There were blanket conditions involving staying away from parks, schools, children. These conditions became overly burdensome and virtually impossible for the Defendant to comply with based on his living situation.

Feliz was a “no-contact” offense. The Defendant in that case never created his own child pornography, nor did he have contact with any of the minors in the child pornography that he collected. Feliz specifically touches on the fact that a GPS is appropriate in contact offenses, including situations where the Defendant has raped a child Supra at 707.

This case is a contact offense, with a named victim, who made an impact statement. There are conditions in place where the Defendant has to stay away from the victim, and there are exclusionary limits in place to help ensure the victim's safety.

The Defendant's assertion that this case has no indication of a "pattern of sexual misconduct" is disingenuous. The facts presented at trial, as well as the impact statement of the victim indicate that the Defendant had in fact made numerous sexual advances towards her, and every time she was of a proper mindset to rebuke them, she did so. The Defendant however, was unable to take "no" for an answer and waited until the victim was unconscious and carried out his sexual desires with her without her even having the ability to consent. That itself shows a compulsion towards sexually deviant activity.

Additionally the Defendant has been categorized as a level 2 sex offender, placing him in a category with a moderate risk to reoffend, and a moderate risk to the public. Both the facts of the case and the level of classification of the Defendant increase the Commonwealth's interest in ensuring the safety of the community and the victim in this case by the requiring the GPS monitoring system on the Defendant.

Moreover, the timeframe required, three years, is not overtly unreasonable based on the facts of the case and the classification of the Defendant, therefore the burden to the Defendant himself is minimal. That minimal burden is certainly outweighed by the competing interest of keeping the community safe.

The Defendant cites to the sentencing transcript, to claim that the statutory requirement is the only reason why the GPS monitor was ordered. However, in looking at the requests of the Commonwealth and the rationale of the judge in ordering the GPS and including the exclusion zones, it supports the idea that there was a balancing test with

regards to the question of ordering the GPS, similar to Commonwealth v. Metellus 98 Mass.App.Ct. 1109 (2020) (unpublished), which states that even if the sentencing transcript supports the idea that everyone presumed the GPS would be imposed because of the statutory requirement, that does not automatically render it invalid under Feliz, it does not automatically render the order as a substantial miscarriage of justice.

The Commonwealth's request for the stay away and no contact request, which the court ordered with the GPS monitoring for the exclusion zones ordered indicate that there was a balancing test of sorts conducting in the imposition of the Defendant's conditions.

Therefore, the Commonwealth respectfully requests this court DENY the Defendant's motion to remove the GPS but amend the conditions as deemed appropriate to continue to monitor the Defendant to ensure the safety of the victim in this case.

Respectfully Submitted
For the Commonwealth,

Amanda Fowle

Amanda Fowle
Assistant District Attorney

stay away / discharge your order. Defendant
must move to vacate GPS after 18 months
if there has been successful compliance.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT OF THE COMMONWEALTH

At G. S. +

Plymouth, ss.

Plymouth County Superior Court
No. 1683CR00424

COMMONWEALTH)
v.)
TIMOTHY RODERICK)
)

FILED
COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPT. OF THE TRIAL COURT
PLYMOUTH COUNTY

JUN 2 2021

DEFENDANT'S MOTION TO VACATE GPS MONITORING
AS A CONDITION OF HIS PROBATION

Carroll
Clerk of Court

The defendant, Timothy Roderick, moves pursuant to Mass. R. Crim. Pro. 30(a) to vacate GPS monitoring as a condition of his probation. After the defendant was convicted at trial, the trial judge mandatorily imposed this condition pursuant to G. L. c. 265, s. 47. However, in *Commonwealth v. Feliz*, 481 Mass. 689 (2019), the SJC ruled that the mandatory imposition of GPS monitoring as a condition of probation is unconstitutional.¹ The defendant asks this Court to vacate GPS monitoring as a condition of his probation in accordance with *Feliz*.

1. Procedural Background.

The defendant was indicted on two counts of rape and three counts of indecent assault and battery.² The defendant went to

¹ The defendant has filed a documentary appendix in support of this motion. It will be cited by page number as (R. __). A copy of the *Feliz* decision is included in the appendix. (R. 1-23).

² A copy of the docket report is included in the appendix. (R. 24-31).

*CC-AP
CC
6-15-21*

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-402

COMMONWEALTH

VS.

TIMOTHY M. RODERICK.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his convictions by a Superior Court jury of two counts of rape, claiming that the judge's instructions on incapacity to consent created a substantial risk of a miscarriage of justice. We affirm.

Background. A woman, whom we shall call Monica, testified that she considered the defendant a friend when, on June 2, 2016, she left a bar with him, went to the house where he resided with his sister, and stayed the night. Monica had stayed at the defendant's house in the past. She and the defendant would "hang out," and Monica would drink alcoholic beverages. Although the defendant had expressed an interest in dating and having sex with Monica many times in the past, Monica "had made it clear that [she] didn't want to be anything more than friends." On the night in question, Monica took her

prescription anxiety medication and went to a bar where she consumed alcoholic beverages. The alcohol made Monica's medication "feel more potent." Monica recalled leaving the bar with the defendant, arriving at his residence, changing into a nightshirt, eating part of an apple, and going to sleep on the floor in the defendant's bedroom while the defendant, still awake, was seated across the room on his bed.

The next morning, when Monica awoke, the defendant said to her, "I just want to let you know that I had sex with your body last night." Monica became angry and argued with the defendant before leaving, walking to a nearby hospital, and reporting that she had been raped. The defendant, in turn, walked into the Wareham Police Department and stated that "[h]e wanted to speak with an officer regarding a report that could potentially be filed by his girlfriend." The defendant told an officer that he and Monica had sex the night before, but that "she forgot what had happened" and became "angry when he refreshed her memory." He handwrote a statement asserting, among other things, that Monica was "very drunk" at the bar, so he took her to his house, where they "in my opinion made love, but she did not remember it happening."

The following Monday, the defendant spoke with Wareham Police Detective Sergeant Michael Smith, who was investigating Monica's complaint. The defendant told Smith that Monica

vomited in his car on the way home from the bar so "[t]he first thing he had to do was wash her outside," and then he "brought her inside," where they took a shower together and had sex. The following morning, the defendant told Monica over coffee, "I fucked you twice last night." When Smith asked the defendant "why he would have to tell her that . . . [i]f she was there," the defendant responded, "[s]ometimes she's there and she isn't there."

The defendant proceeded to tell Smith about his other interactions with Monica. On one occasion, the defendant asked Monica "if he could lay down with her," and "[s]he told him she preferred not." After Monica "passed out," the defendant stated, he "didn't even cross the line. [I] didn't even put [my] hands down her pants." Three other times, the defendant touched Monica's nipples, vagina, and anus, but "[I] didn't even put [my] dick in her." When Smith asked the defendant whether Monica was "aware of this," the defendant said, "[s]he had to have been because she was moaning."¹

The defendant's sister testified for the defense that she noticed that Monica and the defendant were in a good mood when they returned from the bar that night. Although Monica was

¹ At trial, the judge allowed the defendant's motion for required findings of not guilty on three charges of indecent assault and battery on a person over the age of fourteen that had been based on these same alleged touchings.

obviously intoxicated and was not wearing a shirt, the sister testified that Monica was coherent. The sister heard Monica and the defendant laughing and talking loudly as they went into the bathroom to shower. She then saw them go together to the defendant's bedroom.

After resting his case, the defendant requested that the judge give the instruction on incapacity to consent set forth in Commonwealth v. Blache, 450 Mass. 583, 595 n.19 (2008). In pertinent part, that instruction provides:

"If, because of the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness), a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse occurring during such incapacity is without that person's consent.

"If you find that the Commonwealth has proved beyond a reasonable doubt that the complainant was so impaired as to be incapable of consenting as I have just described, and if you further find that the Commonwealth has proved beyond a reasonable doubt that the defendant knew, or reasonably should have known, that the complainant's condition rendered her [or him] incapable of consenting, then the Commonwealth has proved the element of lack of consent."

The judge agreed to give the requested instruction and did so nearly verbatim, stating:

"If, because of some condition or reason, such as sleep or unconsciousness, helplessness or intoxication, a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse during such incapacity is deemed to be without that person's consent.

"If you find that the Commonwealth has proved beyond a reasonable doubt that the complainant was so impaired as to be incapable of consenting as I've just described, and if

you further find that the Commonwealth has proved beyond a reasonable doubt that the defendant knew or reasonably should have known of the complainant's condition, that it rendered her incapable of consenting, then the Commonwealth has proved the element of nonconsent."

Standard of review. Because the defendant did not object to the jury instructions, we must determine whether there was error, and, if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999). "In making that determination, we consider the strength of the Commonwealth's case against the defendant . . . , the nature of the error, whether the error is sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for the error, and whether it can be inferred from the record that counsel's failure to object was not simply a reasonable tactical decision" (citations and quotations omitted). Id.

Discussion. The defendant claims that the judge's instruction, quoted above, was erroneous and created a substantial risk of a miscarriage of justice because, by listing intoxication alongside sleep, unconsciousness, and helplessness, jurors might have believed that the mere fact of Monica's intoxication rendered her incapable of consenting. "It is a matter of common knowledge that there are many levels of intoxication, and the fact of intoxication, by itself, does not

necessarily mean that the individual in question is incapable of deciding whether to assent to a sexual encounter." Blache, 450 Mass. at 590. Thus, where, as here, a defendant is on trial for rape and "the Commonwealth seeks to satisfy the element of lack of consent by proof that the complainant lacked the capacity to consent, the jury must find not just that [the victim] was intoxicated, but that her degree of intoxication was such that it rendered her incapable of consenting to intercourse." Commonwealth v. Urban, 450 Mass. 608, 613 (2008). To emphasize this point, judges presiding over such trials must instruct the jury of the Commonwealth's burden to prove "that the complainant was so impaired as to be incapable of consenting." Blache, supra at 595 n.19.

The judge in this case did so. His slight variation from the wording set forth in Blache did not change the substance of the instruction, and does not constitute error.² "We do not require that judges use particular words" when instructing juries. Commonwealth v. Kelly, 470 Mass. 682, 697 (2015). The judge's instructions as a whole correctly conveyed the relevant legal concepts, which is all that is required. Id.

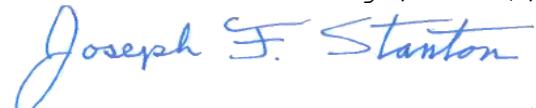
² The judge's omission of the term "mental retardation" from the instruction was entirely appropriate. See Commonwealth v. St. Louis, 473 Mass. 350, 351 (2015) (noting Legislature's intention to remove term "mental retardation" from General Laws); Tartarini v. Department of Mental Retardation, 82 Mass. App. Ct. 217, 217 n.1 (2012) (same).

The judge's instructions could not have created a substantial risk of a miscarriage of justice in any event, because Monica also testified that she was asleep and unconscious at the time of the assaults. The jury therefore did not have to rely on evidence of intoxication to conclude that Monica lacked the capacity to consent. Moreover, evidence that the defendant knew that Monica neither could nor did consent to sexual intercourse was overwhelming. See Alphas, 430 Mass. at 15 (error could not have created substantial risk of miscarriage of justice where evidence of guilt was overwhelming). The defendant told Detective Sergeant Smith that Monica was so intoxicated that he took her home from the bar and "had to wash her outside" because she had vomited. The defendant apparently felt that Monica was intoxicated to the point where "she's there and she isn't there," because that was the reason he gave for having to tell Monica that he had "fucked [her] twice last night." Taken together, the defendant's statements do more than "suggest [that the defendant] actually had appreciated [Monica's] incapacity to consent" to sexual intercourse. Commonwealth v. Mountry, 463 Mass. 80, 93 (2012). They show that the defendant: "had sexual designs" on Monica long before that night, id. at 88; was "capable of understanding and accepting her lack of any romantic interest in him," id. at 93; knew that Monica was intoxicated to the point where she could

not clean vomit off herself; and "waited until [Monica] passed out" to have intercourse with her, knowing that she could not resist, id. at 88. Where the defendant's statements and conduct after Monica left his house the following morning suggest that "he knew exactly what he had done, [and] that he knew it was wrong," id. at 94, we are persuaded that any error in the judge's instructions "did not 'materially influence[]' the guilty verdict." Alphas, 430 Mass. at 13, quoting Commonwealth v. Freeman, 352 Mass. 556, 564 (1967).

Judgments affirmed.

By the Court (Milkey,
Lemire & McDonough, JJ.³),


Clerk

Entered: May 6, 2020.

³ The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-63

COMMONWEALTH

vs.

JULIO TORRES

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from the denial of his motion to modify the conditions of his probation. On appeal, he contends that the condition of his probation requiring him to wear a global positioning system (GPS) device constitutes an unreasonable search, pursuant to Commonwealth v. Feliz, 481 Mass. 689 (2019), and thus the motion judge erred in denying his motion. We affirm.

Background. On October 13, 2000, the defendant pleaded guilty to four counts of rape and one count of indecent assault and battery on a person over the age of fourteen. On the first three rape convictions, the defendant received three concurrent sentences of seven years to seven years and one day commitment to State prison. On the fourth rape conviction and the indecent assault and battery conviction, the defendant was sentenced to

five years of probation, to run concurrently from and after his prison sentence.¹

The defendant was released from prison on July 12, 2006. On November 28, 2006, he stipulated to violating the terms and conditions of his probation by committing a new criminal offense, specifically, for failing to register as a sex offender. On this date, the judge found the defendant in violation but at the request of the probation officer continued the defendant's probation to its original date with the same terms and conditions. On December 13, 2007, the defendant again stipulated to violating his probation by again failing to register as a sex offender. This time, the court having found the defendant in violation, imposed GPS monitoring as an additional condition of the defendant's probation, and again at the request of the defendant's probation officer, continued his probation to its original date.

On April 10, 2008, the supervision of the defendant's probation was allowed to be transferred from the Suffolk County Superior Court to the Worcester County Superior Court. On January 26, 2009, the defendant was charged with assault with intent to rape a child in the Worcester Division of the District

¹ As conditions of his probation, the defendant was ordered to stay away from the victim, with no direct or indirect contact, and was also ordered to undergo sex offender treatment.

Court Department.² The charge was subsequently reduced to annoying and accosting a person of the opposite sex. Following a jury-waived trial on September 3, 2009, the defendant was convicted of that charge and sentenced to six months in the house of correction. On the same date, the defendant stipulated to violating his probation, and as a result, his probation was revoked for the indecent assault and battery conviction, and he was sentenced to one and one-half to two years in prison. Additionally, on his fourth rape conviction, the defendant was reprobated for five years to be served "on and after" his term of commitment. Again, GPS monitoring remained a condition of the defendant's probation.

In 2012, prior to the defendant's release from prison, he was civilly committed as a sexually dangerous person to the Massachusetts Treatment Center, pursuant to G. L. c. 123A. In January 2017, the defendant was released from civil commitment, and his probation, including the condition of GPS monitoring, commenced at that time.

On June 15, 2018, the defendant filed a motion to modify the terms of his probation, seeking to have the condition of GPS

² The facts which formed the basis for that charge include that the defendant grabbed the wrist of an eleven year old girl, who was at the defendant's home visiting his stepson, and he attempted to pull her into a bedroom, stating that he wanted to "fuck." The victim was able to escape the defendant's grasp and go into another room in the home.

monitoring removed. He argued that the purposes of GPS monitoring had been met, and that removal "best serve[d] the ends of justice." Following a hearing on August 27, 2018, his motion was denied. On June 26, 2019, the defendant moved again to modify the terms of his probation, arguing that, in light of a recent decision, Feliz, 481 Mass. at 691, the condition of his probation requiring him to wear a GPS device constituted an unreasonable search.

Following a hearing, the motion judge conducted an analysis, pursuant to Feliz, supra, to determine the reasonableness of the imposition of GPS monitoring as it pertained to the defendant. The judge balanced the Commonwealth's interest in requesting the GPS condition against the invasion of the defendant's privacy by its imposition. The judge concluded that "the Commonwealth's particularized reasons for imposing GPS monitoring outweigh the defendant's Article 14 rights," and determined that the condition was reasonable.³ The judge denied the defendant's motion. This appeal followed.

³ The Commonwealth's reasons for imposing the condition included protection of the public and deterrence of future offenses as the defendant had a history of sexual violence, had violated his probation on several occasions, and had been classified by the Sex Offender Registry Board as a level three sex offender, a level considered to pose the highest risk of reoffending while in the community.

Discussion. 1. Standard of review. Generally, we review a judge's decision on a motion to modify the conditions of probation for an abuse of discretion. See Commonwealth v. Morales, 70 Mass. App. Ct. 839, 842, 846 (2007). "Just as judges have considerable discretion at sentencing in establishing the terms of probation, they also have the discretion to modify those conditions 'as a proper regard for the welfare, not only of the defendant but of the community' may require." Commonwealth v. Goodwin, 458 Mass. 11, 17 (2010), quoting Buckley v. Quincy Div. of Dist. Court Dep't, 395 Mass. 815, 818 (1985). However, where, as here, the judge's denial of the defendant's motion was based on a constitutional determination -- that the imposition of GPS monitoring was a reasonable search under art. 14 -- we "review independently the motion judge's application of constitutional principles." Commonwealth v. Moore, 473 Mass. 481, 484 (2016), quoting Commonwealth v. Franklin, 456 Mass. 818, 820 (2010). Compare Commonwealth v. Tucceri, 412 Mass. 401, 409 (1992) (although typically reviewed under discretionary standard, "[i]f a new trial claim is constitutionally based, [appellate] court will exercise its own judgment on the ultimate factual as well as legal conclusions").

2. Reasonableness of GPS monitoring. In Feliz, the Supreme Judicial Court held that GPS monitoring as a condition

of probation constitutes a search under art. 14, and accordingly, an individualized determination of the search's reasonableness is required.⁴ See Feliz, 481 Mass. at 699-700. In determining whether the imposition of GPS monitoring as a condition of probation is reasonable, "we consider the extent to which GPS monitoring of [the] particular defendant advances the Commonwealth's interests in rehabilitation of the probationer and protection of the public, and the extent of the incremental privacy intrusion occasioned by GPS monitoring on the defendant's diminished, but still extant, expectations of privacy as a probationer." Id. at 701.

"[R]easonableness depends 'on the totality of the circumstances.'" Id. at 701, quoting Grady v. North Carolina, 575 U.S. 306, 310 (2015). Whether the government's interest in imposing GPS monitoring outweighs the defendant's privacy interests will depend on a "'constellation of factors,' including, among others, the intrusiveness of the search; the

⁴ Prior to Feliz, under G. L. c. 265, § 47, any person who was placed on probation for an enumerated sex offense was required to wear a GPS device as a condition of that probation. The defendant was one such person. In Feliz, however, the Supreme Judicial Court concluded that G. L. c. 265, § 47, was "overinclusive in that GPS monitoring [would] not necessarily constitute a reasonable search for all individuals convicted of a qualifying sex offense." 481 Mass. at 690. It held that, absent individualized determinations of reasonableness, the "[m]andatory, blanket imposition of GPS monitoring on probationers" was unconstitutional. Id. at 700.

defendant's particular circumstances, such as his or her criminal convictions, past probation violations, or risk of recidivism; and the probationary purposes, if any, for which the monitoring was imposed." Commonwealth v. Johnson, 481 Mass. 710, 719 (2019), quoting Feliz, 481 Mass. at 701. No single factor is dispositive. Id.

To begin, the government has a "strong interest in protecting the public from sex offenders." Feliz, 481 Mass. at 705. The defendant was classified by the Sex Offender Registry Board as a level three sex offender, meaning that he was considered to pose the highest risk of reoffending and a concomitant danger to the public. See id. at 707 (discussing cases where GPS monitoring deemed reasonable where individual "assigned to the 'most severe' risk assessment tier"). Moreover, the defendant was convicted of four counts of rape and one count of indecent assault and battery, and while on probation for those offenses, the defendant committed several additional offenses. The defendant violated the conditions of his probation three times -- twice for failing to register as a sex offender,⁵ and the third time, while the defendant was being

⁵ "The purpose of the sex offender registration statute is to protect the vulnerable members of our communities from sexual offenders, and from the danger of recidivism posed by sex offenders" (citations and quotations omitted). Doe, Sex Offender Registry Bd. No. 7083 v. Sex Offender Registry Bd., 472 Mass. 475, 481 (2015).

monitored by a GPS device, he was charged with assault with intent to rape a child: a new contact offense. As stated supra, the charge was reduced, and the defendant was convicted of annoying and accosting a person of the opposite sex. See Johnson, 481 Mass. at 719 (defendant's criminal convictions and past probation violations justified imposition of GPS monitoring).

The defendant however argues that these factors are insufficient to render the imposition of GPS monitoring reasonable because, since the condition first was imposed, he has participated in sex offender treatment, he has not committed any new offenses, and several doctors have opined that, as of 2016, he is no longer a sexually dangerous person.⁶ He argues that, for these reasons, the Commonwealth's interest in monitoring his location is diminished and can no longer justify the intrusion on his privacy. We are not persuaded. The defendant, at the time of the motion, had spent the bulk of his time confined and only had been released from civil commitment for a period of two years. Moreover, as a probationer, the defendant's expectation of privacy is diminished. See Johnson,

⁶ It is important to note that each doctor, in reaching their conclusion that the defendant was no longer a sexually dangerous person as of 2016, considered that the defendant would be under the supervision of probation for five years following his release from civil commitment. A condition of that probation included GPS monitoring.

481 Mass. at 720 n.6. As such, weighed against the Commonwealth's interest in protecting the public, as well as its significant interest in "deterring the probationer from engaging in criminal activity and detecting such criminal activity if it occurs," see id. at 719, the burden on the defendant's privacy effected by the GPS device is not so significant to render the condition unreasonable.⁷

In light of the defendant's criminal convictions which were all contact offenses, his numerous violations of probation, his risk of reoffending, and the limited period of time that he has been released from civil commitment, the Commonwealth's interest in imposing GPS monitoring on this defendant persists and outweighs the privacy intrusion occasioned by the condition.

See Johnson, 481 Mass. at 720. Cf. Feliz, 481 Mass. at 705-706. The denial of the defendant's motion to modify the conditions of his probation is therefore affirmed.

So ordered.

By the Court (Wolohojian,
Desmond & Grant, JJ.⁸),


Clerk

Entered: March 30, 2021.

⁷ This is especially true where the defendant has repeatedly violated the less intrusive condition of his probation requiring him to register as a sex offender.

⁸ The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Plymouth, ss.

DAR No. _____
Appeals Court No. 2021-P-0915

COMMONWEALTH)
)
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v.)
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TIMOTHY RODERICK)
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CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that I have served a copy of the defendant's application for direct appellate review to Assistant District Attorney Carolyn Burbine, Plymouth County District Attorney's Office, 32 Belmont Street, Brockton, MA 02401. I have made service via email.

/s/ Edward Crane /s/
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Dated: 10/14/21