19-P-879 Appeals Court

COMMONWEALTH vs. FREDERICK PINNEY.

No. 19-P-879.

Hampden. February 4, 2020. - May 11, 2020.

Present: Rubin, Kinder, & Ditkoff, JJ.

Homicide. Constitutional Law, Arrest, Admissions and confessions, Voluntariness of statement, Result of illegal interrogation, Search and seizure. Search and Seizure, Exigent circumstances, Arrest, Consent, Inevitable discovery, Fruits of illegal arrest, Buccal swab. Evidence, Admissions and confessions, Voluntariness of statement, Result of illegal interrogation, Buccal swab. Practice, Criminal, Motion to suppress, Admissions and confessions, Voluntariness of statement.

Indictment found and returned in the Superior Court Department on April 29, 2014.

After review by the Supreme Judicial Court, 479 Mass. 1001 (2018), a motion to suppress evidence was heard by Michael K. Callan, J., and a motion for reconsideration was considered by him.

Applications for leave to prosecute interlocutory appeals were allowed by David A. Lowy, J., in the Supreme Judicial Court for the county of Suffolk, and the appeals were reported by him to the Appeals Court.

Shane T. O'Sullivan, Assistant District Attorney, for the Commonwealth.

Linda J. Thompson (John M. Thompson also present) for the defendant.

KINDER, J. The defendant, Frederick Pinney, is charged with the murder of Tayclair Moore in violation of G. L. c. 265, § 1. The case was tried in February 2016 and ended without a verdict when a mistrial was declared due to juror misconduct during deliberations. The prosecution continued,[1] and on May 18, 2018, the defendant filed a motion to suppress statements he made to the police. Following an evidentiary hearing, a Superior Court judge allowed the motion to suppress the defendant's statements, reasoning that the defendant was subjected to custodial interrogation before being warned of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

The judge issued a supplemental order in response to the Commonwealth's motion for reconsideration and clarification. He denied the motion for reconsideration, but clarified that the suppression order did not apply to a buccal swab taken from the defendant during his interrogation at the police station.

[1] After the mistrial was declared, the defendant moved to dismiss the indictment on double jeopardy grounds. A Superior Court judge denied the motion and that ruling was affirmed by the Supreme Judicial Court. See Pinney v. Commonwealth, 479 Mass. 1001 (2018).

The Commonwealth sought interlocutory review of the judge's order suppressing the defendant's statements, and the defendant sought interlocutory review of the judge's supplemental order clarifying that the suppression order did not apply to the defendant's buccal swab. A single justice of the Supreme Judicial Court allowed the applications for interlocutory review, and the cross appeals have been consolidated in this court. For the reasons next discussed, we affirm the suppression of the defendant's statements during the interrogation at the police station but reverse so much of the order as suppressed the defendant's statement at his residence. We also conclude that the buccal swab was the fruit of the defendant's illegal arrest and, therefore, should have been suppressed.

Background. The following facts are drawn from the judge's findings, from undisputed facts in the record that were implicitly credited by him, and from the video recording (video) of the defendant's interview, which we have independently reviewed. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 436 (2015). On March 23, 2014, at approximately 12:48 P.M., Springfield Police Officer Richard Labelle arrived at 48 Agnes Street in response to a report of a serious assault. Officer Labelle immediately encountered Christopher Podgurski outside the residence. Podgurski told Labelle that his girlfriend was

inside the house at 48 Agnes Street and that she had been assaulted. Officer Labelle entered the house alone through an unsecured side door and observed the defendant in a hallway near the kitchen. The defendant appeared distraught. He had lacerations on his arms and there was blood in the hallway and the kitchen. Officer Labelle observed knives near the kitchen sink. Concerned for his safety, Officer Labelle ordered the defendant to the ground at gunpoint and searched him for weapons. Officer Labelle asked the defendant if there was anyone else in the house, and the defendant responded that "no one is in the house."

Officer Alan Bethea, who arrived shortly after Officer Labelle, placed handcuffs on the defendant and remained with him while Officer Labelle searched the house for other persons. Officer Labelle discovered the victim on the floor in a room later determined to be the defendant's bedroom. The victim was naked, unresponsive, and had several visible wounds.

The defendant remained handcuffed at the scene for approximately fifty minutes. He was then transported to the Springfield police station by Officer Bethea in a locked police cruiser. During transport the defendant remained handcuffed but made no statements. Upon arrival at the police station, the defendant was escorted by Officer Bethea and his partner to a small, internal, second-floor interview room.

The defendant was interrogated by Detectives Timothy Kenney and James Goldrick. The police removed the handcuffs shortly before the interrogation began at 3:17 P.M., more than an hour after the defendant arrived at the police station. At the beginning of the interrogation, Detective Kenney told the defendant that he wanted to talk to him, but that the defendant was not under arrest and was free to leave at any time. When the detective asked him if he understood, the defendant mumbled and nodded. The video reveals that the defendant's affect at the time was flat and that he was barely responsive. No Miranda warnings were administered to the defendant prior to or during the interview.

In response to questions from Detective Kenney, the defendant stated that he felt "stressed" and "tired." The day before had been "a really bad day." He "was depressed, upset, [and] stressed." After drinking beer and sharing an "eight-ball" of cocaine with the victim at 48 Agnes Street, the defendant took ten Lorazepam pills with the intent to harm himself.

The defendant explained that the victim and Podgurski (the victim's boyfriend) had been living with the defendant at 48 Agnes Street for three days. The victim and Podgurski shared a bedroom adjacent to the defendant's bedroom. At around 3 A.M. the victim went to sleep in her room. The defendant took knives

into his bedroom, cut his wrists, and passed out. The defendant told the detectives that he had no idea how the victim ended up on the floor in his room. He denied harming the victim.[2]

The interrogation lasted approximately one hour. The defendant was lethargic, but he responded to questions appropriately. The judge found, and our review of the video confirms, that the defendant "told a consistent narrative that evidenced solid short-term memory." After approximately forty-two minutes, Detective Kenney asked if the defendant would be willing to provide a sample of his deoxyribonucleic acid (DNA). The defendant responded, "Absolutely. . . . I have nothing to hide." The defendant then executed a written form consenting to a saliva sample, which Detective Goldrick took by swabbing the inside of the defendant's cheek.

The interrogation continued for approximately fifteen minutes after the buccal swab was taken. At the end of the interrogation, the defendant was not arrested. He was transported to the hospital by ambulance out of concern for his suicidal thoughts. The police sought an arrest warrant for the defendant eight days later on March 31, 2014. The defendant was

[2] An autopsy revealed that "the victim died as a result of asphyxia by ligature strangulation by another." Pinney, 479 Mass. at 1003.

arrested later that day when he was discharged from the hospital.

Discussion. We review the judge's decision under familiar standards. We accept his factual findings unless they are clearly erroneous. See Commonwealth v. Welch, 420 Mass. 646, 651 (1995). We defer to the judge's assessment of the credibility of the testimony taken at the evidentiary hearing on the motion to suppress, see Commonwealth v. Scott, 440 Mass. 642, 646 (2004), but we are in the same position as the motion judge in reviewing the video of the defendant's interrogation, and therefore make our own determination as to the weight of that evidence. See Commonwealth v. Novo, 442 Mass. 262, 266 (2004). We "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

1. The Commonwealth's appeal. a. The interrogation at the police station. The Commonwealth claims error in the suppression of the defendant's statements during his police interrogation, arguing that Miranda warnings were unnecessary because the defendant was not in custody. The Commonwealth relies primarily on Detective Kenney's statement at the beginning of the interview that the defendant was not under arrest and was free to leave.

It is well settled that Miranda warnings are necessary only when a defendant is subject to custodial interrogation, Commonwealth v. Jung, 420 Mass. 675, 688 (1995), and it is the defendant's burden to prove custody. Commonwealth v. Larkin, 429 Mass. 426, 432 (1999). "The crucial question is whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that he was in custody. . . . [I]f the defendant reasonably believed that he was not free to leave, the interrogation occurred while the defendant was in custody, and Miranda warnings were required." Commonwealth v. Groome, 435 Mass. 201, 211 (2001), quoting Commonwealth v. Damiano, 422 Mass. 10, 13 (1996).

In determining whether the defendant was in custody for Miranda purposes, we consider "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that the person is a suspect; (3) the nature of the interrogation . . . ; and (4) whether . . . the person was free to end the interview . . . as evidenced by whether the interview terminated with an arrest." Groome, 435 Mass. at 211-212. Applying these criteria to the facts in this case, we discern no error in the judge's conclusion that the defendant was subject to custodial interrogation at the police station.

Considered alone, Detective Kenney's statement that the defendant was free to leave might support a conclusion that the defendant was not in custody. However, merely stating that someone is not in custody does not make it so. No single factor is conclusive. See Commonwealth v. Bryant, 390 Mass. 729, 737 (1984). Here, the evidence showed that the defendant was handcuffed shortly after being confronted by police at his residence. Approximately fifty minutes later, he was transported to the police station involuntarily, in the locked rear seat of a police cruiser. Altogether, the defendant remained in the presence of police officers and secured in handcuffs for approximately two and one-half hours before the handcuffs were removed and the interrogation at the police station commenced.

The interrogation was conducted by two detectives in a closed interview room. The tone of the interrogation was professional, but the questions were pointed. Detective Kenney accused the defendant of being "evasive." He asked the defendant directly if he hurt the victim or had sex with her. Detective Kenney challenged the defendant on his statement that when he awakened, he did not see the victim's body on his bedroom floor. He also confronted the defendant regarding his failure to tell police at the scene that there was another person in the house. When pressed on that point, the defendant

stated, "[N]ow you're trying to tell me you think that I killed [the victim]." Considered in their entirety, Detective Kenney's questions conveyed his suspicion that the defendant was not being truthful when he denied harming the victim. The totality of these circumstances, measured against the factors outlined in Groome, 435 Mass. at 211-212, supports the judge's conclusion that a reasonable person in the defendant's position would have believed that he was not free to leave. Miranda warnings should have been given to the defendant before he was questioned, and the defendant's unwarned statements at the police station were properly suppressed.

b. The statement at the defendant's residence. The Commonwealth contends that, even if the defendant was subjected to custodial interrogation before being advised of his Miranda rights, his statement at his residence that "no one is in the house" should not have been suppressed. We agree. The United States Supreme Court has stated that, in some circumstances, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." New York v. Quarles, 467 U.S. 649, 657 (1984). This exception extends to situations in which the safety of police as well as members of the public is threatened.

Commonwealth v. Loadholt, 456 Mass. 411, 416-419 (2010), vacated on other grounds, 562 U.S. 956, S.C. 460 Mass. 723 (2011).

Here, when Officer Labelle entered the residence, he had information that a female had been assaulted and that she was in the residence. Officer Labelle immediately observed the defendant in the hallway near the kitchen with lacerations on his arms. There was blood in the hallway and kitchen, and there were knives near the kitchen sink. Although a patfrisk of the defendant revealed no weapons, Officer Labelle testified that "[i]t was a volatile situation. I hadn't determined who was the assailant [and if the assailant] was still in the house. There was a[n] indication that there had been an assault that took place from the blood, and for the safety of both the officers, myself, and anybody else that may have been present, I had [the defendant] secured until we could determine the nature -- of what -- what had transpired." This testimony was not disputed at the hearing on the motion to suppress.

Thus, the evidence showed that Officer Labelle was faced with a rapidly evolving and potentially dangerous situation. His immediate concern was to assess the threat of harm to other persons and to himself. In these circumstances, the need to know if there were other persons present in the house outweighed the need for Miranda warnings. To conclude otherwise would be "penalizing officers for asking the very questions which are the

most crucial to their efforts to protect themselves and the public." Quarles, 467 U.S. at 658 n.7. Accordingly, because we conclude that the defendant's unwarned statement at his residence was subject to the public safety exception to the Miranda requirement, we reverse so much of the judge's order as suppressed the defendant's statement that "no one is in the house."[3]

2. The defendant's appeal. The judge issued a supplemental memorandum of decision which clarified that his order suppressing the defendant's statements did not apply to the buccal swab taken from the defendant. Among other reasons, the judge stated that "the swab was provided by [the defendant] voluntarily and with his rational consent." The defendant claims error in the judge's decision, arguing that the defendant's consent to the buccal swab was the fruit of his illegal arrest and unwarned statements. Under the circumstances presented here, we agree.[4]

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[3] Because we conclude that this statement is admissible under the public safety exception to the Miranda requirement, we need not address the Commonwealth's alternative argument that the defendant was not in custody at his residence.

[4] The Commonwealth argues that the defendant waived his claim regarding suppression of the buccal swab because he failed to refer to the buccal swab in his motion and supporting affidavit. The Commonwealth, however, in its motion to reconsider, specifically requested that the judge clarify whether his order suppressed the buccal swab. While the judge agreed that "the voluntariness of the DNA buccal swab provided

"The general rule is that evidence is to be excluded if it is found to be the 'fruit' of a police officer's unlawful actions." Commonwealth v. Balicki, 436 Mass. 1, 15 (2002), citing Wong Sun v. United States, 371 U.S. 471, 484 (1963). This fruit of the poisonous tree doctrine "has been applied to evidence derived from violations of both the Fourth and Fifth Amendments to the United States Constitution." Commonwealth v. Damiano, 444 Mass. 444, 453 (2005).

Here, the defendant's motion to suppress evidence alleged violations of both the Fourth and Fifth Amendments. The defendant's Fourth Amendment claim was that evidence was "obtained as a result of an unlawful arrest made without probable cause." The judge did not reach this issue, but the Commonwealth conceded at oral argument that the police did not have probable cause to arrest the defendant at the time he was handcuffed and transported involuntarily to the police station.[5]

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by [the defendant] was not meaningfully briefed, or argued, or set forth in the affidavit required under Mass. R. Crim. P. 13," as appearing in 442 Mass. 1516 (2004), he nevertheless addressed the merits of the claim at the Commonwealth's request. Accordingly, the defendant's suppression claim regarding the buccal swab was not waived. See Commonwealth v. Vargas, 475 Mass. 338, 344 nn. 6 & 7 (2016) (claims not raised but addressed by judge are not waived).

[5] As the Commonwealth bears the burden of establishing the constitutional propriety of a warrantless arrest, we accept the Commonwealth's concession and do not attempt to determine independently whether there was probable cause to arrest. See Commonwealth v. Jackson, 464 Mass. 758, 760-761 (2013).

The question then, is whether the defendant was seized and effectively under arrest such that probable cause was required.[6]

Any investigative police seizure of the person that "exceed[s] the scope of investigatory stops outlined in Terry [v. Ohio, 392 U.S. 1 (1968)], and its progeny" is unlawful in the absence of probable cause. Commonwealth v. Borges, 395 Mass. 788, 790 (1985). In evaluating a seizure, we view the facts and circumstances objectively, without regard to the subjective belief of the individual detained about his circumstance. Id. at 791.

Here, it is undisputed that the defendant was not formally placed under arrest until eight days after his interrogation. The evidence at the suppression hearing, however, established that the defendant was seized and effectively arrested at his residence. He was immediately ordered to the floor at gun point

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[6] We examine the defendant's argument regarding suppression of the buccal swab under the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights rather than under the Fifth Amendment and art. 12 of the Declaration of Rights. See Commonwealth v. Va Meng Jo, 425 Mass. 99, 102 (1997) (appellate court is free to rule on grounds different than motion judge). "[A]lthough the privilege against self-incrimination under art. 12 [and the Fifth Amendment] is broad, it protects only against the compulsion of communications or testimony and not against the production of real or physical evidence, such as fingerprints, photographs, lineups, blood samples, handwriting, and voice exemplars." Commonwealth v. McGrail, 419 Mass. 774, 777 (1995). Here, the buccal swab did not require the defendant to testify or communicate any information to the Commonwealth and, therefore, the broad protections of the Fifth Amendment and art. 12 do not apply.

and searched for weapons. He was then handcuffed and secured for fifty minutes before he was transported involuntarily to the police station in the back of a locked police cruiser. Upon arrival, he was taken to an internal interview room, where he remained in handcuffs with two police officers for another hour. These circumstances, viewed objectively, require a conclusion that the defendant was effectively under arrest when he was detained at the scene, handcuffed, and transported to the police station. Because the Commonwealth conceded that the police lacked probable cause to arrest the defendant at that point, the arrest violated the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights.[7]

However, an illegal arrest does not always result in exclusion of evidence subsequently obtained. The exclusionary rule does not apply "when the connection between the police officer's conduct and the discovery of the evidence has 'become so attenuated as to dissipate the taint.'" Balicki, 436 Mass. at 16, quoting Wong Sun, 371 U.S. at 484. The Commonwealth has

[7] The Commonwealth's suggestion that the defendant's detention and removal from his residence was justified by the community caretaking exception is unavailing. The defendant's transport to the police station and subsequent interrogation were not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Commonwealth v. Lubiejewski, 49 Mass. App. Ct. 212, 216 (2000), quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973). Therefore, the police community caretaking function does not apply.

the burden of proving that the evidence it has obtained is sufficiently attenuated from the underlying illegality. Commonwealth v. Fredette, 396 Mass. 455, 459 (1985). We must determine whether the "evidence came about as a result of the 'exploitation of th[e] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Commonwealth v. Vasquez, 482 Mass. 850, 865 (2019), quoting Commonwealth v. Long, 476 Mass. 526, 537 (2017).

We consider multiple factors in determining whether the defendant's statement consenting to the buccal swab was sufficiently attenuated from his illegal arrest: (1) the temporal proximity of the statement to the arrest; (2) the presence of intervening circumstances between the arrest and the statement; (3) the observance of the Miranda rule subsequent to the illegal arrest; and (4) the purpose and flagrancy of the misconduct. Damiano, 444 Mass. at 455. Here, the defendant's consent to the buccal swab was obtained approximately forty-two minutes into the unwarned interrogation of the defendant, which began approximately two and one-half hours after the defendant was first placed in handcuffs. During that time he remained in police custody. While a defendant's consent may, in some circumstances, be an intervening event that constitutes adequate attenuation, consent "does not automatically attenuate the taint of an illegality." Commonwealth v. Fredericq, 482 Mass. 70, 80

(2019). "A defendant's consent to a search cannot constitute adequate attenuation where the consent itself is tainted by the illegality." Id. at 81.

Here Detective Kenney's request for the defendant's consent to take a buccal swab was made after the defendant's unwarned statements that flowed directly from his illegal arrest. The defendant admitted that he had been with the victim the night before, that he cut himself and bled in his bedroom, that he saw the victim lying on the floor of his bedroom after he was awakened the next morning, and that he failed to tell the first responding officer that the victim was in his bedroom. In these circumstances, we cannot reasonably conclude that Detective Kenney's request for the buccal swab, and the defendant's subsequent consent, were not tainted by the defendant's arrest and ensuing unwarned statements.

Finally, we address whether the buccal swab would have inevitably been discovered. Under the inevitable discovery doctrine, the exclusionary rule does not apply to evidence that would have inevitably been discovered by lawful means. See Commonwealth v. Hernandez, 473 Mass. 379, 386 (2015). To sustain its burden on inevitable discovery, the Commonwealth must prove "inevitability by a preponderance of the evidence and, once the relevant facts have been proved, that discovery by lawful means was 'certain as a practical matter.'" Balicki, 436

Mass. at 16, quoting Commonwealth v. Perrot, 407 Mass. 539, 547 (1990). Here, the judge did not make a factual finding regarding inevitable discovery, but he observed that "it is probable that the buccal swab and the results of the swab would have been eventually obtained by the Commonwealth by way of a pretrial swab motion." While we agree, with the benefit of hindsight, that it was "probable" that the Commonwealth would have filed a motion for a buccal swab to facilitate DNA testing in this case, the record before the judge at the time did not support a conclusion that discovery of the buccal swab was certain as a practical matter.

To obtain a postindictment order for a buccal swab, the Commonwealth must show "that 'the defendant's blood will probably produce evidence relevant to the question of the defendant's guilt.'" Commonwealth v. Maxwell, 441 Mass. 773, 778 (2004), quoting Commonwealth v. Trigones, 397 Mass. 633, 640 (1986). We acknowledge that this is a relatively low bar and that motions for a buccal swab are commonplace in the Superior Court and frequently allowed. But at the time, there was no motion before the judge explaining the relevance of the defendant's buccal swab in this case. And the evidence at the hearing on the motion to suppress, absent the defendant’s

statements, did not support a conclusion that discovery of the buccal swab was inevitable and certain as a practical matter.[8]

Conclusion. We affirm the portion of the order suppressing the defendant's statements made during his interrogation at the police station, but we reverse so much of the order as suppressed the defendant's statement at his residence. We also reverse so much of the judge's supplemental order on the Commonwealth's motion to reconsider and clarify as denied the motion to suppress the defendant's buccal swab.

So ordered.

[8] Nothing in our decision should be interpreted as prohibiting the Commonwealth from seeking a court order for the defendant's buccal swab on remand. Such an application, of course, cannot rely on evidence suppressed under our decision.