18-P-1079 Appeals Court

COMMONWEALTH vs. FRANK BARRETT.

No. 18-P-1079.

Suffolk. October 2, 2019. - May 14, 2020.

Present: Milkey, Sullivan, & Ditkoff, JJ.

Controlled Substances. Cellular Telephone. Search and Seizure, Exigent circumstances, Warrant. Evidence, Result of illegal search, Judicial notice, Relevancy and materiality, Absence of witness. Constitutional Law, Search and seizure, Harmless error. Practice, Criminal, Motion to suppress, Warrant, Harmless error. Error, Harmless.

Indictments found and returned in the Superior Court Department on October 26, 2009.

A pretrial motion to suppress evidence was heard by Charles J. Hely, J; the cases were tried before Jeffrey A. Locke, J., and a motion for new trial was considered by him.

Dennis M. Toomey for the defendant.
Julianne Campbell, Assistant District Attorney, for the Commonwealth.

DITKOFF, J. The defendant, Frank Barrett, appeals from his Superior Court convictions of unlawful distribution of heroin, G. L. c. 94C, § 32 (a); possession of heroin with the intent to

distribute, G. L. c. 94C, § 32 (a); and unlawful possession of cocaine, G. L. c. 94C, § 32A (c); and from the denial of his motion for a new trial. The Commonwealth argues that exigent circumstances permitted a police officer to answer a call made to the defendant's cell phone approximately one hour and fourteen minutes after the phone was seized. Because the Commonwealth failed to produce any evidence that it was impracticable to obtain a search warrant before the call was received, we are constrained to conclude that the search was not justified by exigent circumstances, and that the defendant's motion to suppress the call and the evidence derived from that call should have been allowed. Further concluding that the admission of this evidence was not harmless, we reverse.[1]

1. Background. On April 23, 2009, at approximately 5 P.M., a Boston police officer witnessed a man and a woman pacing back and forth on Townsend Street. Suspecting that they were drug users, he began surveillance. After several minutes, the officer saw another man arrive whom he later identified as the defendant. The defendant and the man walked together into a park while the woman remained on the corner. After about ten seconds, the man rejoined the woman, but the officer did not see

[1] Because we reverse the criminal convictions, we need not consider the defendant's appeal from the denial of his motion for a new trial.

where the defendant went. The officer followed the couple and found the man holding three bags of a substance that resembled heroin, preparing the heroin for intravenous use. The officer arrested the man and the woman.

At the police station, the man agreed to call the person who sold him the drugs from a police telephone. During the call, the officer heard the man state that he had another forty dollars and wished to purchase more heroin.[2] The man reported that the defendant agreed to meet him in Dudley Square.[3] The officer did not record the phone number dialed by the man.

An hour later, the officer identified the defendant exiting a bus in Dudley Square. The police arrested the defendant at approximately 6:30 P.M. Police found five plastic bags of crack cocaine and eleven plastic bags of heroin, either on the defendant or in the transport wagon.

Booking began at 6:49 P.M. At booking, the police took from the defendant two cell phones, $1,537 in cash, and a Massachusetts identification in someone else's name.

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[2] At trial, the officer quoted the man as saying, "I have another forty. I need to see you." The officer testified that the man then said, "I'll see you there." These statements were not admitted for their truth.

[3] Because the man did not testify at trial, this statement was not admitted at trial.

At approximately 8:03 P.M., while the officers were still doing their paperwork, one of the defendant's cell phones rang. The motion judge found that this occurred approximately one hour and fourteen minutes after booking began.[4] Without a warrant, the officer answered the cell phone. The caller stated he wanted to purchase a forty. The officer arranged to meet the caller "in Dudley." Two officers went to Dudley and met the caller.

After returning to the station, the officer again answered the defendant's cell phone when it rang at approximately 9:30 P.M. This caller stated that "he was going to need some heroin for his people real soon." The officer did not describe following up on this call. There was no evidence presented at the suppression hearing regarding how long it would ordinarily take to obtain a search warrant under these circumstances.

The defendant moved to suppress the phone calls and the fruits derived therefrom. After an evidentiary hearing, a judge denied the motion, finding that the exigency exception to the search warrant requirement applied. The motion judge found that "[a] ten hour time frame would certainly be usually enough time

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[4] The motion judge acknowledged that the evidence did not definitely resolve whether booking began or ended at 6:49 P.M., but concluded that the result would be the same "[w]hether the booking had begun 15 or 20 minutes before that, or concluded 15 or 20 minutes after that." We agree with that assessment.

to obtain a warrant. But a one hour or two hour time frame is not."

After a trial at which evidence of the phone calls and the fruits therefrom were admitted, a jury convicted the defendant of all charges. This appeal followed.

2. Motion to suppress the incoming phone calls. a. Legal standard. "When reviewing a motion to suppress, 'we accept the judge's subsidiary findings of fact absent clear error,' but 'independently review the judge's ultimate findings and conclusions of law.'" Commonwealth v. Jewett, 471 Mass. 624, 628 (2015), quoting Commonwealth v. Tyree, 455 Mass. 676, 682 (2010). "The Fourth Amendment [to the United States Constitution] and art. 14 [of the Massachusetts Declaration of Rights] provide 'that every person has the right to be secure against unreasonable searches and seizures' of his or her possessions." Commonwealth v. White, 475 Mass. 583, 587-588 (2016), quoting Commonwealth v. Porter P., 456 Mass. 254, 260 (2010). "If the Commonwealth conducts a search or seizure without first obtaining a warrant, the search or seizure is 'presumptively unreasonable' and, therefore, presumptively unconstitutional." White, supra at 588, quoting Commonwealth v. Craan, 469 Mass. 24, 28 (2014). A warrantless search "may be justified if the Commonwealth can demonstrate that the search or seizure 'falls within a narrow class of permissible exceptions

to the warrant requirement.'" Commonwealth v. Tremblay, 480 Mass. 645, 662 (2018), quoting White, supra. "One such exception to the warrant requirement is a search based on probable cause and exigent circumstances that make obtaining a warrant impracticable." Commonwealth v. Ferreira, 481 Mass. 641, 655 (2019).

Although police officers are authorized to seize a cell phone during a routine inventory search, their authority does not extend to manipulating the phone. See Commonwealth v. Alvarez, 480 Mass. 1017, 1018 (2018); Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 558-559 (2015). Answering a ringing phone constitutes a search. See Commonwealth v. DePina, 75 Mass. App. Ct. 842, 849 (2009). Thus, "the "Commonwealth bears 'a heavy burden' to show (1) that the search or seizure was supported by 'probable cause,' such that a warrant would have issued had one been sought,[] and (2) that there 'exist[ed] . . . exigent circumstances' that made obtaining a warrant impracticable." White, 475 Mass. at 588, quoting Tyree, 455 Mass. at 684. We assume, without deciding, that there was probable cause to support the search, see DePina, supra at 847-848 (reasonable to infer that drug delivery service utilized cell phones), and move directly into the question of exigent circumstances.

b. Proof of exigent circumstances. "[T]he potential loss or destruction of evidence can constitute an exigent

circumstance justifying a warrantless entry and search . . . but only if the Commonwealth proves that the officers' belief was objectively reasonable and supported by specific information." Commonwealth v. Owens, 480 Mass. 1034, 1036 (2018). We review whether exigent circumstances existed with "particular emphasis on whether police 'consider[ed] how long it would take to obtain a warrant' before acting . . . and whether police engaged in an unjustified delay before seeking a warrant." Tyree, 455 Mass. at 690, quoting Commonwealth v. Pietrass, 392 Mass. 892, 899 (1984). If the police face "a '"now or never" situation[,]' . . . they may be able to rely on exigent circumstances to search the phone immediately." Riley v. California, 573 U.S. 373, 391 (2014), quoting Missouri v. McNeely, 569 U.S. 141, 153 (2013). Even when the passage of time inevitably affects the quality of the evidence, courts may not assume the presence of exigent circumstances. See McNeely, supra at 156.

In McNeely, the United States Supreme Court rejected the proposition that "the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies . . . nonconsensual blood testing in all drunk-driving cases." 569 U.S. at 145. Even though research demonstrated that alcohol dissipates from the body over time, the Supreme Court determined that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on

the totality of the circumstances." Id. at 156. Courts may not merely assume that there were exigent circumstances even with inherent temporal limitations.[5]

Similarly, in Tyree, there was no exigency where the evidence failed to support that the stolen money would imminently change hands, the defendants would flee, or that the defendants would destroy the clothes and masks used in the robbery. See 455 Mass. at 685-686. Thus, we may not find the presence of exigent circumstances if "the record is devoid of evidence that obtaining a warrant before the police [conducted a search] was impracticable." Id. at 690. Accord Commonwealth v. Street, 56 Mass. App. Ct. 301, 307 (2002), quoting Commonwealth v. Huffman, 385 Mass. 122, 125 (1982) (no exigent circumstances found when "[t]he Commonwealth did not offer any evidence as to the time it would take to get a warrant, or indicate that it would be impractical to get one").

Despite the absence of any evidence at the suppression hearing regarding the practicality of obtaining a warrant, the motion judge found that one to two hours was not enough time to do so. Like the motion judge, we are cognizant that obtaining a

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[5] The defendant was first convicted in 2011, but those convictions were later overturned on the basis of State drug laboratory misconduct. The events here took place in 2009, and the suppression hearing occurred in 2011. Neither the police nor the motion judge had the benefit of the teachings of Riley or McNeely.

search warrant in two hours in Suffolk County, especially after court hours, is likely unrealistic. Cf. Commonwealth v. Almonor, 482 Mass. 35, 68 (2019) (Gants, C.J., concurring) ("The length of time required to obtain a warrant depends on the length of three time periods: [1] the time needed to write an affidavit and particularize an application and warrant, [2] the time needed to locate a judge or magistrate [or reasonably exhaust efforts to locate him or her], and [3] the time needed to appear before the magistrate or judge and obtain his or her signature"). Such personal knowledge, however, is no substitute for evidence. We also knew that Worcester Academy was a school in Worcester, but that knowledge did not excuse the Commonwealth's failure to prove that Worcester Academy was a school within the scope of G. L. c. 94C, § 32J. See Commonwealth v. Gonzales, 33 Mass. App. Ct. 728, 730 & n.1 (1992).

We have no doubt that the motion judge was well acquainted with the mechanics of obtaining search warrants in Suffolk County. Nonetheless, "[a] judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice." Commonwealth v. O'Brien, 423 Mass. 841, 848 (1996), quoting Furtado v. Furtado, 380 Mass. 137, 140 n.1 (1980). This is not the sort of fact of which a judge may take judicial notice. "Matters are judicially noticed only when

they are indisputably true." Commonwealth v. Greco, 76 Mass. App. Ct. 296, 301 (2010), quoting Nantucket v. Beinecke, 379 Mass. 345, 352 (1979). The impossibility of obtaining a search warrant in one to two hours is not indisputable nor universally true. See Commonwealth v. Forde, 367 Mass. 798, 802 (1975) ("the failure of the Commonwealth to offer any explanation why no effort was made to obtain a warrant in the three hours prior to the McDonald conversation which was overheard is fatal to its claim of exigency"). Furthermore, "[e]ven in situations where judicial notice is appropriate, it should not be taken without notice to the parties and an opportunity to be heard." Commonwealth v. Hilaire, 92 Mass. App. Ct. 784, 789 (2018), citing Mass. G. Evid. § 201(d) & commentary (2017).

The Commonwealth's burden to show that it was impracticable to obtain a search warrant in one hour and fourteen minutes[6] is not a heavy one. Presumably, an officer's testimony regarding the steps necessary to obtain a search warrant and his experience regarding how long those steps take would be

[6] It is, of course, possible that the cell phone was not seized at the beginning of booking and thus the relevant time period was slightly shorter. It was, however, the Commonwealth's burden to produce evidence supporting the exigency. See Commonwealth v. Polanco, 92 Mass. App. Ct. 764, 769 (2018).

adequate, if credited.[7] Such evidence, however, was not offered here. Accordingly, because there is no evidence in the record that obtaining a warrant was impracticable here, the Commonwealth failed to meet its burden of showing exigency, and we are constrained to conclude that the motion to suppress should have been allowed. See Tyree, 455 Mass. at 690.

c. Harmlessness. "Because the defendant moved to suppress this evidence before trial, we review the constitutional error to determine whether it was harmless beyond a reasonable doubt." Commonwealth v. Tavares, 482 Mass. 694, 709 (2019). "The burden is on the Commonwealth to overcome the presumption of prejudice beyond a reasonable doubt." Commonwealth v. O'Donnell, 92 Mass. App. Ct. 262, 268-269 (2017). "The 'essential question' is whether the error had, or might have had, an effect on the jury and whether the error contributed to or might have contributed to the jury's verdicts." Dyette, 87 Mass. App. Ct. at 560, quoting Commonwealth v. Housewright, 470 Mass. 665, 675 (2015).

The phone calls and the resulting meeting were powerful evidence of the defendant's intent to distribute the narcotics seized and was highly damaging to the defense argument that the defendant had been misidentified as the person interacting with

[7] Had the officer so testified, however, the defendant would have been able to cross-examine the officer to test this assertion and to explore alternatives.

the man and the woman and that no drug deal had occurred at that time. Moreover, the Commonwealth relied heavily on the phone calls during its closing argument. The prosecutor stated that "this phone received two phone calls from individuals that you can conclude were attempting to purchase drugs." Similarly, defense counsel acknowledged that the officer's testimony about the phone calls was "pretty damaging stuff." In light of these facts, we are unable to say that the error was harmless beyond a reasonable doubt. Accordingly, we reverse the convictions.[8]

3. Issues for retrial. a. Eyewitness identification instruction. Although the defendant was not entitled as a matter of right to a sua sponte eyewitness identification instruction, "a Rodriguez instruction[9] is proper 'whenever identification is an issue raised by the evidence.'" Commonwealth v. Navarro, 474 Mass. 247, 251 (2016), quoting Commonwealth v. Williams, 54 Mass. App. Ct. 236, 240 (2002). Because the officer's eyewitness identification of the defendant is central to the Commonwealth's case, we are confident that

[8] Understandably, the Commonwealth makes no argument that we should consider the possession of cocaine charge separately for harmlessness purposes. Under the circumstances, we decline to do so sua sponte.

[9] See Commonwealth v. Rodriguez, 378 Mass. 296 (1979), S.C., 419 Mass. 1006 (1995).

defense counsel will request, and receive, an eyewitness identification instruction on retrial.

b. Admissibility of profiling evidence. Massachusetts courts have consistently found profiling evidence inadmissible at trial. See Commonwealth v. Horne, 476 Mass. 222, 226-227 (2017); Commonwealth v. Sutherland, 93 Mass. App. Ct. 65, 68 (2018). "Testimony regarding a criminal profile is nothing more than an expert's opinion as to certain characteristics which are common to some or most of the individuals who commit particular crimes." Commonwealth v. Coates, 89 Mass. App. Ct. 728, 734 (2016), quoting Commonwealth v. Day, 409 Mass. 719, 723 (1991). This may be distinguished from proper testimony regarding "how drug transactions occur on the street." Commonwealth v. Little, 453 Mass. 766, 769 (2009). Accord Commonwealth v. Alvarado, 93 Mass. App. Ct. 469, 470-471 (2018). Profile evidence focuses on the characteristics of criminals, while proper expert testimony focuses on the characteristics of crimes.

In 2012, we concluded that this prohibition of profile evidence did not apply to testimony that the defendant's companions "appeared to be drug-dependent individuals" because they were "disheveled looking," and that the defendant's appearance was not like that. Commonwealth v. Caraballo, 81 Mass. App. Ct. 536, 537 (2012). We held that the detective's "testimony (i.e., that the defendant did not exhibit the

characteristics of the drug-dependent individuals he had encountered on the streets of Springfield) provided some support for a conclusion that the defendant was a drug dealer rather than a user" and was proper because the detective "did not opine that the defendant was a drug dealer." Id. at 540.

Since Caraballo, however, the Supreme Judicial Court has decided that evidence that a defendant does not exhibit the characteristics of drug-dependent individuals is inadmissible negative profiling evidence. Horne, 476 Mass. at 227. Such evidence "is an attempt to convince the jury to determine a defendant's guilt by comparing him or her to stereotypes rather than by individualized adjudication." Id. at 228. Accord Sutherland, 93 Mass. App. Ct. at 68.[10]

Here, the officer testified at trial about the physical appearances of the male and female buyers, stating that "[t]hey had a filthy rotten appearance to them, as if they hadn't showered in a very long period of time . . . . Their faces were drawn out." Based on his experience as a narcotics unit officer, the officer testified that "it was [his] opinion that they were drug abusers." Profiling evidence may not be used to "to prove that since the defendant did not match the physical

[10] The trial here occurred after Caraballo, but before Horne. Accordingly, the trial judge properly applied the law applicable at the time.

characteristics of a drug addict, he must be a drug dealer." Horne, 476 Mass. at 227. For the same reasons that it is now impermissible to posit that the defendant must be a drug dealer because he does not match the physical characteristics of a drug addict, we conclude that, after Horne, it is impermissible for a witness to opine that the defendant is a drug dealer because the other parties to a drug transaction meet the physical characteristics of drug addicts. At retrial, the officer's opinion that the man and woman were drug abusers because of their physical characteristics should not be admitted.

c. Missing witness instruction. A missing witness instruction "permits the jury, 'if they think reasonable in the circumstances, [to] infer that that person, had he been called, would have given testimony unfavorable to the party.'" Commonwealth v. Saletino, 449 Mass. 657, 668 (2007), quoting Commonwealth v. Anderson, 411 Mass. 279, 280 n.1 (1991). Such an instruction may be given only if its proponent establishes a sufficient foundation on the record. See Commonwealth v. Ortiz, 61 Mass. App. Ct. 468, 471 (2004). "In order to determine whether there has been a sufficient foundation for a missing witness instruction, we look at '(1) whether the case against the defendant is [so strong that,] faced with the evidence, the defendant would be likely to call the missing witness if innocent; (2) whether the evidence to be given by the missing

witness is important, central to the case, or just collateral or cumulative; (3) whether the party who fails to call the witness has superior knowledge of the whereabouts of the witness; and (4) whether the party has a "plausible reason" for not producing the witness.'" Commonwealth v. Broomhead, 67 Mass. App. Ct. 547, 552 (2006), quoting Ortiz, supra.

Here, the defendant testified that his father was the source of the money seized from his person. On cross-examination, the Commonwealth attempted to lay the foundation for a missing witness instruction concerning the father. The defendant explained that he had not expected to testify and that his father was available if the Commonwealth wanted him to testify. Ultimately, the trial judge ruled that a missing witness instruction was not warranted.

After the Commonwealth's failed attempt to lay the foundation for the missing witness instruction, the trial judge properly instructed the jury that "a defendant in a criminal case has no obligation to present evidence whatsoever. And so to the extent you construe this line of inquiry as suggesting the defendant ought to produce a witness, he does not have to in any way. The burden of proof lies with the Commonwealth." The judge, however, added, "You may consider this evidence only to the extent that it assists you in determining this witness's credibility." That last sentence was error. Once the

Commonwealth failed to lay the proper foundation for a missing witness instruction, the defendant's testimony about his father's whereabouts and availability had no probative value at all. See Commonwealth v. Beltrandi, 89 Mass. App. Ct. 196, 203 (2016). At the retrial, should this issue arise again and the Commonwealth attempts but fails to lay the foundation for a missing witness instruction, the judge should omit that sentence from the instruction to the jury.

4. Conclusion. The denial of the defendant's motion to suppress the phone calls and the fruits of the phone calls is reversed. The judgments are reversed and the verdicts are set aside.

So ordered.