19-P-367 Appeals Court

COMMONWEALTH vs. DAVID SANTA MARIA.[1]

No. 19-P-367.

Worcester. January 17, 2020. - May 22, 2020.

Present: Vuono, Rubin, & Sacks, JJ.

Controlled Substances. Resisting Arrest. Search and Seizure, Probable cause. Probable Cause. Constitutional Law, Search and seizure, Probable cause. Practice, Criminal, Motion to suppress, Probable cause hearing, Jury and jurors, Challenge to jurors, Substitution of alternate juror. Jury and Jurors.

Indictments found and returned in the Superior Court Department on January 24, 2014.

A pretrial motion to suppress evidence was heard by James R. Lemire, J., and the case was tried before Janet Kenton-Walker, J.

Robert L. Sheketoff for the defendant.
Susan M. Oftring, Assistant District Attorney, for the Commonwealth.

[1] We spell the defendant's last name as it appears in the indictments.

SACKS, J. After a Superior Court jury trial, the defendant, David Santa Maria, was convicted of assault and battery on a police officer (G. L. c. 265, § 13D), possession of oxycodone (G. L. c. 94C, § 32A [a]), and resisting arrest (G. L. c. 268, 32B).[2] The defendant claims error in (1) the denial of his motion to suppress the drugs found on his person during a warrantless search, and (2) the nonrandom selection of a particular juror to serve as an alternate. We conclude that the motion to suppress was properly denied and that, although the nonrandom selection of the alternate juror violated G. L. c. 234A, § 68, the defendant has not shown that he was "specially injured or prejudiced thereby," as required by G. L. c. 234A, § 74. We therefore affirm the judgments.

1. Suppression. a. Facts. We summarize the relevant facts as found by the motion judge, supplemented where necessary by uncontroverted testimony expressly credited by the judge. See Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007), S.C.,

[2] The jury returned verdicts of not guilty on the indictment charging the defendant with assault and battery by means of a dangerous weapon (G. L. c. 265, § 15A [b]) and a second indictment of assault and battery on a police officer. The defendant's motion for a required finding of not guilty was allowed on an indictment charging a violation of civil rights causing bodily injury (G. L. c. 265, § 37). Five additional indictments charging various offenses stemming from the same incident were nol prossed or dismissed with the Commonwealth's consent.

450 Mass. 818 (2008). None of the judge's subsidiary findings is challenged on appeal.

On January 21, 2014, at approximately 1 P.M., Officer Patrick Moran was conducting surveillance in the parking lot of a Mobil gasoline station at the corner of Houghton and Grafton Streets in Worcester. Moran, a twenty-year veteran of the Worcester Police Department, had extensive training and experience in narcotics investigations and had participated in thousands of arrests stemming from street-level drug activity. Based on his experience, Moran knew that the Mobil parking lot and the parking lot of an establishment across the street, Honey Farms, were locations where drug transactions are common. In addition, the Worcester police had received complaints from citizens that street-level drug dealing was occurring in these locations.

On the afternoon in question, Moran was working undercover, in plainclothes and driving an unmarked cruiser, when he witnessed two related incidents, the second of which involved the defendant. The first incident began when, as Moran was parked in the rear of the Mobil lot, a Chevrolet Cruze parked next to him. The Cruze's driver went into the convenience store connected to the station for a few minutes and then returned to sit in his car. A short time later, the driver of a green pickup truck pulled up directly across the front of Moran's car

and the Cruze and stopped, in the middle of an area that vehicles would use to pull out of the parking lot onto the street. Moran found this unusual, because there were numerous parking spots available. The driver of the truck was subsequently identified as Darron Andrews, a codefendant.

The Cruze's driver got out of his car and approached Andrews. Moran observed the pair make a "quick hand to hand" exchange of an item through the truck's driver's side window. Moran believed that he had observed an illegal drug transaction. Moran observed the Cruze's driver "looking at something in his hand" as he walked back to his car. Moran testified that, based on his training and experience, "people who are purchasing drugs, it's very common for them to now look at what was purchased to make sure, one, they didn't get a beat bag; two, they got the right amount for what they just paid."[3]

After the exchange, Andrews immediately drove his truck across Grafton Street to the Honey Farms parking lot, while the Cruze drove away down Grafton Street. Moran informed other officers in the area of his observations and attempted to follow the Cruze but lost it in traffic. Moran then returned to the

[3] Moran continued, "[I]t's small enough that they are looking in their hand at it. It's not a pack of butts, it's not a protein bar, it's not a beer because it's small enough that it can be concealed in the palm of their hand."

Honey Farms lot where he and other officers, including Sergeant Michael Hanlon, continued to surveil Andrews.

The second incident began when Andrews, after parking his truck in the Honey Farms lot, remained sitting in the driver's seat. Moran believed that he was "probably waiting for another customer," and soon thereafter, the defendant, driving a gold-colored sport utility vehicle (SUV), entered the lot and parked. Like Andrews, the defendant did not enter any of the nearby stores. Rather, he got out of the SUV, walked over to Andrews's truck, and sat in the passenger seat. At this point, Moran believed that a drug transaction was about to take place, and he gave the order to approach the truck.

Within approximately thirty seconds, two police vehicles, one driven by Moran, blocked Andrews's truck to prevent him from driving away. Moran then approached Andrews, while Hanlon and Officer Dana Randall approached the defendant. Moran announced that he was a Worcester police officer, opened the door, and ordered Andrews out of the truck. Andrews was holding cash ($297) in his hand. Andrews got out of the truck, and Moran patted him down and found eleven packets of heroin and "crack" cocaine in his shirt pocket.

In the meantime, essentially simultaneously, Hanlon, with his police badge displayed, announced himself as a Worcester police officer, opened the truck's passenger door, and ordered

the defendant to get out. The defendant did not immediately comply. Instead, he thrust his hands toward his waistband. Hanlon, based on his training and experience, believed that the defendant was attempting either to conceal or retrieve weapons or narcotics. He and Randall then physically removed the defendant from the truck. A struggle ensued. At one point, Randall struck the defendant in the face. Eventually, the defendant was subdued and handcuffed, but not before he spat blood at Randall. The defendant was searched, and the police recovered a plastic bottle of pills, later determined to be oxycodone, from his waistband. Both the defendant and Andrews were arrested.

On these facts, the motion judge concluded that the police had at least a reasonable suspicion that (1) Andrews had sold drugs when he was in the Mobil lot, and (2) when the defendant entered Andrews's truck, another drug transaction was taking place. Although this reasonable suspicion justified a threshold inquiry, the judge found that, once the police approached the truck, they made no threshold inquiry before issuing the exit order. The judge further ruled that the exit order was not justified by concerns about flight or officer safety,[4] but was

[4] The judge recognized that an exit order in furtherance of a threshold inquiry could be justified by such concerns, if they were factually supported. See Commonwealth v. Bostock, 450 Mass. 616, 622 (2008). Here, however, police vehicles had

issued with the intent of conducting a search, which required probable cause. The judge concluded, however, that probable cause existed, and he thus denied the defendant's motion to suppress the pills found on his person.[5]

b. Discussion. In reviewing a ruling on a motion to suppress, "we adopt the motion judge's factual findings absent clear error," Isaiah I., 450 Mass. at 821, and "conduct an independent review of his ultimate findings and conclusions of law," Commonwealth v. Jimenez, 438 Mass. 213, 218 (2002). Here, we conclude, on grounds slightly different from those articulated by the motion judge, that the police had probable cause to search the defendant and, as a result, the oxycodone was properly seized. See Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997) (appellate court may affirm ruling on motion to suppress on alternative ground, where supported by record and findings).

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blocked in the truck, preventing its escape, and the police expressed no safety concerns about approaching it.

[5] The defendant had also moved to suppress the results of a subsequent warrantless search of his SUV. The Commonwealth presented no evidence regarding that search, and the judge allowed the defendant's motion in that regard. Andrews also filed a motion to suppress. The judge heard the motions together and denied Andrews's motion. Andrews was not tried with the defendant; the Commonwealth's brief indicates that Andrews later pleaded guilty to the charges against him.

Probable cause exists when police know of "enough facts and circumstances 'to warrant a person of reasonable caution' in believing that the defendant had committed or was committing a crime." Id., quoting Commonwealth v. Gullick, 386 Mass. 278, 283 (1982). "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Commonwealth v. Kennedy, 426 Mass. 703, 710-711 (1998), quoting Brinegar v. United States, 338 U.S. 160, 175 (1949).

We agree with the judge that the police had probable cause to believe that Andrews had just engaged in a drug transaction with the Cruze's driver. "[I]n Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992), the Supreme Judicial Court set forth a nonexclusive list of factors that, when taken together, support a ruling that there was probable cause to search a person in the context of a suspected street-level drug transaction." Commonwealth v. Sanders, 90 Mass. App. Ct. 660, 661 (2016). As summarized in Sanders, the Santaliz factors are "(1) the observation of an unusual transaction; (2) furtive actions by the participants; (3) the event occurs in a location where the police know drug transactions are common; and (4) an experienced officer on the scene regards the event as consistent with a street-level drug transaction." Id. at 661 n.1. Three of those

factors were plainly present here. Police observed an apparent hand-to-hand exchange between Andrews and the Cruze's driver, in an area (the Mobil lot) known for drug transactions, and an experienced officer on the scene, Moran, believed that he had witnessed a drug sale.

The evidence with respect to the transaction is slightly stronger than in Kennedy, where it merely "appeared to the officer that something was exchanged." Kennedy, 426 Mass. at 704. Even there the court held that, given the easily-concealed nature of small packages of drugs, an officer need not actually see an object exchanged in order to have probable cause. See id. at 710-711. Here, in contrast, the officer saw the Cruze's driver "looking at something in his hand" as he walked back to his car, consistent with a buyer of drugs checking to make sure he received what he paid for. This provided the requisite "factual support for the inference that the parties exchanged an object." Commonwealth v. Ilya I., 470 Mass. 625, 631 (2015), quoting Commonwealth v. Stewart, 469 Mass. 257, 263 (2014). And that the Cruze's driver examined the object in his hand as he returned to his car, rather than openly while still engaged with Andrews, supports an inference of the exchange of contraband, in which the participants would want to complete the transaction as quickly as possible and limit their contact with each other in public to the minimum necessary.

The defendant argues that the remaining Santaliz factor -- furtive actions by the participants -- was absent here. But the officer described the transaction as "quick." Andrews did not even park in a space, instead stopping in front of two parked cars and leaving immediately, only to park right across the street in another parking lot known for drug transactions and then stay in his truck, in a manner that caused the experienced officer to believe that Andrews was "probably waiting for another customer." "[T]he quickness of the interaction . . . reasonably could be interpreted by the officer as suspicious conduct, similar to the suspicious conduct of the 'furtive' transaction observed in the Santaliz case." Kennedy, 426 Mass. at 708-709.

The defendant also argues that the police did not know either him or Andrews to have a "reputation in the community as a drug dealer," another factor that can contribute to probable cause. Id. at 710. But we have consistently "avoided an overly formulaic approach" to determining probable cause in this area. Sanders, 90 Mass. App. Ct. at 660. "Probable cause, after all, is a fact-intensive inquiry and must be resolved based on the particular facts of each case" (quotation and citation omitted). Commonwealth v. Long, 482 Mass. 804, 813 (2019). Although the question is close, we think that on all the facts and circumstances, the police had probable cause, prior to the

defendant's arrival on the scene, to believe that Andrews was selling drugs out of his truck.[6]

Accordingly, the police could lawfully order Andrews out of the truck, both to search and arrest him[7] and to search the truck under the "automobile exception," Commonwealth v. Johnson, 461 Mass. 44, 49 (2011), for evidence of drug transactions. And to facilitate that search, it was also reasonable to order the defendant out of the truck, regardless of whether the police had probable cause to believe that he, too, was engaged in a drug

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[6] This case is quite different from Commonwealth v. Barreto, 483 Mass. 716 (2019), where the court held, without expressly addressing the Santaliz factors, that the police lacked reasonable suspicion to believe that a street-level drug transaction had occurred. See id. at 720-721. In contrast to Barreto, here the relevant events occurred in an area known for street-level drug sales; the driver of the Cruze did not leave and return to a residence at which Andrews had stopped; the officer saw what appeared to be an exchange, not merely a delivery; the Cruze's driver left the interaction with something in his hand; and the officer saw him furtively examine it immediately after the encounter with Andrews. Moreover, Andrews did not then drive away, but instead took up a position in a nearby parking lot -- which had been the subject of citizen complaints about drug dealing -- in a manner suggesting to the experienced narcotics investigator that he was "waiting for another customer."

[7] See Commonwealth v. Washington, 449 Mass. 476, 480-481 (2007) (exigent circumstances justifying warrantless search include search of suspect incident to lawful arrest; search may precede arrest, as long as events are substantially contemporaneous and probable cause exists independent of results of search).

transaction. See Commonwealth v. Young, 78 Mass. App. Ct. 548, 552, 554 (2011).

Even assuming "the police initially had no basis to do more than order the defendant to exit the vehicle while they performed a search of the vehicle's interior for evidence of the crime of [Andrews's] arrest, the defendant's behavior in response to the exit order changed the nature of the encounter." Id. at 555. Instead of complying with Hanlon's order, the defendant thrust both hands toward his waistband. Hanlon, based on his training and experience, believed that the defendant was attempting either to conceal or retrieve weapons or narcotics. These circumstances, combined with what police already knew and had observed of the conduct of Andrews and the defendant,[8] established probable cause to search the defendant for evidence of a drug transaction. The defendant's motion to suppress the drugs found in his waistband during that search was properly denied.

2. Nonrandom selection of alternate juror. a. Facts. On the first day of jury selection, after thirteen jurors were seated, the venire was exhausted. The trial judge announced,

[8] As the judge correctly concluded, at the time the defendant entered the truck, the police had at least a reasonable suspicion that drug distribution was taking place, warranting a threshold inquiry of the defendant. The defendant does not contend otherwise.

without objection, that she intended to proceed with only thirteen jurors rather than fourteen.[9] The jury were then sworn and the trial commenced. The judge informed the jurors that "one of you will be chosen by the clerk at random at the very last step of the trial, and that person will be designated as an alternate. However, until that time, nobody knows who the alternate is," and so all jurors should carefully attend to the evidence. The parties gave their opening statements and two witnesses testified.

The next day, before the trial resumed, juror number 51 (juror 51) asked to see the judge. During a sidebar conference, the juror told the judge that he had forgotten to mention during voir dire that he had been arrested and charged in a domestic dispute with his sister about twenty years ago.[10] The charges had been dismissed, and he stated that he did not believe the incident would affect his ability to be fair and impartial to both parties. After the juror stepped away from sidebar, defense counsel told the judge, "I have no comment, but we're

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[9] During empanelment the Commonwealth had used five of its six allotted peremptory challenges, and the defendant had used two.

[10] The juror had disclosed during voir dire that he had been arrested for shoplifting some thirty years earlier but that no charges had been brought. The juror was found indifferent, and neither party exercised a peremptory challenge.

good to go, and if the Commonwealth decides that they want to get rid of this juror, we would be in a better position before they deliberate to know how badly we need him." The Commonwealth responded, "If anyone should make the decision, it should be made now." The judge then said to the Commonwealth, "[T]he question is whether you wish to challenge him. I find that he's still indifferent."

The Commonwealth decided to challenge the juror, and the judge responded, "I am not inclined to challenge him, having jeopardy attach.[11] . . . I am inclined to, at the end of the case, to take that into consideration and perhaps designate him to be the alternate, should we have [thirteen] at the end, which I don't suspect that we wouldn't have. . . . So my inclination is to allow him to continue to sit, and I can designate him as the alternate, without him knowing that, at the end of the case." Defense counsel responded, "Well, if I will object to that, I will object at the time. . . . I think it's a safer course than just excusing him now." The trial then resumed.

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[11] We note that "in a jury trial, jeopardy attaches when the jurors are sworn," Commonwealth v. Super, 431 Mass. 492, 496 (2000), and "[p]eremptory challenges shall be made before the jurors are sworn," Mass. R. Crim. P. 20 (c) (2), 378 Mass. 891 (1979). Rule 20 (c) (2) does not give a judge "discretion to allow a peremptory challenge after the juror has been sworn." Commonwealth v. Johnson, 426 Mass. 617, 627 (1998).

The trial concluded the following day. Near the beginning of her instructions, the judge stated, "[A]s I told you at the beginning, the name[] of one of you will be drawn at random by the clerk at the very, very end of the instructions, and that person will be designated as the alternate. . . . [B]ut we don't know who that person is yet because that number has not been drawn," so all jurors should carefully attend to the instructions. Once she finished instructing the jury, the judge raised at sidebar the issue of designating juror 51 as the alternate juror. The judge said, "[B]ased on the Commonwealth's position, and the fact that juror [51] did not reveal that previously, and the Commonwealth's desire to strike him, I am inclined to, without him knowing it, designate him as the alternate." Defense counsel objected, which the judge noted for the record.

The judge then explained to the jury the need to designate an alternate juror and the important role that such a juror plays, adding, "[D]on't be overly disappointed should you be selected to be an alternate." The judge then directed the clerk to pick the alternate, whereupon the clerk announced that juror 51 would serve in that role. The jury then began to deliberate. Late the next afternoon, the jury returned verdicts finding the defendant guilty on three counts and not guilty on two others.

b. Discussion. The defendant correctly argues that the nonrandom selection of juror 51 as the alternate juror violated G. L. c. 234A, § 68 (§ 68). That statute requires that, to select an alternate juror, "the court shall direct the clerk to place the names of all of the available jurors except the foreperson into a box or drum and to select at random the names of the appropriate number of jurors necessary to reduce the jury to the proper number of members required for deliberation in the particular case" (emphasis added).[12] Id. See Mass. R. Crim. P. 20 (d) (2), 378 Mass. 891 (1979) (criminal rule 20 [d] [2]) (prescribing similar method for selecting alternate juror). We recognize that the trial judge sought in good faith to balance the competing goals of (1) minimizing the risk of a mistrial in the event another juror could not deliberate and the result was to reduce the number of jurors to less than the requisite twelve, and (2) accommodating the Commonwealth's objection to the juror based on his late disclosure of pertinent information. However, § 68 does not permit the manner in which the balance was struck here.

[12] Importantly, § 68 also provides, "Nothing in this section shall prevent the court from entering a valid judgment based upon . . . procedures other than that specified in this section where all parties have by stipulation agreed . . . to such procedures." G. L. c. 234A, § 68. Here, however, the defendant objected to the nonrandom selection.

The nonrandom selection of the alternate in this case cannot be upheld as the equivalent of allowing a Commonwealth challenge for cause[13] or a peremptory challenge. See note 11, supra. Nor was this an exercise of the judge's "discretionary authority to dismiss a juror at any time in the best interests of justice."[14] G. L. c. 234A, § 39. The juror here was not dismissed.

A juror may become less satisfactory to the Commonwealth or the defendant based on disclosures, conduct, or other events during a trial. But where the judge has found the juror to remain indifferent, and the judge makes no finding that the best interests of justice warrant the juror's dismissal, § 68 and

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[13] The judge found that the juror remained indifferent. Moreover, the juror was not excused, but remained available to deliberate if necessary. Finally, the time for challenges for cause had passed. See Mass. R. Crim. P. 20 (b) (3), 378 Mass. 890 (1979).

[14] We need not decide whether, on these facts, the judge would have been within her discretion to do so. Compare Commonwealth v. Cousin, 449 Mass. 809 (2007), cert. denied, 553 U.S. 1007 (2008), holding that, where three deliberating jurors had failed to disclose their criminal histories on their juror questionnaires, in circumstances permitting an inference of purposeful concealment, the jurors were "unable to perform [their] duty for . . . good cause shown," and thus the judge properly dismissed them, even though a mistrial resulted (emphasis omitted). Id. at 821-823, quoting G. L. c. 234, § 26B. In Commonwealth v. Tiscione, 482 Mass. 485 (2019), the court noted that although G. L. c. 234, § 26B, was repealed in 2016, essentially the same authority to dismiss a juror remains in G. L. c. 234A, § 39. See id. at 489 n.5.

criminal rule 20 (d) (2) do not permit use of the alternate juror selection process as a device to prevent the juror from deliberating.[15] Random selection of alternate jurors is the fairest mechanism to both parties. Moreover, the use of nonrandom procedures, contravening § 68's requirement that the process not only be random but appear random, does not promote public confidence in the administration of justice. See G. L. c. 234A, § 68 (alternates are to be "select[ed] at random" from "box or drum" containing names of all jurors except foreperson).

The violation of § 68 does not entitle the defendant to relief, however, unless he has been "specially injured or prejudiced thereby." G. L. c. 234A, § 74. The defendant has not met this requirement. He articulated no prejudice when he objected at trial. On appeal, he argues that he was deprived of his right to have the alternate chosen pursuant to § 68 -- but this amounts to no more than an assertion that § 68 was violated and does not show any resulting special injury or prejudice.

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[15] We acknowledge that in Commonwealth v. The Ngoc Tran, 471 Mass. 179 (2015), a juror who appeared to the judge and both parties to have been asleep at various points in the trial was for that reason designated as an alternate. Id. at 189-191. On appeal, the court agreed that the procedure was "irregular," but the defendant had not objected at trial (indeed, trial counsel, "deferring to the judge, requested that the juror be made an alternate"), and there was no substantial likelihood of a miscarriage of justice. Id. at 189-190. "[I]t is obviously not in the interest of justice to have a juror deliberate who has not heard the evidence or parts of the judge's charge" (citation omitted). Id. at 190.

The defendant does not argue that any deliberating juror was biased against him or that the deliberating jury as a whole were not fair and impartial. Also, as we have previously observed, "there is no right to the particular impartial jurors [who a defendant] speculates may be most favorably disposed to his defense" (quotation omitted). Commonwealth v. Mora, 82 Mass. App. Ct. 575, 579 (2012). The defendant here does not claim any such right.

The defendant does assert that he was prejudiced by what he terms the judge's "acquiescence to the prosecution's choice as to who should deliberate"; he suggests that "[m]ost trial lawyers, after watching the jury during the course of the trial, would like the opportunity to designate who should be the alternate jurors." But that is not what happened here. To the contrary, the Commonwealth sought to remove the juror as soon as he disclosed his past encounter with the criminal justice system. It was the defendant who twice suggested that any decision on the juror be postponed until the close of the evidence; the Commonwealth's position was that any decision "should be made now" and it attempted to challenge the juror. When the judge declined to allow that challenge, the Commonwealth expressed no support for the judge's suggestion that she might designate the juror as the alternate. At the close of the evidence, again without any request or expression

of support by the Commonwealth, the judge informed the parties that juror 51 would be chosen as the alternate.

In short, we see no basis for the defendant's suggestion that the Commonwealth sought to influence the choice of the alternate, let alone that the Commonwealth did so based on observations of the jurors during the trial. In these circumstances, although the nonrandom selection violated § 68, we are bound by the statutory requirement that the verdict not be set aside unless the defendant was specially injured or prejudiced by the violation.[16] G. L. c. 234A, § 74.

Judgments affirmed.

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[16] This case is unlike Tiscione, 482 Mass. at 492-494, where, after holding that the discharge of a deliberating juror was error, and noting the statutory requirement for the defendant to show that he was specially injured or prejudiced, the court observed that the error was one of constitutional dimension, requiring an analysis of whether it was harmless beyond a reasonable doubt. Because the jury had previously been deadlocked, but then reached a verdict shortly after the juror was discharged, the "facts allow[ed] for the inference that the removal of the juror had an impact on the outcome of the case," and so the error was not harmless beyond a reasonable doubt. Id. at 493. Here, in contrast, the juror in question did not deliberate, nor are there any facts comparable to those in Tiscione. Moreover, although the defendant's brief includes an argument heading asserting that his statutory and constitutional rights were violated by the nonrandom selection of the alternate juror, the brief contains no actual argument of a constitutional violation.