18-P-573 Appeals Court

COMMONWEALTH vs. TIMOTHY SALMONS.

No. 18-P-573.

Norfolk. April 5, 2019. - September 11, 2019.

Present: Agnes, Maldonado, & Sacks, JJ.

Cellular Telephone. Personal Property, Property seized at time of arrest. Constitutional Law, Taking of property. Due Process of Law, Taking of property. Search and Seizure, Return. Practice, Criminal, Property seized at time of arrest.

Indictments found and returned in the Superior Court Department on May 31, 2016.

A motion for return of property was heard by Beverly J. Cannone, J., and a motion for clarification was heard by Kenneth J. Fishman, J.

Rebecca A. Jacobstein, Committee for Public Counsel Services, for the defendant.
Michael P. McGee, Assistant District Attorney, for the Commonwealth.

SACKS, J. After pleading guilty to firearms, assaultive, and other offenses, and after being sentenced to a term of ten years in State prison, followed by terms of probation, the

defendant sought the return of his three cell phones, which police had unlawfully seized without a warrant from the apartment in which he was arrested. A Superior Court judge ordered their return to the defendant's designated representative, but another judge subsequently allowed the Commonwealth's request to first "wipe" all data from two of the cell phones in order to erase two video recordings (videos) (one of which was sexually explicit) and some photographs of the victim. The defendant appealed. We conclude that the judge erred in these circumstances in ordering the cell phones wiped before their return.

Background. In February of 2016, police responded to an apartment in Braintree to investigate a report of a domestic altercation. The victim allowed the police into her apartment, where they found the defendant and arrested him for assault and battery and related charges. The victim told officers that she had been in a "dating relationship" with the defendant since Christmas. The officers observed drug paraphernalia in plain view, and they obtained the victim's permission to search the apartment. They found no drugs but seized the paraphernalia and the defendant's three cell phones. Further investigation resulted in the seizure of a sawed-off shotgun from the defendant's grandmother's apartment. Conversations reported by the victim and overheard on a recorded telephone line at the

police station suggested that the defendant was attempting to intimidate the victim to discourage her from cooperating with the police.

Six months after the cell phones were seized, police applied for and obtained a warrant to search them for evidence of drug offenses. Shortly thereafter, the Supreme Judicial Court decided in Commonwealth v. White, 475 Mass. 583, 590-591 (2016), that probable cause to seize or search a cell phone requires, among other things, "information establishing the existence of particularized evidence likely to be found there." The court further ruled that, when a cell phone or other item is seized without a warrant and police later obtain a warrant to search it, the search is unreasonable unless the Commonwealth shows, among other things, "that the delay between the seizure and the filing of the application for a search warrant was reasonable." Id. at 593.

Based on White, the defendant here moved in November of 2016 to suppress the evidence found in the search of his cell phones. The Commonwealth did not oppose the motion, and a judge allowed it.[1]

[1] As the prosecutor later explained, "after [White] came out, [the Commonwealth] agreed that it should be suppressed [based on] the way that they were seized."

In February of 2017, the defendant pleaded guilty to possession of a sawed-off shotgun, an armed career criminal violation (G. L. c. 269, § 10G [b]), strangulation, assault and battery by means of dangerous weapon, four counts of intimidating a witness, and three counts of assault and battery.[2] An indictment for conspiracy to violate G. L. c. 94C was dismissed. The defendant was sentenced to concurrent State prison terms of ten years to ten years and one day on the sawed-off shotgun and armed career criminal charges, to be followed upon release by concurrent three-year probationary terms on the other offenses. One of the special conditions of probation requires the defendant to stay away from and have no contact, directly or indirectly, with the victim and her family.

At the time of sentencing, the defendant moved for the return of his cell phones, asserting that they were no longer needed as evidence. The Commonwealth filed no opposition. A judge allowed the motion and ordered that the cell phones, being held by the Braintree police, be returned to the defendant or his authorized representative.

More than eight months later, the Commonwealth filed a "motion for clarification" of the order that the cell phones be

[2] Although the record before us is not entirely clear, it appears that the same person was the victim of all of the assaultive and witness intimidation offenses.

returned. The motion stated that, when the search warrants for the cell phones had been executed, two of the cell phones were found to contain "numerous and sexually explicit photographs and videos of the defendant and [the victim]." The Commonwealth sought approval, before returning those cell phones, to wipe their memories "by engaging the factory reset option" to ensure that "no sexually explicit photographs or videos of the victim [could] be given to the defendant's representatives for possible retaliation for her participation in the prosecution."

Regrettably, the Commonwealth's motion was unsupported by any affidavit, the hearing on the motion was nonevidentiary, and the judge made no findings of fact.[3] From the representations of the prosecutor and defense counsel at the hearing, however, we glean the following. The defendant was serving a ten-year prison sentence, during which time he himself could not have access to the cell phones themselves even if they were returned to his representative (who was likely to be his brother). The Commonwealth made no claim that any data on the cell phones was still needed as evidence,[4] was contraband, was the fruit of any

[3] The judge was not the same as the judge who had ordered the cell phones suppressed or the plea judge.

[4] The prosecutor stated that one of the cell phones contained two photographs of the sawed-off shotgun, but that even after that evidence was suppressed, the defendant had pleaded guilty to possessing the shotgun.

crime, or was the property of the victim or anyone other than the defendant.

The Commonwealth's sole reason for seeking to wipe the cell phones was that materials like the videos and photographs had "been used against victims in the past, and [the prosecutor] certainly [did not] want it coming from [his] office or the Braintree police." Defense counsel responded that there was no evidence that the defendant would use any data on the cell phones against the victim and no motive for him to do so. He was already serving a ten-year sentence, and "[a]ny kind of threat or embarrassment on the [I]nternet against the victim . . . would certainly come back to [the defendant] immediately."

When the cell phones were first searched, defense counsel had been given a compact disc or other storage medium containing a "dump" of the data on the cell phones. The prosecutor stated that he had "no doubt" that defense counsel could access any data the defendant wanted. Defense counsel disagreed, asserting that the data dump was generated by software designed to perform forensic searches of the cell phones, and she had found the data in the dump to be difficult for a lay person to search or navigate. She asserted that the defendant or his family would want access to material on the cell phones such as family

photographs,[5] log-in information for social media applications, and contact information such as telephone numbers -- data that was difficult to find in the data dump. She further stated that, before the Commonwealth filed its motion, the defendant had unsuccessfully attempted to settle the matter on the basis that the defendant "doesn't want these controversial photos returned . . . if he can avoid it[,] because it protects him from any future allegations. And we had suggested to the Commonwealth, maybe we can just delete the data that is of concern."

The prosecutor asserted, however, that, due to the amount of data on the cell phones and the different forms in which it existed, it was not feasible to go through the cell phones to find and delete only the videos and photographs of the victim.[6] Even if certain files were found and deleted, he argued, they might still exist in other forms elsewhere on a given cell phone; "[t]he only thing that we reasonably can do is wipe the entire phone." In contrast, defense counsel stated her belief, based on her review of all of the images in the data dump, that the videos in question had already been deleted from the cell

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[5] The defendant was "going to spend ten years in jail and the vast majority of the photographs that he has of his family are existing on these cell phones."

[6] No expert or other evidence was offered in support of this assertion.

phones and appeared in the data dump only because the deleted data had been forensically recovered; they would not be accessible on the cell phones themselves. Defense counsel stated that, in her review, she had seen one video of "sexual activity" and one video and twenty-five photographs in which the defendant was either "in a cuddling position or kissing the victim." She asserted that there was nothing unlawful in the videos and photographs themselves; the Commonwealth did not disagree.

The judge expressed concern that, if the cell phones were returned without being wiped, the materials at issue would be available to the defendant's brother or others, who might disseminate them, intentionally or otherwise, and thereby harm the victim. "[T]he [c]ourt has some responsibility . . . whether it's for nefarious purposes or even mistakenly done, to protect a victim of crime when . . . I haven't seen really a compelling need that the defendant needs the information that he's talking about here[,] particularly given the fact that he won't even have access to the [cell] phone[s] for some period of time." The judge acknowledged that there was "a level of speculation involved in the Commonwealth's position" as to what remained on the cell phones; nevertheless, he was "not persuaded that the balance necessarily weighs heavily in favor of the defendant." Allowing the cell phones to be wiped would "avoid[]

a risk which is far greater than the perceived needs of the defendant."

The judge thus allowed the Commonwealth's motion to approve the wiping of the phones. He ordered, however, that the defendant first be afforded time to list for the Commonwealth any specific data he wished to obtain from the phones before they were wiped. The defendant appealed and obtained a stay of any data erasure pending appeal.[7]

Discussion. 1. Governing law. We begin by acknowledging the strong constitutional protections against governmental deprivations of private property. "[N]o part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." Art. 10 of the Massachusetts Declaration of Rights. "[N]o subject shall be . . . deprived of his property . . . or estate, but by the judgment of his peers, or the law of the land." Art. 12 of the Massachusetts Declaration of Rights. See art. 14 of the Massachusetts Declaration of Rights; Fourth and Fifth Amendments to the United States Constitution.

[7] So far as the record shows, the cell phones remain in the Commonwealth's custody.

These protections are recognized to some extent in G. L. c. 276, § 3, which governs property lawfully seized pursuant to a warrant. Once such property is no longer needed as evidence, any such property obtained in the commission of a crime must promptly be returned to its owner. Id., citing G. L. c. 276, § 1, cl. First. The statute goes on to provide that, except for certain categories of property (none of which is relevant here),[8] "all other property seized in execution of a search warrant shall be disposed of as the court or justice orders and may be forfeited and either sold or destroyed, as the public interest requires, in the discretion of the court or justice." G. L. c. 276, § 3. By its terms, however, the statute is limited to property seized pursuant to a warrant. See Commonwealth v. Rufo, 429 Mass. 380, 384 (1999) ("there is no basis for extending the reach of G. L. c. 276, § 3, beyond its terms to [cover] property not seized pursuant to a warrant").

As to property unlawfully seized without a warrant, the Supreme Judicial Court has recognized that, "[i]f a defendant moves for the return of property which a judge has already

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[8] Certain property is to be disposed of in specified ways, including diseased or tainted animals, meat, fish, or produce of any kind; various types of guns, knives, and other dangerous weapons; certain monies; and property the forfeiture and disposition of which is provided for in any other general or special law. G. L. c. 276, § 3 (a)-(d).

determined in the same proceeding was unlawfully seized, and no third person has any reasonable claim to the property, the judge has the authority to enter any appropriate order concerning the return of the property (or, if it has been lost or destroyed, payment of its fair market value)." Commonwealth v. Sacco, 401 Mass. 204, 208 (1987). See Commonwealth v. One 2004 Audi Sedan Auto., 456 Mass. 34, 45 (2010). As indicated in Sacco, supra at 205, 207, such a motion should be supported by affidavit and otherwise comply with Rule 61 of the Rules of the Superior Court (2019).

2. Basis for judge's order. The Sacco rule governs here. A judge in the defendant's criminal prosecution determined that the cell phones were unlawfully seized; the defendant filed a properly-supported motion seeking the return of the cell phones, including their data, to his authorized representative (because he is in prison); and no third person had any reasonable claim to the cell phones or data.[9] The Commonwealth did not oppose the motion, and a judge allowed it. The remaining question, then, is whether it was "appropriate" for another judge, acting on the Commonwealth's motion filed after an eight-month delay, to allow

[9] The Commonwealth has not argued that the victim has an ownership interest in or other claim to the videos and photographs at issue, nor did the Commonwealth suggest that the videos or photographs were taken without her consent.

the Commonwealth to destroy the defendant's data before returning the cell phones to him.

That question is not answered by an unguided balancing of the defendant's interests in regaining possession of what is his against the Commonwealth's asserted interests in keeping or destroying it. "[T]he concept of private property represents a moral and political commitment that a pervasive disposition to balance away would utterly destroy. The commitment is enshrined in our Constitutions." Goulding v. Cook, 422 Mass. 276, 278 (1996). Those constitutional protections, and a judge's determination that the property was unlawfully seized, require a different starting point.[10]

We thus begin with a strong presumption that the defendant is entitled to the return of his property -- without regard to whether he has shown any need for it[11] -- and then ask whether

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[10] In a related context, "[w]hen a criminal conviction is invalidated by a reviewing court and no retrial will occur . . . the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction." Nelson v. Colorado, 137 S. Ct. 1249, 1252 (2017). See Commonwealth v. Martinez, 480 Mass. 777, 779 (2018).

[11] Cf. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-435 (1982) (governmentally-mandated permanent physical occupation of small area of property is a taking, "without regard to whether the action . . . has only minimal economic impact on the owner," and "is perhaps the most serious form of invasion of an owner's property interests," because it interferes with rights to possess, use, and dispose of property). See Goulding, 422 Mass. at 277-278.

the Commonwealth has shown a proper legal basis for refusing to return it. Contrary to the Commonwealth's argument, there is no such authority in G. L. c. 276, § 3. Even if the statute applied to property unlawfully seized without a warrant, but see Rufo, 429 Mass. at 384, none of its provisions governing specific categories of property applies here. See note 8, supra. For other types of property, the statute contains a catch-all clause directing that such property "shall be disposed of as the court or justice orders and may be forfeited and either sold or destroyed, as the public interest requires, in the discretion of the court or justice." G. L. c. 276, § 3. But that provision adds no guidance, even by implication, to what the court recognized in Sacco is a judge's authority, when a defendant seeks return of unlawfully seized property to which no third person has any reasonable claim, "to enter any appropriate order concerning the return of the property (or, if it has been lost or destroyed, payment of its fair market value)." Sacco, 401 Mass. at 208. Indeed, the catch-all clause for property seized pursuant to a warrant, insofar as it refers to forfeiture and sale or destruction of the property based on the broader public interest, appears to conflict with what the Sacco court assumed would be the focus of an "appropriate order" regarding unlawfully seized property: the return of the

property, or payment to the defendant of its fair market value if it had been lost or destroyed. See id.

Simply put, the lawful seizure of property pursuant to a warrant furnishes a basis for a judge's discretionary determination of how to dispose of that property if the statute is otherwise silent. But when, as here, property is unlawfully seized without a warrant, cannot be used as evidence,[12] and is not unlawful to possess, it should be returned, upon proper motion, to its undisputed owner or the owner's representative. Even if a judge could order otherwise based on proof that the property needed to be retained or destroyed in order to further some compelling public interest, there was no such showing here.

The Commonwealth argues that the judge here properly considered the likelihood that, unless the cell phones were wiped, the data on them could be used to harm the victim. But the Commonwealth points to no statute or decisional law authorizing the seizure and destruction of otherwise-lawful property on the ground that it might be used to commit a crime

[12] We recognize that there are circumstances in which unlawfully seized items may still be used as evidence. See, e.g., Commonwealth v. Olsen, 405 Mass. 491, 493-494 (1989) (probation revocation proceedings). Cf. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 695-698 (1965) (exclusionary rule applies in "quasi-criminal" forfeiture proceedings [citation omitted]); Commonwealth v. Nine Hundred & Ninety-Two Dollars, 383 Mass. 764, 765 n.2 (1981) (same).

or inflict other harm in the future. Nor does the Commonwealth point to any law allowing unlawfully seized property to be forfeited and destroyed on such a basis.[13]

Even if, on some record, such seizure and destruction might be allowed, the judge here made no finding that the harm would occur unless the cell phones were wiped. The judge's statement that wiping the cell phones would "avoid[] a risk which is far greater than the perceived needs of the defendant," was not a finding of fact that such harm was in any sense likely. Rather, it was an interest-balancing conclusion -- one that erroneously put the burden on the defendant to show a need to possess what was already his.

Nor has the Commonwealth persuaded us that wiping the cell phones was authorized by the "public interest" standard of G. L. c. 276, § 3, as interpreted in Beldotti v. Commonwealth, 41 Mass. App. Ct. 185 (1996), cert. denied, 520 U.S. 1173 (1997). In that case, Beldotti, after his conviction of murder in the first degree as part of a "brutal sex crime" (citation omitted), id. at 185, sought the return of property seized from him pursuant to a warrant, id. at 188, including four dildos and

[13] Statutes such as G. L. c. 22C, § 45, governing (among other things) the disposition by State police of property taken from a person under arrest and not claimed within six months, are not relevant here.

numerous sexually explicit publications concerning the torture of women. Id. at 189. The court recognized that "property may not be forfeited simply because it is offensive or repugnant." Id. But in the case before it, there was "a connection between the property that Beldotti [sought] to have returned to him and the crime he committed." Id. He had mutilated and desecrated the victim's body and then taken graphic photographs of it. Id. "The items that Beldotti [sought] to have returned to him can be seen as being directly related to those acts, as having influenced his behavior, or as being relevant to an understanding of the psychological or physical circumstances under which the crime was committed." Id. Return of those items "would justifiably spark outrage, disgust, and incredulity on the part of the general public and thereby undermine its confidence in the criminal justice system." Id. It was thus "within the public interest to punish the offender for the criminal act by refusing to return the property."[14] Id.

This case is unlike Beldotti, for two reasons. First, the seizure here was without a warrant and unlawful, and thus the public interest standard of G. L. c. 276, § 3, does not directly apply. Second, the facts here do not approach those in Beldotti. Any connection between the crimes and the property

[14] The Beldotti approach was followed by the New Hampshire Supreme Court in State v. Gero, 152 N.H. 379, 384-386 (2005).

here is far more attenuated than in that case and is insufficient to justify the judge (who we also note was not the sentencing judge) in imposing additional punishment on the defendant by allowing the Commonwealth to destroy the materials it had illegally seized.

3. Protection of victims. We recognize the importance of protecting victims from retaliation and further victimization by those who offended against them, and nothing we have said precludes the use of other mechanisms to provide such protection. In cases where the requested return of a defendant's property implicates these issues, we can envision them being addressed by the judge at the time of sentencing. In those instances, the Commonwealth -- having had the opportunity to consult with the victim in accordance with the victims' bill of rights, G. L. c. 258B, § 3 -- could seek appropriate probation conditions regarding a defendant's dissemination of information, including visual materials, intended or likely to reach the victim. Cf. Commonwealth v. Pereira, 93 Mass. App. Ct. 146, 152-155 (2018). And, in cases governed by G. L. c. 276, § 3, the Commonwealth could ask that the sentencing judge apply the statute's "public interest" standard, as interpreted in Beldotti, 41 Mass. App. Ct. at 189, in determining the disposition of property seized pursuant to a warrant.

A victim may also have a variety of other remedies available, depending of course on the circumstances of each case. See G. L. c. 209A (abuse prevention orders); G. L. c. 258E (harassment prevention orders); G. L. c. 214, § 1B ("right against unreasonable, substantial or serious interference with [personal] privacy," enforceable through equitable relief and damages).

State criminal laws provide further protections. Under the witness intimidation statute, G. L. c. 268, § 13B, a person may be subject to criminal punishment for engaging in conduct intended to "punish, harm or otherwise retaliate against" a witness, potential witness, or person who is aware of information relating to a violation of a criminal law.[15] State law also criminalizes the recording, among other things, of a sexually explicit video of a person in violation of that person's reasonable expectation of privacy and without that person's knowledge and consent.[16] See G. L. c. 272, § 105. See

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[15] Under an earlier version of the statute, it was unclear whether conduct aimed at punishing a witness or potential witness in a concluded proceeding was covered. See Commonwealth v. Hamilton, 459 Mass. 422, 431-437 (2011). In 2018 the Legislature rewrote the statute to address this issue and others. See St. 2018, c. 69, § 155. We of course do not decide any question regarding the interpretation of the statute in its current form.

[16] We express no view on the possible application of the statute to this case. The record here is entirely silent on

also 18 U.S.C. § 2261A(2)(B) (Federal criminal "cyber-stalking" statute enacted as part of Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4). The Legislature may wish to consider adopting legislation prohibiting the nonconsensual dissemination of pornography, sometimes described as "revenge porn." See, e.g., State v. VanBuren, 2018 Vt. 95 (2019) (upholding facial constitutionality of Vermont law criminalizing nonconsensual dissemination of pornography).

Conclusion. The order allowing the Commonwealth's motion for clarification and approving the wiping of the defendant's cell phones is reversed.

So ordered.

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whether the victim consented to the recording of any sexually explicit video of her that may exist.