COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

MIDDLESEX COUNTY 2020 SITTING

No. SJC-12919

COMMONWEALTH OF MASSACHUSETTS,
APPELLANT,

V.

JORGE DELGADO-RIVERA,
APPELLEE.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT
ALLOWING A MOTION TO SUPPRESS

BRIEF FOR THE COMMONWEALTH

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX COUNTY 2019 SITTING

No. 19-P-1094

COMMONWEALTH OF MASSACHUSETTS,

APPELLANT,

V.

JORGE DELGADO-RIVERA,

APPELLEE.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT
ALLOWING A MOTION TO SUPPRESS

BRIEF FOR THE COMMONWEALTH

ISSUE PRESENTED

Did the motion judge err in concluding that the defendant had standing to challenge the search of a co-defendant's cellular phone in Texas where the defendant was neither present nor charged with a possessory offense, and lacked any expectation of privacy in the device or its contents? More specifically, did the motion judge err where an individual lacks any expectation of privacy in a text message once the individual sends that message to

another party, the individual cannot control whether the message will be shared by the recipient, and where the message is later viewed during a search of the recipient's cell phone?

STATEMENT OF THE CASE

Prior Proceedings

On September 20, 2017, a Middlesex grand jury returned indictments charging the defendant, as well as several additional co-defendants,[1] with a variety of charges including trafficking in 200 grams or more of cocaine, a violation of G.L. c. 94C, § 32E(b), conspiracy to commit money laundering, a violation of G.L. c. 267A, § 2, and conspiracy to violate the drug laws, a violation of G.L. c. 94C, § 40. (RA 6, 18-31).[2] The impetus for the investigation that resulted in these charges was a September 18, 2016, car stop of co-defendant Leonel Garcia-Castaneda in Texas, conducted by Texas law enforcement, that uncovered evidence of drug activity. That evidence included text

[1] Co-defendants include Leonel Garcia-Castaneda (No. 1781CR00462), Jairo Salado-Ayala (No. 1781CR00463), Maritza Medina (No. 1781CR00464), Brandon Ortiz (No. 1781CR00465), Adika Manigo (No. 1781CR00466), and Mark Yarde (No. 1781CR00467).

[2] References are as follows: to the Commonwealth's record appendix as "(RA [page])"; and to the January 31, 2019 pretrial hearing transcript as "(Tr [page])".

messages between a Massachusetts phone number – subsequently linked to the defendant – and Garcia-Castaneda's phone that appeared to pertain to shipments of narcotics and payments to be made into certain bank accounts. (RA 34).

On November 20, 2018, co-defendant Garcia-Castaneda moved to suppress the fruits of the Texas car stop, including the search of his (Garcia-Castaneda's) phone. (RA 12, 41-42). On January 24, 2019, the Commonwealth filed a memorandum of law opposing standing for all defendants other than Garcia-Castaneda. (RA 12, 43-48). On January 31, 2019, the defendant moved to join in Garcia-Castaneda's motion. (RA 12; Tr 16). On that same date, Justice Shannon Frison orally allowed the defendant's motion to join in Garcia-Castaneda's motion to suppress, and proceeded to an evidentiary hearing on the merits of motion to suppress. (Tr 45). Relying on a decision of the Supreme Court of Washington, Commonwealth v. Hinton, 179 Wash. 2d 862 (2014), the motion judge granted the defendant standing based solely on the discovery of text messages sent by the defendant on Garcia-Castaneda's phone. Specifically, the motion judge stated:

> I disagree with the premise that the electronic communications are similar to the mail. I do think that although you cited cases by other Supreme Courts, it sounds like [Massachusetts] ha[s not] squarely dealt with it, at least our highest court hasn't squarely dealt with it. So I actually agree with the analysis in Hinton that even though the receiver of the text messages can do away with them or give them to the police or do whatever with them, that is a little bit different than, say, putting stuff out onto social media or more generally out in which it can be discovered by members of the public or police or anyone else. I think even text messages between two individuals does give the sender standing and I'm going to make that ruling in this case and allow the counsel for Mr. Delgado-Rivera to participate in the hearing on Mr. Castaneda's motion.

(Tr 45). That hearing was ultimately not completed after one of the Commonwealth's witnesses asserted a Fifth Amendment privilege against self-incrimination. (Tr 70).

On February 11, 2019, the Commonwealth filed a Request for Findings of Fact and Rulings of Law soliciting, among other things, a written ruling on the question of the defendant's standing to challenge the Texas car stop. (RA 12, 49-50). On February 12, 2019, Justice Frison issued the following relevant rulings of law:

1. Delgado-Rivera and Garcia-Castaneda have standing to challenge the motor vehicle stop of defendant Garcia-Castaneda in Pharr, Texas on September 18, 2016 by then-Officer Jose Tamez of the Pharr Police Department . . . ;

. . .

5. Given Jose Tamez's invocation of his privilege against self-incrimination and his unavailability to testify for Commonwealth at the motion hearing, the defendants' motion to suppress the motor vehicle stop must be allowed.

(RA 13, 51). On February 19, 2019, the Commonwealth filed a timely notice of appeal. (RA 13, 52).

On March 11, 2019, the Commonwealth filed its application for leave to pursue an interlocutory appeal pursuant to Mass. R. Crim. P. 15(a)(2) and supporting memorandum of law with the Single Justice of the Supreme Judicial Court. (RA 53-68). On April 2, 2019, the Single Justice (Gaziano, J.) allowed the Commonwealth's interlocutory appeal. (RA 53, 69-71). On July 24, 2019, the Commonwealth's appeal entered on the docket of the Appeals Court.

Statement of the Facts

On September 18, 2016, Officer Jose Tamez of the Pharr Police Department conducted a stop of a red Honda Civic in the area of 10 W. Expressway in McAllen, Texas after observing a traffic infraction by that vehicle in nearby Pharr. (RA 44). He had been watching the vehicle after receiving information from another officer that federal agents were conducting an

investigation which indicated that the car contained narcotics. (RA 44). The driver and sole occupant of the vehicle was identified as co-defendant Leonel Garcia-Castaneda. (RA 44). During the stop, Officer Tamez was assisted by a second officer, Omar Avendano, also of the Pharr Police and a Task Force Officer with the Department of Homeland Security, Homeland Security Investigations. (RA 44).

During the course of the stop, Garcia-Castaneda gave written consent for police to search his vehicle and cell phones. (RA 44). On one of the phones, officers observed a series of historical text messages with a Massachusetts-based area code whose contact was assigned the name “Bora” that appeared to pertain to shipments of narcotics and payments to be made into certain bank accounts.[3] (RA 44). The phone also included pictures of receipts of shipments to a UPS store in Everett, Massachusetts. The search did not yield contraband, however, and Garcia-Castaneda was subsequently released with a warning. (RA 44).

[3] At the time of the stop, the officers had no familiarity with the defendant or the phone number in question, and no knowledge of any cocaine distribution network in Middlesex County, Massachusetts.

Following the stop, law enforcement agents in Texas advised the Massachusetts State Police of information reviewed on Garcia-Castaneda's phone. (RA 44). Through a series of subsequent investigative steps, including court-authorized GPS tracking, physical surveillance, and telephone record analysis, State Police investigators identified the user of the "Bora" telephone as the defendant, a resident of Middlesex County. (RA 44). The police thereafter conducted a months-long investigation of the defendant and other individuals suspected of engaging in a series of related drug trafficking and money laundering schemes to smuggle kilograms of cocaine from southern Texas into Massachusetts for distribution in Middlesex County and elsewhere in the Commonwealth. (RA 44-45). The subsequent investigation, which involved judicially-authorized GPS surveillance, wiretaps, and search warrants, incorporated the facts of the Texas car stop into supporting affidavits. (RA 45).

The principal Massachusetts-based members of the conspiracy identified over the course of the investigation include the defendant, and co-defendants Jairo Salado-Ayala and Maritza Medina. (RA 45). The

evidence indicates that the defendant coordinated the importation and sale of the cocaine in Massachusetts and the payments for that cocaine to co-defendant Garcia-Castaneda, who lived in Texas and caused the cocaine to be shipped to Massachusetts. (RA 45). Salado-Ayala participated in the conspiracy by working for the defendant cutting, packaging, and distributing cocaine, picking up and shipping packages believed to contain cocaine or cash payments, depositing cash payments for cocaine, and collecting debts owed to the defendant. (RA 45). Medina received payments for cocaine which were dropped off by Salado-Ayala and others, discussed police surveillance of the defendants, translated telephone calls for the defendant, shipped packages in furtherance of the conspiracy, and made cash deposits intended to pay for the cocaine. (RA 45).

ARGUMENT

THE MOTION JUDGE ERRED IN GRANTING THE DEFENDANT STANDING TO CHALLENGE THE SEARCH OF A CO-DEFENDANT'S CELLULAR PHONE WHERE THE DEFENDANT WAS NOT PRESENT AT THE TIME OF THE SEARCH, HAS NO POSSESSORY INTEREST IN THE DEVICE, IS NOT CHARGED WITH A CRIME FOR WHICH POSSESSION OF THE DEVICE OR ITS CONTENTS IS AN ELEMENT, AND RELINQUISHED ANY EXPECTATION OF PRIVACY IN TEXT MESSAGES FOUND ON THE CO-DEFENDANT'S DEVICE UPON RECEIPT OF THOSE MESSAGES BY ANOTHER PARTY, PARTICULARLY AS THE DEFENDANT LACKED ANY CONTROL OVER THOSE MESSAGES OR ABILITY TO LIMIT THEIR FURTHER DISSEMINATION.

The motion judge erred in concluding that the defendant – who was not present at the scene of the stop, has no possessory interest in Garcia-Castaneda's cellular phone, and is not charged with a crime for which possession of the phone or the text messages contained therein is an element of the offense – had standing to challenge the legality of the Texas car stop and subsequent consent search. Her ruling finds no support in the decisions of the Appeals or Supreme Judicial Court, which have never held that an individual has a reasonable expectation of privacy in the contents of a sent text message subsequently viewed on another party's cellular phone. As the Commonwealth will demonstrate, this ruling is also contrary to the law of numerous other jurisdictions –

both state and federal – which generally holds that an individual lacks standing in such circumstances.

In order to contest the constitutionality of a search or seizure under the Fourth Amendment to the United States Constitution or Article 14 of the Massachusetts Declaration of Rights, a defendant first bears the burden of showing that he or she has standing. Rakas v. Illinois, 439 U.S. 128, 133-134 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted"); Commonwealth v. Montes, 49 Mass. App. Ct. 789, 793-794 (2000) (same). The touchstone of rights under the Fourth Amendment is a "reasonable expectation of privacy" on the part of the specific defendant asserting the challenge in connection with the particular item that is the subject of the search. Minnesota v. Carter, 525 U.S. 83, 88 (1998) ("[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable . . . ").[4]

[4] In this respect, federal law has merged the standing analysis with the substantive rights protected by the

The Supreme Judicial Court has defined Article 14 standing more broadly. In addition to items in which he or she is found to have both a possessory interest and a reasonable expectation of privacy, a defendant has "automatic standing" when he or she "is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt." Commonwealth v. Amendola, 406 Mass. 592, 601 (1990). See Commonwealth v. Mora, 402 Mass. 262, 267 (1988) (automatic standing has no relevance when contemporaneous possession of the contraband is not an element of guilt).[5]

Applying traditional standing principles, the motion judge clearly erred by conferring standing on the defendant. The defendant was not present at the time of the alleged government action. He lacks any possessory interest in Garcia-Castaneda's cellular

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Fourth Amendment and considers only the issue whether a search occurred for Fourth Amendment purposes. See United States v. Salvucci, 448 U.S. 83, 92-93 (1980); Rakas v. Illinois, 439 U.S. 128, 138-139 (1978).

[5] The Supreme Judicial Court has repeatedly considered, and declined to adopt, the additional principle of target standing. See Commonwealth v. Santiago, 470 Mass. 574, 577-580 (2015). In any case, the defendant did not raise this theory in his motion or argument, and the present facts would not support application of this standing theory.

phone. Commonwealth v. Cruz, Appeals Court, No. 13-P-1129, slip op. at *2 (Mar. 24, 2014) (defendant drug trafficker in Massachusetts did not have standing to challenge seizure of cocaine from car in Texas following motor vehicle stop where defendant was not present and possession of seized evidence at time of contested search was not an element of crime with which defendant was charged). Texas officials were not familiar with the defendant or his criminal activity at the time of the search.

The defendant's claim of standing rests solely on the officer's observation of text messages the defendant previously sent to Garcia-Castaneda on the latter co-defendant's phone. However, the defendant likewise lacks any possessory interest in the content of that message, which resided on Garcia-Castaneda's phone. And he lacked any ability to limit the further dissemination of that message to others. The Fourth Amendment does not protect items that a defendant "knowingly exposes to the public." United States v. Miller, 425 U.S. 435, 442 (1976). See also Hoffa v. United States, 385 U.S. 293, 302 (1966) (Fourth Amendment does not protect "wrongdoer's misplaced

belief that a person to whom he voluntarily confides his wrongdoing will not reveal it").

Our Supreme Judicial Court – while limiting its application in certain circumstances – continues to adhere to the tenets of the third-party doctrine. Commonwealth v. Augustine, 467 Mass. 239, 251 (2014) ("we do not reject categorically the third-party doctrine and its principle that disclosure to a third party defeats an expectation of privacy"). Likewise, the United States Supreme Court's recent decision in Carpenter v. United States did not disturb the doctrine's general application. 138 S. Ct. 2206, 2220 (2018) ("Our decision today is a narrow one. . . . We do not disturb the application of Smith and Miller . . . ."). See also United States v. Johnson, U.S. Dist. Ct., No. 17-10129-LTS, slip op. at *6-7 (D. Mass. Feb. 25, 2019) (rejecting application of Carpenter to e-mail in possession of a third party where the "case did not address one's expectation of privacy in the electronic information, wherever stored, of another user", and reaffirming application of third-party doctrine to preclude defendant's standing to challenge search of incriminating e-mail

in Yahoo account of co-defendant) (emphasis in original).

Beyond finding no support in Massachusetts case law, the motion judge's decision to confer standing on the defendant in these circumstances is at odds with holdings of various other states and federal circuits. In United States v. Dunning, the First Circuit concluded that a defendant lacked an expectation of privacy in a letter sent to another, as "the sender's expectation of privacy ordinarily terminates upon delivery." 312 F.3d 528, 531 (1st Cir. 2002), citing United States v. Gordon, 168 F.3d 1222, 1228 (10th Cir. 1999) and United States v. King, 55 F.3d 1193 (6th Cir. 1995). Federal courts have applied the same rationale to e-mails intentionally sent to a third party. See, e.g., United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004) (reasoning that "[i]ndividuals generally possess a reasonable expectation of privacy in their home computers," but "may not . . . enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient"); Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) (the sender of an e-mail lacks "a

legitimate expectation of privacy in an e-mail that ha[s] already reached its recipient").

The Supreme Court of Rhode Island recently extended this logic to "sent" text messages residing on the cellular phone of another party. State v. Patino, 93 A.3d 40, 54-57 (R.I. 2014). See also State v. Tentoni, 365 Wis. 2d 211, 218-222 (2015) (same); State v. Carle, 266 Or. App. 102, 107-115 (2014) (same). The Court astutely recognized that appellate determinations as to an individual's expectation of privacy in text messages "have most often turned on whether the defendant owned or was the primary user of the cell phone" on which the messages were discovered. Patino, 93 A.3d at 55, and cases cited. This question of control is key. In rejecting the defendant's expectation of privacy in sent messages housed on another party's device, and his claim of standing, the Court noted that "when the recipient receives [a] message, the sender relinquishes control over what becomes of that message on the recipient's phone." Id.

Because the sender of a text message "ha[s] neither possession nor control of the cell phone," "d[oes] not have the right to exclude others from using it[,]" and "ha[s] no control over who view[s]

it[,]" he cannot claim an objectively reasonable expectation of privacy in the message's contents. Id. at 57. The Patino Court found the defendant's "lack of control . . . underscored by the fact" that the other party "signed a consent form" authorizing a search of her device; facts virtually identical to those in the present case. Id. at 56. Moreover, the Court observed that there was "no media more susceptible to sharing or dissemination than a digital message, such as a text message or e-mail, which vests in the recipient a digital copy of the message that can be forwarded to or shared with others at the mere click of a button." Id. at 56 n.21.

In this case, by her own admission, the motion judge's ruling appears to be premised exclusively on her adoption of the rationale espoused in State v. Hinton, 179 Wash. 2d 862, 867-875 (2014). (Tr 45). Indeed, that decision formed the centerpiece of the defendants' standing argument. (Tr 7-9, 16). However beyond being an outlier among appellate decisions addressing this issue, and contrary to at least one decision of this Court, see Commonwealth v. Santana, Appeals Court, No. 16-P-755, slip op. at *2 n.4 (Oct. 4, 2017) (holding that defendant drug seller lacked

standing to challenge search of drug buyer's cell phone), the Hinton case is distinguishable on several grounds.

Most notably, the Court's ruling is premised not on Fourth Amendment protections, but rather on article I, section 7 of the Washington state constitution, a provision that provides broader protections than both the federal and Massachusetts constitutions.[6] See State v. Hinton, 179 Wash. 2d 862, 868 (2014) ("It is well established that article I, section 7 is qualitatively different from the Fourth Amendment and provides greater protections. . . . The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry."). For example, the Supreme Court of Washington has interpreted article I, section 7 to require a warrant before law enforcement may conduct curbside trash pulls. See State v. Boland, 115 Wash. 2d 571, 575-581 (1990). Contrast Commonwealth v. Pratt, 407 Mass. 647, 659-660 (1990) (defendant lacks expectation of privacy under art. 14 in curbside trash). Moreover, the only other jurisdiction to address the Hinton court's rationale

[6] The provision reads: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

squarely rejected it. See Patino, 93 A.3d at 57 (“We agree wholeheartedly with the dissent in that case”).

Additionally, while rejecting the analogy between letters and text messages, Hinton entirely ignores decisions concluding that an individual lacks a reasonable expectation of privacy in sent e-mails which, like sent text messages, are readily viewable on the digital device of another party and subject to further dissemination at the click of a button. See, e.g., Lifshitz, 369 F.3d at 190; Guest, 255 F.3d at 333. Furthermore, the Court’s rejection of this analogy appears premised, at least in part, on a conclusion that the messages were still “in transit”. Hinton, 179 Wash. 2d at 873 (concluding that defendant “retained a privacy interest in the text messages he sent, which were delivered to Lee’s phone but never received by Lee[,]” as “subjecting a letter to potential interception while in transit does not extinguish a sender’s privacy interest in its contents”) (emphasis supplied). Here, there is no suggestion that Garcia-Castaneda had not viewed the messages; indeed the record suggests that he responded to them. (RA 34, 44).

To reiterate, the defendant was not present at the time of the Texas search. The text messages in question were found on the device of another party. The motion judge was not presented with the question of a defendant's expectation of privacy in copies of sent messages on his own phone, but rather a message received by and viewed on the phone of another party. The defendant forfeited any objectively reasonable expectation of privacy in those messages by sharing them with that individual. Moreover, he lacked any means by which to control the further dissemination of those messages to others – be they civilians or law enforcement. There is also no evidence that the defendant took any steps to protect the contents of those messages by, for example, using encrypted messaging applications like Signal or Telegram, or an application that defaults to content deletion such as Snapchat. There is simply no basis for the motion judge's conclusion that the defendant had either an objective expectation of privacy in the sent text messages or standing to challenge the Texas car stop.

Lastly, the defendant is not charged with any offense for which possession of Garcia-Castaneda's telephone or other evidence seized during the Texas

car stop is a necessary element. Although the possession of such evidence by his co-defendant Garcia-Castaneda may be probative of certain charges against the defendant (e.g., conspiracy to traffic cocaine and to commit money laundering), the possession of such evidence is not an element of the charge and therefore is legally insufficient to confer automatic standing. See Commonwealth v. Albert, 51 Mass. App. Ct. 377, 379 n.5 (2001) (defendant charged with conspiracy did not have automatic standing because conspiracy is a non-possessory offense, nor did he have an expectation of privacy in the earlier search of the person of a codefendant).

The trial court erred in concluding that the defendant had standing to challenge the Texas car stop and search of co-defendant Garcia-Castaneda's phone. The motion judge's ruling is contrary to well-established principles of standing in this Commonwealth, and is also contrary the bulk of state and federal precedent. The defendant not only lacks standing to challenge the stop in question, but also to invoke the potential unlawfulness of the Texas car stop in arguing for the suppression of evidence potentially deemed fruits of that stop. See

Commonwealth v. Santoro, 406 Mass. 421, 422 (1990) (holding that defendant who lacks standing cannot rely on unlawful search of co-defendant in arguing for suppression of "fruits").

CONCLUSION

For the foregoing reasons, the motion judge's order allowing the defendant's motion to suppress should be reversed.

Respectfully Submitted
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Dated: August 28, 2019

ADDENDUM

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85 Mass.App.Ct. 1108
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Heriberto CRUZ.

No. 13–P–1129.
|
March 24, 2014.

By the Court (KAFKER, GREEN & SULLIVAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The issue presented is whether the defendant, Heriberto Cruz, has automatic or target standing to challenge a search and seizure of cocaine conducted in Texas on July 19, 2008, notwithstanding that he was not present at the search in Texas and not charged with a crime for which possession of the seized evidence at the time of the contested search is an essential element, but rather was charged based on his trafficking in cocaine in Massachusetts on July 21, 2008. We conclude that he has neither automatic nor target standing to challenge the search and seizure in Texas.

Background. On July 19, 2008, a Texas police officer patrolling a Texas highway stopped a vehicle with Massachusetts license plates for not properly signalling a lane change. Apparently the driver appeared very nervous to the officer and gave rambling, inconsistent answers to a series of questions posed by the officer regarding what he was doing in Texas. The officer requested consent to search the car, which was denied. The officer then summoned a drug-sniffing dog which alerted to the presence of drugs in the automobile. A probable cause search of the vehicle followed and nine kilograms of cocaine were found in a cooler in the trunk of the vehicle. The driver was read his Miranda rights and agreed to cooperate with law enforcement. Two days later, on July 21, 2008, he made a controlled delivery of the cocaine to the defendant and codefendant in Medford, Massachusetts. The defendant was arrested immediately following the delivery of the cocaine. A Middlesex County grand jury returned indictments charging the defendant with trafficking in cocaine "on or about" July 21, 2008, in violation of G.L. c. 94C, § 32E(*b*)(4), and conspiracy to violate the controlled substances law in violation of G.L. c. 94C, § 40. The defendant moved to suppress evidence seized as a result of the Texas automobile stop. His affidavit stated that the automobile was "operated by a person known to me." He stated that the "cocaine seized from the automobile in Texas on July 18, 2008 and in turn delivered to my residence on July 21, 2008 is the same cocaine which is the subject of the ... indictment." In an accompanying memorandum regarding standing, the defendant, as well as his codefendant, stated that the "defendants had possession of the cocaine on July 19 when it was being transported through Texas en route to Massachusetts in the same way they possessed the cocaine when it was seized on July 21 in Massachusetts." After a nonevidentiary hearing was held, the motion judge denied the motion to suppress. At trial, the jury convicted the defendant of trafficking. Thereafter he entered a change of plea and pleaded guilty on the conspiracy count. The appeal before us is limited to the trafficking charge.

Discussion. The defendant contends that he has automatic standing to challenge the legality of the Texas search and seizure. The test for automatic standing has been consistently defined by the Supreme Judicial Court as follows: "When a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence." *Commonwealth v. Amendola*, 406 Mass. 592, 601 (1990). See *Commonwealth v. Frazier*, 410 Mass. 235, 242–243 (1991). Measured by that criterion, the defendant is not entitled to automatic standing, because he was not charged with a crime requiring possession of the cocaine at the time of the contested search and seizure in Texas on July 19. Rather, the defendant was charged with a crime requiring possession of the cocaine two days later on July 21. It is not an essential element of the crime to prove that the defendant possessed the cocaine on July 19.

***2** As part of his automatic standing argument, the defendant stresses his constructive possession of the cocaine on July 19. As he is not charged with a crime based on possession, actual or constructive, of cocaine on

July 19, his contention that he constructively possessed the cocaine on July 19 adds nothing to his automatic standing argument.[1]

The defendant also argues that target standing principles should be applied here. Target standing recognizes the "right of one who is the target of an investigation, to challenge unconstitutional conduct toward a third person. Unconstitutional searches of small fish intentionally undertaken in order to catch big ones may have to be discouraged by allowing the big fish, when caught, to rely on the violation of the rights of the small fish...." *Commonwealth v. Manning*, 406 Mass. 425, 429 (1990). Whether the Supreme Judicial Court will recognize target standing remains uncertain at this point. In earlier decisions, the court has reserved judgment on the question. *Ibid*. See *Commonwealth v. Price*, 408 Mass. 668, 673 (1990). Recently, however, it has agreed to hear a case that presents the issue for reconsideration and sought amicus briefs on the question of target standing. See *Commonwealth v. Santiago*, No. SJC–11619. Regardless, we are not presented here with a case in which target standing could even apply. There is nothing in the record to suggest that the defendant was a target of police activity, or that the stop was intentionally undertaken to yield evidence against him. See *Commonwealth v. Manning*, *supra* at 429–430.[2]

Judgment affirmed.

All Citations

85 Mass.App.Ct. 1108, 5 N.E.3d 3 (Table), 2014 WL 1123707

Footnotes

1 Moreover, his affidavit is insufficient on its face to establish his knowledge, ability, and intention to exercise dominion and control over the cocaine in the car in Texas. He only attested that he knew the driver of the automobile and that the cocaine that was seized on July 19 was the same cocaine that was brought to his home. Unsupported legal arguments claiming possession of the cocaine cannot be relied on to prove constructive possession.

2 Finally, we decline the defendant's invitation to consider other proposed changes in current standing doctrine, and reject his arguments based on such proposed changes in the law.

92 Mass.App.Ct. 1107
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Kevin SANTANA.

16–P–755
|
Entered: October 4, 2017

By the Court (Agnes, Massing & Lemire, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** A jury convicted the defendant of possession of heroin with intent to distribute, in violation of G. L. c. 94C, § 32(a); possession of cocaine with intent to distribute in violation of G. L. c. 94C, § 32A(c); and distribution of heroin in violation of G. L. c. 94C, § 32(a).[2] On appeal, he argues that the motion judge erred in denying his motion to suppress, that he was deprived of the effective assistance of counsel, and that there was insufficient evidence to support his conviction of distribution of heroin. We affirm in part and reverse in part.

Background. We summarize the motion judge's findings of fact on the motion to suppress, supplementing where appropriate with uncontroverted testimony from the suppression hearing. Commonwealth v. Melo, 472 Mass. 278, 286 (2015). We reserve for later reference the facts relevant to the defendant's argument that the evidence presented at trial was insufficient to sustain the conviction of distribution of heroin.

On the afternoon of the defendant's arrest, a New Bedford police narcotics investigator, Detective Jonathan Lagoa, was surveilling a high crime area known for illicit drug dealing. Detective Lagoa observed a male on a red and white motorized scooter engage in what appeared to be a hand-to-hand drug transaction with a female known to the detective as a drug user named Nicole Goetz. He described the male as light-skinned, wearing a T-shirt, khaki cargo shorts, and a full face helmet. Following the transaction, the man on the scooter drove away. Lagoa issued a "be on the lookout" bulletin (BOLO) with the driver's description. Shortly thereafter, he and another officer located and arrested Goetz. Goetz was taken to the police station and admitted that she had just purchased heroin from an individual known to her as "J–Roc." A search of the recent call list on Goetz's cellular telephone (cell phone) showed that three calls were made to the contact listed as "J–Roc" immediately before the transaction.

About thirty minutes later, Detective Shane Ramos of the New Bedford police narcotics unit, responding to the BOLO, observed a male driving a red, black, and white scooter about three-quarters of a mile from the location of the alleged drug transaction. Detective Ramos signaled for the driver to stop, but the driver did not comply and drove through a stop sign. Ramos saw the driver drop an object before briefly losing sight of him. Once he regained sight of the driver, Ramos saw him take "a bunch of baggies" from his pocket and toss them into the road. Ramos also observed the driver travel in the wrong lane before eventually losing sight of him again.

Upon hearing Detective Ramos's radio broadcast of the chase, Detective Lagoa proceeded to the suspect's location. Once there, he saw a man hugging the side of a building, seemingly attempting to hide from sight. Lagoa immediately recognized this individual, the defendant, as the same person he had seen in the prior transaction with Goetz. Lagoa arrested the defendant and seized a cell phone from him. At the same time, Detective Ramos arrived at the scene and observed a red, white, and black scooter as well as a full face helmet behind the building.

***2** Shortly thereafter, Detective Lagoa contacted New Bedford police Detective Kevin Lawless, who was with Goetz at the station, and told him to use Goetz's cell phone to initiate a call to the number associated with "J–Roc." Lagoa immediately observed the cell phone seized from the defendant begin to ring. He answered the call and confirmed the caller was Detective Lawless.

Discussion. 1. Motion to suppress. In reviewing a judge's action on "a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error, but conduct an independent review of the judge's ultimate findings and conclusions of law." Commonwealth v. Washington,

449 Mass. 476, 480 (2007), citing Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

a. The arrest. The defendant argues that the motion judge erred in finding that police had probable cause to arrest him. "Probable cause to arrest exists when, at the moment of arrest, the facts and circumstances known to the police officers were sufficient to warrant a person of reasonable caution in believing that the defendant had committed or was committing a crime." Commonwealth v. Gullick, 386 Mass. 278, 283 (1982). Here, as the motion judge stated in his well-supported findings and rulings of law, the facts known to the police at the moment Detective Lagoa arrested the defendant amounted to sufficient probable cause. They included Lagoa's determination that the defendant was the same person he had observed earlier in the transaction with Goetz about three-quarters of a mile away. See Commonwealth v. Johnson, 32 Mass. App. Ct. 355, 358–359 (1992) (important factor in determining probable cause was that experienced police officers observed what they reasonably believed was a drug transaction). Moreover, at the time of the arrest, Lagoa was aware of Detective Ramos's observations of the defendant. In his attempt to stop the defendant because he matched the description of the suspect in the earlier transaction, Ramos broadcast to Lagoa that the defendant had refused to stop, had violated several traffic laws, and had discarded what appeared to be "a bunch of baggies." See Commonwealth v. Hernandez, 448 Mass. 711, 715 (2007).[3] Given the totality of these circumstances, the motion judge did not err in concluding the defendant's arrest was supported by sufficient probable cause or in denying the motion on that basis.

b. The incoming call. The defendant also argues that the motion judge erred in declining to suppress evidence resulting from the call made by the police from Goetz's cell phone to the defendant's cell phone.[4]

***3** When the item searched is a defendant's cell phone, the United States Supreme Court has held that the possible intrusion into an individual's privacy is different "in both a quantitative and a qualitative sense from other objects ... kept on an arrestee's person." Riley v. California, 134 S. Ct. 2473, 2489 (2014). Unlike a backpack, the capacity of even the least expensive cell phones expands far beyond the physical limitations of the item itself. Ibid. This capacity to hold millions of easily accessible digital files, which range from the mundane to the intimately detailed, substantially impacts an individual's privacy interest in his or her cell phone. Ibid.

However, beside the fact that the incoming call directed to Detective Lagoa was by means of the defendant's cell phone, this case is distinguishable from Riley and its progeny. Here, Lagoa did not search the digital contents of the phone in any way; instead, he merely answered an incoming phone call. Cf. Commonwealth v. Sheridan, 470 Mass. 752, 763 (2015) (search of text messages); Commonwealth v. Mauricio, 477 Mass. 588, 593 (2017) (search of digital photographs); Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 558–589 (2015) (search of call log).

Because Detective Lagoa initiated the call and was the intended recipient, the risk of intrusion into the defendant's private life through his cell phone was minimal. Simply put, the defendant's privacy interest in this specific call is distinct from his privacy interest in his cell phone as a ubiquitous tool for everyday life. See Riley, 134 S. Ct. at 2489 ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone"). Without resolving the question whether answering the cell phone by the police constituted a search or was admissible, we conclude that, even if inadmissible, allowing testimony of the call constituted harmless error.

At the time Detective Lagoa arrested the defendant and seized the cell phone he was carrying,[5] Lagoa had probable cause to believe the defendant was the same individual involved in the hand-to-hand transaction with Goetz. Lagoa also knew from Goetz that the individual was known to her as "J–Roc." From this information, Lagoa justifiably believed that initiating a call to the phone number associated with "J–Roc" on Goetz's cell phone would result in an incoming call to the cell phone seized from the defendant. After Lagoa directed Detective Lawless to make the call to the "J–Roc" contact, the defendant's seized phone immediately rang. The mere answering of it to confirm that the call was from the Goetz phone added little to the prosecutor's case. Therefore, based on the totality of the record before us, even if the call was inadmissible, "we are satisfied beyond a reasonable doubt that the tainted evidence did not have an effect on the jury and did not contribute to the jury's verdicts." Commonwealth v. Tyree, 455 Mass. 676, 701 (2010).

2. Ineffective assistance of counsel. The defendant also claims, in this direct appeal, that his trial counsel was ineffective in failing to object to a portion of the jury instructions and in failing to request an instruction on good faith misidentification pursuant to Commonwealth v. Pressley, 390 Mass. 617, 619–620 (1983). See Commonwealth v. Zinser, 446 Mass. 807, 809 n.2 (2006). We disagree.

The trial judge's instruction on identification was a proper statement of the law and did not excuse the Commonwealth from proving that the defendant was the person police had previously observed engaging in criminal activity.[6] The instruction merely highlighted that the Commonwealth was allowed to prove the defendant's identity through circumstantial evidence. While it may have been prudent for counsel to object to the reference to "statements by the defendant to others about his participation" as there was no evidence of any such statements, the failure to object did not deprive the defendant of "an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

***4** Similarly, defense counsel's failure to request a Pressley instruction did not result in ineffective assistance. In Commonwealth v. Willard, 53 Mass. App. Ct. 650, 661 (2002), defense counsel failed to request a Pressley instruction, but nonetheless "ably targeted [the] infirmities in identification during his cross-examination of the Commonwealth's witnesses ... [and] thoroughly argued misidentification in his closing argument to the jury." Defense counsel's actions here were analogous in this regard. Through cross-examination and summation at closing, defense counsel thoroughly advanced a misidentification theory. Thus, there is "no doubt that the defense of misidentification was squarely before the jury, and ... the failure of defense counsel to request a Pressley instruction did not amount to ineffective assistance of counsel." Ibid.

3. Sufficiency of the evidence supporting distribution of heroin conviction. The defendant contends that, since there were no chemical test results or testimony regarding the nature of the substance seized from Goetz, the Commonwealth failed to prove beyond a reasonable doubt that it was, in fact, heroin.[7] The Commonwealth acknowledges the oversight in failing to chemically test the substance and in failing to realize the mistake until after the presentation of evidence, but argues that sufficient circumstantial evidence was presented to prove the substance was heroin. We disagree.

Testimony that a defendant's actions are consistent with the transfer of an illicit substance is insufficient to support a conviction for distribution of it. "In a case involving a narcotics offense, the Commonwealth must prove beyond a reasonable doubt that the substance at issue is a particular drug because such proof is an element of the crime charged." Commonwealth v. MacDonald, 459 Mass. 148, 153 (2011) (citations and quotations omitted). When evidence of a substance's chemical composition is presented through a police officer's opinion, it "must not be conclusory, but must be based on objective criteria as well as on sufficient training or experience." Id. at 154. Here, in response to Detective Lagoa's conclusory statement that the item seized from Goetz upon her arrest was a bag of heroin, defense counsel appropriately objected and the statement was struck.[8] The prosecutor then asked Lagoa to describe the contents of the bag by its size, color, and texture. He responded only that it was a "brown powdery substance." None of the officers who testified were asked to identify the substance as heroin based on their training and experience in identifying narcotics and no evidence was presented to show that an independent field test was conducted.[9] Viewing the entire record, we agree with the defendant that the evidence here was insufficient to prove beyond a reasonable doubt that the substance underlying the conviction of distribution of heroin was, in fact, heroin. Therefore, we must vacate that conviction.[10]

***5** Conclusion. On the indictment charging the defendant with distribution of heroin (second or subsequent offense), the judgment is reversed, the verdict and finding of guilt are set aside, and judgment shall enter for the defendant. The remaining judgments are affirmed.

So ordered.

Reversed and judgment entered in part; otherwise affirmed.

All Citations

92 Mass.App.Ct. 1107, 94 N.E.3d 435 (Table), 2017 WL 4398573

Footnotes

1 The panelists are listed in order of seniority.

2 After the jury verdicts the defendant pleaded guilty to a second or subsequent offense on each conviction.

3 The judge also did not err in finding that Detective Ramos had reasonable suspicion to attempt to stop the suspect on the scooter because he matched the description of the individual involved in the alleged drug transaction with Goetz. Any variations in the descriptions, including the prominent colors of the scooter, were insignificant and did not erode his reasonable suspicion. See Commonwealth v. Bell, 78 Mass. App. Ct. 135, 139 (2010). Moreover, as the motion judge noted, it is significant that "during the search and chase, Detective Ramos observed no other scooters or males matching the description given in the BOLO." See Commonwealth v. Mercado, 422 Mass. 367, 371 (1996).

4 The defendant lacks the standing required to contest the search of Goetz's cell phone. See Commonwealth v. Santoro, 406 Mass. 421, 422 (1990). See also Commonwealth v. Santiago, 470 Mass. 574 (2015).

5 The seizure of the cell phone was proper and incident to the lawful arrest. See Commonwealth v. Freeman, 87 Mass. App. Ct. 448, 453–454 (2015).

6 The relevant portion of the instruction is as follows:

> "It's not essential that at the moment of the crime the person committing the act be identifiable, as the Commonwealth may prove the defendant's involvement by other means, including physical evidence, circumstantial evidence, statements by the defendant to others about his participation, or some combination thereof."

7 The defendant makes no argument concerning the sufficiency of the evidence underlying his convictions of possession of cocaine with intent to distribute and possession of heroin with intent to distribute. Sufficient evidence was presented on those charges showing that the drug samples, which came from the bags discarded by the defendant during pursuit, were chemically tested.

8 The Commonwealth conceded at oral argument that testimony about Goetz's hearsay statement to police that the substance was heroin is irrelevant.

9 We reject the Commonwealth's argument that, because there was sufficient evidence to prove that some of the plastic bags discarded by the defendant contained heroin, the jury were entitled to infer that the bag seized from Goetz came from the same source and was therefore also heroin. No evidence was presented to show the discarded bags possessed any distinctive characteristics that were similar to the bag seized from Goetz.

10 Because the defendant received identical concurrent sentences on the convictions, there is no need to remand for resentencing.

2019 WL 917175
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

UNITED STATES of America,
v.
Walter JOHNSON, Defendant.

Criminal No. 17-10129-LTS
|
Filed 02/25/2019

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ORDER ON MOTIONS TO SUPPRESS

Leo T. Sorokin, United States District Judge

***1** Defendant Walter Johnson is charged with (1) distribution of child pornography and (2) possession of child pornography. Johnson moved to suppress various physical evidence obtained through searches in early 2017, Doc. No. 92, and evidence of statements he made on April 27, 2017, during questioning at his home and at the Framingham Police Department, Doc. No. 87. The government opposed. Doc. No. 100. The Court held a hearing on January 15, 2019, that was evidentiary only as to the motion to suppress the evidence of Johnson's statements obtained during the search of his home. See Docs. No. 101, 103, 108, 109, 116. For the reasons that follow, the motion to suppress physical evidence, Doc. No. 92, is DENIED, while the motion to suppress the evidence of Johnson's statements, Doc. No. 87, is ALLOWED IN PART and DENIED IN PART.

I. FACTS

A. Initial Investigation

The Court makes the following factual findings based on materials submitted by the parties and, as to the circumstances of Johnson's April 27, 2017, statements, the credible testimony offered during the January 15, 2019, evidentiary hearing.[1]

On January 19, 2017, a Rhode Island State Police detective began investigating a Craigslist user who had made a posting on the site entitled "Perv on your daughter." Doc. No. 100 at 1. On January 24, 2017, the detective communicated via email with Richard Woodhead, the Craigslist user who made the post. Doc. No. 93 at 1. On January 27, 2017, the detective, working with Department of Homeland Security Special Agent James Richardson, served a warrant authorized by a Rhode Island state court magistrate on Yahoo, Woodhead's email provider, that directed the seizure of "[a]ny and all records associated with" Woodhead's email account. Doc. No. 93-1 at 4. Among the emails Yahoo provided in response to the warrant were some to Woodhead from various Craigslist users. Doc. No. 93 at 2.

On February 24, 2017, the United States Attorney's Office for the District of Rhode Island served a federal grand jury subpoena on Craigslist that directed the company to produce subscriber information for three of the Craigslist users whose emails had appeared in Woodhead's Yahoo account. Doc. No. 93-2 at 25–26. The subscriber information sought "includ[ed] names, addresses, telephone numbers, contact email addresses and any other subscriber information related to" the users, "as well as any advertisements placed or responded to by these email addresses." Id. at 26. When Craigslist returned the requested material on March 7, 2017, the data returned included not only the non-content subscriber information sought but also content such as private communications, including images. Doc. No. 93 at 3. The material from Craigslist identified another Yahoo email address that was associated with one of the Craigslist users. Doc. No. 100 at 2. That Craigslist user, and the owner of that Yahoo email address, would ultimately turn out to be Johnson. Id. at 2–3. During Richardson's review of that material with an assistant United States attorney, the attorney asked Richardson to stop reviewing the records because a search warrant would have been

required to seek message content, while a subpoena could only have lawfully sought non-content user information. Id. at 2 n.2; Doc. No. 93 at 15.

***2** On March 13, 2017, Richardson sought and obtained a warrant, issued by a magistrate judge in the District of Rhode Island and served on Craigslist, for much of the non-content and content information that Craigslist had returned in its response to the earlier subpoena. Doc. No. 93 at 3. Richardson's affidavit described his work in his position on the Internet Crimes against Children ("ICAC") Task Force in Rhode Island. It stated that Richardson's investigation of Woodhead had grown out of the Rhode Island State Police detective's investigation of Woodhead's Craigslist post. Doc. No. 93-2 at 12–13. It explained that Woodhead lived in South Attleboro, Massachusetts, Doc. No. 93-2 at 18, while another target—who would turn out to be Johnson—lived in Framingham, Massachusetts, id. at 23. It also stated that Craigslist had already provided records showing that Woodhead's Craigslist posting had been made from Cumberland, Rhode Island, id. at 13, and that Woodhead had told Johnson that he was in the "Providence area," id. at 23. It described Richardson's use of the Rhode Island State Police's undercover telephone line, which has a Rhode Island area code, to communicate with Woodhead. Finally, the affidavit also candidly revealed that Craigslist had already provided some of the material sought by the warrant and stated that Richardson explicitly did not rely on that material to establish probable cause for the issuance of the warrant. Id. at 25–26.

On March 29, 2017, the government received materials from Craigslist in response to the warrant. Doc. No. 93 at 4. That material again identified Johnson's Yahoo email account. Doc. No. 93-3 at 21. On that basis, on March 31, 2017, Richardson sought and obtained a search warrant from the same District of Rhode Island magistrate judge for records associated with Johnson's Yahoo email account. Doc. No. 100 at 2–3. The warrant stated that the records sought were located in the Northern District of California. Doc. No. 93-3 at 2. Yahoo's response, provided on April 5, 2017, included over 9,900 of Johnson's emails. Doc. No. 93 at 5. The information received from Yahoo allowed the government to determine that the account was associated with 20 Burdette Avenue, Framingham. Id.; Doc. No. 93-4 at 11. The government also determined that Johnson owned the home located at that address. Doc. No. 100 at 3.

On April 6, 2017, the United States Attorney's Office in Boston obtained a search warrant from a magistrate judge in the District of Massachusetts for that address based on an affidavit by Special Agent Janet Connolly. See Doc. No. 93-4. The affidavit relied in significant part on the emails obtained from the March 31 warrant. Id. at 11–13. The warrant itself authorized a search for "[a]ll records, in whatever form, and tangible objects that constitute evidence, fruits, and instrumentalities of 18 U.S.C. § 2252A." Id. at 5.

B. Physical Search and Interrogation

Johnson lives at 20 Burdette Avenue in Framingham, Massachusetts. Doc. No. 116 at 189. His home is a small, one-story single-family house with a detached garage at the end of his driveway abutting the backyard of his home. Id. at 88, 199–200. His home comprises five rooms. Id. at 29, 73, 88; Ex. 12. At the front door, there is a porch along part of the front of the house. Id. The front door leads into an entryway, to the left of which is a living room. Id. The dining room is directly ahead. Id. Directly off the dining room to the left is Johnson's bedroom which he shares with his partner. Id. The kitchen is behind the dining room. Id. A hallway that runs parallel to the kitchen connects Johnson's bedroom to a second bedroom in the rear of the house. Id. The bathroom is off that hallway, which also has a door into the kitchen. Id. The home has no second floor; the basement contains no habitable space. Doc. No. 116 at 29.

On April 27, 2017, the sun rose at 5:44 a.m. Ex. 24. The temperature was in the low 50s with overcast skies.[2] About fifteen minutes later, at 6:00 a.m., fifteen law enforcement agents from the Department of Homeland Security, the U.S. Coast Guard, the Massachusetts State Police, the Taunton Police Department, and the Framingham Police Department arrived at 20 Burdette Street in several vehicles, including a van equipped to process electronic evidence. Doc. No. 88-3 at 1–2; Doc. No. 116 at 51. The van parked in front of Johnson's home, while some of the other law enforcement vehicles parked in Mr. Johnson's driveway—thereby blocking any car in the driveway from exiting—and others parked on the street. Id. at 51, 163.

***3** Some, but not all, of the agents went up to the front porch, some standing directly in front of the door, while others remained on the lawn. Id. at 23. At least one agent went around to the back of the house, effectively surrounding it. Id. at 195. Other agents remained in their vehicles. All of the Homeland Security agents wore ballistics vests with police markings. Id. at 18. No officer drew a weapon. Id. at 25.

While the officers were gathering around the home, Johnson and his life partner Pat Kryzak were sleeping in their bedroom, the main bedroom of the home. Id. at 154, 190. The officers began banging on the door with a "loud pounding." Id. at 21, 191. The commotion awoke Kryzak and Johnson. Id. at 191. Johnson came out of his bedroom into the entryway area of the house where the agents could see him, at which point they shouted that it was the police and that he should "open up," which he did. Id. Johnson was shirtless, wearing only gym shorts and slippers. Id. at 191, 196. Before he opened the door, he observed the police cars in the driveway of his home that were blocking in his own car, which was parked at the end of the driveway, as well as other cars in the street. Id. at 199–200.

When Johnson opened the front door, the officers immediately entered the home and, after announcing that they had a search warrant, verbally directed Johnson to the kitchen, also taking his arm to escort him there. Id. at 195. When they reached the kitchen, Johnson saw through the back door of his home the agent stationed in the back to guard the rear door. Id. While the officers escorted Johnson to the kitchen, Kryzak came out of their bedroom into the dining room. Id. at 155. The agents told her they had a warrant and showed her the warrant, on which she observed Johnson's name and the address of the home. Id. Agents then gestured for Kryzak to go into the living room, the room farthest from the kitchen, where she was told to sit on the couch. Id. at 159. An agent brought in a chair from the dining room, placed it near the sofa, and sat by Kryzak. Id. at 160. At some point during the agents' time in the house, one agent posted labels with large letters in each room. Id. at 108.

In the kitchen, Johnson sat at the counter island with Richardson and Connolly. Id. at 198. Nearly immediately after entering Johnson's home, without exchanging pleasantries, and despite Johnson's obvious undress, the agents started an audio recorder and began to interrogate him at 6:08 a.m. Id. Both agents were wearing ballistics vests that identified them as police and gave the agents a big, bulky look, although the agents removed the vests when they sat down to commence their interrogation. Id. at 37–39, 74. By this point, at least ten agents or officers had entered Johnson's small home. There were two agents, at least, with him in the kitchen, others in the adjacent hallway and back bedroom, one with Kryzak in the living room, and still others in his bedroom and the dining room off of the kitchen. Id. at 161. Although all the agents in his home, with one exception, were wearing firearms on their waists, at no point did Connolly, Richardson, or any other agent present in the home draw or otherwise display a firearm. Id. at 25, 38, 45–46, 75, 133–34. No one offered to permit Johnson to retrieve clothing at this point. The agents did not inform Johnson about his Miranda rights before the interrogation began. Id. at 199. Johnson was not handcuffed or physically restrained in any other way. Id. at 45.

***4** Shortly after the interview began, Connolly closed the door that leads from the kitchen into the back hallway where other agents were searching. Id. at 40. Connolly also asked about closing the door to the dining room, but there was no door. Id. at 89. The two agents then questioned Johnson for almost thirty minutes about his email accounts, his use of social media and Craigslist for sexual activities or pornography, his sexual preferences, and his interests in pornography. Ex. 1.

At 6:34 a.m., the agents turned off the recording device. Doc. No. 88 at 2. At some point after the agents stopped the recording, Kryzak asked for and received permission to leave the living room to get a bathrobe. Doc. No. 116 at 160. She then walked through the kitchen to the hallway near the rear of the house, where the bathrobe was in a closet. Id. at 161. On her way, she observed Johnson at the kitchen island, noting that he was still shirtless and wearing only his gym shorts. Id. She saw agents throughout the home, including in both the second bedroom and the back hallway. Id.

As the agents' search of the home continued, Johnson remained in the kitchen, always with at least one or two agents and, for the first time, Johnson made a request to get more clothing. Id. at 196, 201–03. Richardson told Johnson that, because of the ongoing search, he could not move about the home, such as by going to his room to get clothes, and that if he needed clothes, an agent would get them for him. Id. at 197, 225. No agent was dispatched to obtain any clothing for Johnson in response to this request. Id. Johnson understood Richardson's response to mean that he was required to stay in the kitchen and therefore remained in the kitchen, clothed only in his gym shorts. Id. at 203.

At some point after the agents turned off the recording device, Richardson informed Johnson that agents were not able to find a certain folder on Johnson's computer that Johnson had told them contained child pornography on the recording. Id. at 42, 204. Johnson told Richardson that the folder was not on the computer, but rather was on a thumb drive on top of the door frame inside a closet in a bedroom at the rear of the house. Id. at 140–41. Richardson successfully retrieved the thumb drive from the location Johnson described. Id. at 140–41, 150. Richardson also asked Johnson whether he was willing to undergo a polygraph examination to confirm whether he

had sexual contact with minors, and Johnson agreed. Id. at 46–48, 228.

During the approximately one hour the agents did not record their interactions with and questioning of Johnson, Johnson requested the agents permit him to make a phone call to inform his employers that he would not be coming to work. Id. at 206. The agents did not allow Johnson to handle his iPhone, but rather looked up Johnson's employers' phone numbers in the iPhone themselves and then allowed him to place the calls on his landline phone. Id. at 207. At some other point during this unrecorded period between 6:34 a.m. and 7:35 a.m., Richardson encouraged Johnson to be honest with them because Richardson could inform the Court of his cooperation, which would be to Johnson's benefit. Id. at 209–10.

Meanwhile, after Kryzak returned to the living room in her bathrobe, agents asked her questions about where electronics, such as computers and cell phones, could be found in the house. Id. at 167. At some point later, Kryzak asked whether she would be able to go to work. Id. at 163. Agents told her that she would be able to go to work and allowed her to go to her bedroom to dress. Id. at 163–64. While she was in her bedroom and not fully dressed, a male agent opened the closed door between the bedroom and the dining room without knocking and entered the bedroom. Id. at 164. Kryzak told him that she was getting dressed, and he went back out into the dining room. Id. During all this time, Kryzak did not observe Johnson, who remained in the kitchen. Id. at 165–66.

***5** At 7:35 a.m., agents Connolly and Richardson restarted the audio recorder. Ex. 1; Doc. No. 88 at 4. Connolly told Johnson that he was not under arrest at that point and asked him again about his consent to take a polygraph examination. Ex. 1. While the recording ran, Johnson also signed an acknowledgement of his Miranda rights. Doc. No. 116 at 56–57. The agents stopped the second recording at 7:38 a.m. Ex. 1.

After the second recording, Johnson was informed that he was under arrest. Doc. No. 116 at 53. At that point, Johnson asked again for more clothes. Id. at 211. This time, the agents granted the request. Id. An agent retrieved jeans and a T-shirt while Johnson remained in the kitchen, exchanging the T-shirt for a different shirt at Johnson's request. Id. at 212. Johnson also requested shoes, but the agents told him to wear his slippers because otherwise the shoestrings would have to be removed. Id. He also asked to use the bathroom, and an agent then escorted him to the bathroom. Id. at 197–98. Although an agent did not enter the bathroom with him, one remained outside the bathroom door, which stayed cracked open. Id. at 63–64, 124–25, 127. Shortly thereafter, at about 8:00 or 8:30, Johnson was handcuffed and taken to the Framingham Police Department, a short drive from Johnson's home. Id. at 213. At the police station he was booked, processed and then waited for the polygraph examination. Doc. No. 88 at 4; Ex. 2. Kryzak ultimately left the house for work after agents had taken Johnson out of the house under arrest. Doc. No. 116 at 168–69.

The polygraph examination to which Johnson had consented was conducted by FBI Special Agent Christopher Braga, who was not present at the home during the search and Johnson's arrest. Doc. No. 100 at 4. The interview began at 10:27 a.m. Ex. 2. At the beginning of the interview, Braga informed Johnson of his Miranda rights, and Johnson again signed an acknowledgement of his rights. Id. Braga stated that the interview was not concerned with the child pornography matter that was the subject of the search of Johnson's home. Ex. 2; Doc. No. 100 at 5. The interview focused almost entirely on Johnson's sexual preferences and whether he ever had sexual contact with minors. Id. The interview ended at 1:26 p.m. Ex. 2.

II. LEGAL STANDARD

"A search within the meaning of the Fourth Amendment 'occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.' " United States v. D'Andrea, 648 F.3d 1, 5–6 (1st Cir. 2011) (quoting Kyllo v. United States, 533 U.S. 27, 33 (2001)). The defendant "has the burden of establishing that 'his own Fourth Amendment rights were violated by the challenged search or seizure.' " United States v. Rheault, 561 F.3d 55, 58–59 (1st Cir. 2009) (quoting Rakas v. Illinois, 439 U.S. 128, 131 n.1 (1978)). To do so, he must show that he "had a reasonable expectation of privacy in the place searched or the thing seized." United States v. Thornley, 707 F.2d 622, 624 (1st Cir. 1983). "The Supreme Court has set out a two-part test for analyzing the expectation question: first, whether the movant has exhibited an actual, subjective, expectation of privacy; and second, whether such subjective expectation is one that society is prepared to recognize as objectively reasonable." Rheault, 561 F.3d at 59. If the defendant establishes that the search violated his constitutional rights, then the "exclusionary rule, where applicable, requires suppression of evidence obtained in violation of the Fourth Amendment." D'Andrea, 648 F.3d at 6 (citing Herring v. United States, 555 U.S. 135, 129 (2009)).

***6** "[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Michigan v. Summers, 452 U.S. 692, 705 (1981). But such detention, even if permissible, can also be custodial for the purposes of Miranda, because "a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be given Miranda warnings," which "are designed to protect against the extraordinary danger of compelled self-incrimination that is inherent in such situations." United States v. Hughes, 640 F.3d 428, 434–35 (1st Cir. 2011) (internal quotations omitted); see also United States v. Widi, 686 F. Supp. 2d 107, 112 (D. Me. 2010) ("the fact that a detention is permissible under the Fourth Amendment does not make the detention any less custodial for Miranda purposes").

III. DISCUSSION

A. Physical Evidence

1. State Warrant for Woodhead's Email Account

Johnson first seeks to suppress the emails recovered from Woodhead's Yahoo email account, and fruits that resulted therefrom, on the basis that the warrant authorized by the Rhode Island state court magistrate, pursuant to which the emails were produced, was overbroad and therefore invalid. Doc. No. 93 at 6. But Johnson has not met his burden of demonstrating his reasonable expectation of privacy in the contents of Woodhead's email account. "[T]he Fourth Amendment does not protect items that a defendant knowingly exposes to the public," and, therefore, "if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery." United States v. Dunning, 312 F.3d 528, 531 (1st Cir. 2002) (internal quotations and citations omitted). As a result, given that Johnson has sent his messages to another user, he no longer had a reasonable expectation of privacy in the messages after their delivery to that user. Because Johnson therefore lacks standing to challenge the warrant that sought Woodhead's emails, the Court need not decide the validity of the Rhode Island warrant.

Johnson argues that the Supreme Court's decision in Carpenter v. United States, 138 S. Ct. 2206 (2018), changed the analysis of a defendant's reasonable expectation of privacy with respect to electronic, rather than physical, messages in the possession of a third party. Doc. No. 93 at 12; Doc. No. 114 at 7–8. He argues that Carpenter recognized that "the government's technologically-enhanced search capabilities are qualitatively different, and more invasive, than searches carved out by the traditional exceptions to the warrant requirement." Doc. No. 114 at 12. As a result, he argues, the Supreme Court is likely to hold that a governmental search infringes a person's Fourth Amendment privacy interests whether the search is of information held by one's own service provider or by someone else's. Id. at 10.

Carpenter held that a cell phone subscriber has a reasonable expectation of privacy in cell site location information stored by the cellular provider such that the government must obtain a search warrant before seeking such information from the provider. 138 S. Ct. at 2217. To hold otherwise, the Court reasoned, would be to subject cell phone users—a majority of Americans—to "tireless and absolute surveillance." Id. at 2218. But however Carpenter may have narrowed the third-party doctrine with respect to information stored on a service provider's server and associated with one's *own* account, that case did not address one's expectation of privacy in the electronic information, wherever stored, of *another* user. The other cases that Johnson cites to show "uncertainty about the application of the third-party doctrine to email," Doc. No. 93 at 12, similarly deal with one's expectation of privacy in the contents of one's *own* email account, despite the sharing of those contents with one's email provider. See, e.g., United States v. Ackerman, 831 F.3d 1292, 1304 (10th Cir. 2016); In re Grand Jury Subpoena, JK-15-029, 828 F.3d 1083, 1090 (9th Cir. 2016); United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010); United States v. Forrester, 512 F.3d 500, 511 (9th Cir. 2008); United States v. Keith, 980 F. Supp. 2d 33, 39–40 (D. Mass. 2013). These cases therefore do not cast doubt on the application of the third-party doctrine to this case, and no more does Carpenter "settle[ ]" that question in favor of Johnson. Doc. No. 93 at 12.

***7** Rather, the third-party doctrine continues to apply with force in this case. The information obtained pursuant to the search warrant served on Yahoo was stored in Woodhead's email account, not Johnson's. The information arrived in Woodhead's account because of Johnson's intent to "knowingly expose[ ] to the public," Dunning, 312 F.3d at 531, the contents of his messages by

sending them purposefully to another user. Johnson's intent to share the messages with Woodhead is significantly different than the average cell phone user's incidental and essentially unintended sharing of location data with her cellular provider. Sending email is more similar to the traditional sending of messages through the physical mail, the post-delivery search of which does not raise any prospect of "tireless and absolute surveillance." Carpenter, 138 S. Ct. at 2218. Accordingly, Johnson lacks a reasonable expectation of privacy in the messages and therefore the ability to challenge the validity of the search warrant served on Yahoo.

Johnson offers one final ground on which he contends he can challenge the search of Woodhead's Yahoo account. He contends that the search of Woodhead's email account should be viewed as a physical intrusion into a constitutionally protected area, and therefore as subject to the common-law trespassory test, an equally sufficient alternative to the reasonable-expectation-of-privacy test. Doc. No. 114 at 15; see United States v. Jones, 565 U.S. 400, 409 (2012). Although the common-law trespassory test would, in general, allow a Fourth Amendment challenge only from the person whose property was trespassed against, Johnson submits that the Supreme Court has also recognized that a defendant may challenge a search of someone else's property when he has an interest in that property. Doc. No. 114 at 16; see also Stoner v. California, 376 U.S. 483 (1964) (hotel room searched with hotel owner's permission, but not guest's); Chapman v. United States, 365 U.S. 610, 616–17 (1961) (apartment searched with landlord's permission, but not tenant's).

Even assuming, without deciding, that an email account could be a constitutionally protected area for the purpose of the common-law trespassory test, this argument fails. Unlike in the cases Johnson cites, in which the defendant exercised possessory control over the hotel room or apartment at issue, Johnson had no control over Woodhead's email account at any point. As a result, Johnson had no property-like interest in Woodhead's email account itself; his only arguable interest was in the messages contained in the account. In this way, his messages again more closely resemble letters sent by one person to another person's home, which the sender has never entered. Once the letters have arrived in the recipient's home, the sender has no possessory interest in the letters, nor can the sender be said to have a property interest in the recipient's home. See Dunning, 312 F.3d at 531 (when letters were found in a governmental search of a home, defendant could "claim the protection of the Fourth Amendment only if he had a legitimate expectation of privacy in the [searched] home in general"). As such, even under the common-law trespassory test, Johnson may not challenge the search of Woodhead's email account.[3]

2. Federal Warrants

Johnson next seeks to suppress the emails recovered from his own Yahoo email account, and fruits that resulted therefrom, making two supporting arguments. Doc. No. 93 at 14–21.

First, Johnson argues that the March 13, 2017, warrant was based on the material received in response to the February 24, 2017, federal grand jury subpoena served on Craigslist. Id. at 14–15. Because that subpoena was overbroad and therefore obtained more information than permitted by the Stored Communications Act, Johnson argues, the warrant based on the information obtained from the subpoena was invalid, requiring suppression of the evidence obtained from its execution. Id. at 16–17.

***8** This argument fails for a simple reason: The March 13, 2017, warrant plainly did not rely on the information received in response to the February 24, 2017, subpoena. The affidavit that Agent Richardson submitted to the federal magistrate judge in support of the warrant offers 14 pages of information in support of probable cause, none of which was received in response to the Craigslist subpoena. See Doc. No. 93-2 at 11–25. Having provided that information, the affidavit then candidly offers information about the grand jury subpoena and Richardson's experience with the material received from that subpoena, specifying that he was "not relying on any of the information" from the Craigslist subpoena "to establish probable cause for the issuance of the warrant" requested. Doc. No. 93-2 at 25–26. The affidavit clearly offers sufficient probable cause for the issuance of a warrant for the requested information before it mentions the material provided in response to the subpoena. As a result, the Court need not decide whether the subpoena was unlawfully overbroad, and this challenge to the Craigslist warrant does not succeed.

Second, Johnson argues that both the March 13, 2017, warrant served on Craigslist and the March 31, 2017, warrant served on Yahoo were invalid because the Rhode Island federal magistrate judge who authorized the warrants lacked territorial jurisdiction over the crimes under investigation. Doc. No. 93 at 18. The Stored

Communications Act ("SCA"), under which both warrants were authorized, authorizes the issuance of warrants for electronic communications by "any court that is a court of competent jurisdiction," 18 U.S.C. § 2703(d), which term is defined to include "any district (including a magistrate judge of such a court) ... that ... has jurisdiction over the offense being investigated," id. § 2711(3)(A). Johnson argues that the warrants are therefore invalid because the U.S. District Court for the District of Rhode Island lacks territorial jurisdiction over the alleged crimes at issue in this case, which Johnson argues were perpetrated, if anywhere, in Massachusetts. Doc. No. 93 at 20.

Even assuming without deciding that § 2711 requires *territorial* jurisdiction, as well as subject matter jurisdiction, this argument also fails. Johnson offers no evidence upon which the Court could conclude that the Rhode Island law enforcement personnel at work in this case were not investigating crimes committed within the jurisdiction of the District of Rhode Island. The warrant, on its face, states that the information was sought for use in the investigation of violations of the federal child pornography laws by "Richard F. Woodhead and others." Doc. No. 93-3 at 6. At the time of the warrant application, Richardson knew that Woodhead's Craigslist posting, to which Johnson responded, appeared to have been posted from Cumberland, Rhode Island. Id. at 10. He also knew that Woodhead had identified himself in communications with Johnson as in the "Providence area." Id. at 20. Richardson, who wrote the warrant application, was also based in Rhode Island, and was assigned to the Internet Crimes against Children Task Force in Rhode Island. Id. at 8–9. These facts set forth in the warrant application provide ample reason to conclude that Richardson was investigating crimes potentially committed in Rhode Island.

That the charges in the present case were ultimately brought in Massachusetts or that Johnson is a resident of Massachusetts is immaterial. The SCA does not limit the use of evidence produced pursuant to a § 2703 warrant to crimes ultimately charged in the judicial district of the federal district court that issued the warrant. Rather, again assuming without deciding that § 2711 requires territorial jurisdiction, the SCA limits the issuance of § 2703 warrants to investigations of offenses committed in the issuing court's judicial district. As an "offense involving ... transportation in interstate or foreign commerce," a violation of the federal child pornography laws may be "prosecuted in any district from, through, or into which such commerce ... moves." 18 U.S.C. § 3237(a). Although the warrants at issue did identify the defendant as a resident of Massachusetts, the investigation could have determined that its target crimes—which are not limited to or even necessarily encompassed by the present charges—could or should have been charged in another jurisdiction, such as Rhode Island. Accordingly, this challenge to the validity of the two warrants also fails.[4]

B. Statements

1. At Johnson's Home

***9** Johnson next seeks to suppress the statements he made during the search of his home. Doc. No. 88 at 4. He argues that he was in custody during the interrogation conducted during the search, but had not been advised of his Miranda rights, thus rendering his statements inadmissible. Doc. No. 88 at 4. Because the government concedes that Johnson was interrogated at his home without Miranda warnings, Doc. No. 116 at 249, the only question before the Court is whether Johnson was in custody during the interrogation.

Whether a suspect is in custody during an interrogation is clear when that suspect is under formal arrest. Hughes, 640 F.3d at 435. In cases short of formal arrest, "an inquiring court uses a two-part test to see if a person is in custody for Miranda purposes: first the court examines the circumstances surrounding the questioning and then it sees whether those circumstances would cause a reasonable person to have understood his situation to be comparable to a formal arrest." United States v. Guerrier, 669 F.3d 1, 6 (1st Cir. 2011). "Determining what constitutes custody can be a slippery task," United States v. Ventura, 85 F.3d 708, 711 (1st Cir. 1996) (citation and internal quotation omitted), that requires "considering the totality of the circumstances," United States v. Mittel-Carey, 493 F.3d 36, 39 (1st Cir. 2007) (citation and internal quotation omitted).

To guide the custody inquiry, the First Circuit "has identified four factors that, among others, may inform a determination of whether, short of actual arrest, an individual is in custody. These factors include whether the suspect was questioned in familiar or at least neutral surroundings, the number of law ©enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." Hughes, 640 F.3d at 435 (internal

quotations omitted). "[T]he determination of whether custody exists depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Id.

Here, the interview of Johnson took place in his own home, which "generally presents a less intimidating atmosphere than, say, a police station." Hughes, 640 F.3d at 436. However, the defense argues that the facts of this case resemble those in Mittel-Carey, a case in which the First Circuit ruled that questioning conducted in the defendant's home had been a custodial interrogation. 493 F.3d at 39–40. In that case, the First Circuit found "dispositive" several facts: "(1) the early hour of the search and interrogation (6:25 AM); (2) the presence of eight officers in the home; (3) that the defendant was confronted with an unholstered gun in his darkened bedroom; (4) the physical control the agents maintained over the defendant at all times; (5) the length of the interrogation (ninety minutes to two hours); and (6) the coercive statements made by the interrogating agent, which seemed designed to elicit cooperation while carefully avoiding giving the defendant Miranda warnings." Id. at 40.

Among the six facts in Mittel-Carey that the First Circuit found dispositive, "the element that carrie[d] the most weight [wa]s the level of physical control that the agents exercised over the defendant during the search and interrogation." Id. The defendant had been "ordered to dress, go downstairs, and was told where to sit; he was physically separated from his girlfriend and not allowed to speak to her alone; and he was escorted by agents on the three occasions that he was permitted to move, including while he used the bathroom." Id. Accordingly, "[w]hile an interrogation in a defendant's residence, without more, certainly weighs against a finding of custody, the level of physical control the agents exercised over [the defendant] in this case weighs heavily in the opposite direction, despite the fact that the control was exercised inside defendant's home." Id.

***10** In this case, applying the factors identified by the First Circuit and considering the totality of the circumstances, the Court concludes that a reasonable person in Johnson's circumstances would have understood himself to be in custody. While the interrogation occurred within Johnson's home, a fact weighing against a finding of custody, the agents exercised immediate and total control over both Johnson's home and Johnson himself. They arrived earlier in the morning than the officers in Mittel-Carey.[5] At least ten armed officers in ballistics vests entered as soon as Johnson opened the door. Once inside the home, the officers separated Johnson and his partner, moving them to opposite ends of the home while simultaneously occupying every room of the house, and physically took Johnson into the kitchen.

Thereafter, over the next two hours, the agents executing the search "exploited [the] cozy confines" of Johnson's "small" home and "invaded the defendant's personal space." Hughes, 640 F.3d at 436 (describing factors that would weigh toward custody during an interrogation at defendant's home). Johnsons was not permitted to speak with Kryzak, either with or without the agents. Johnson remained dressed only in gym shorts, apparently the clothing in which he had slept. The only means out of the kitchen led to other officers—within Johnson's home, in front of the home, and even behind it—and the officers shut the one open door out of the kitchen, closing off that space. Kryzak, meanwhile, was under the watchful eye of at least one officer in the living room. When she wanted a robe or, later, to dress, she required permission from the officers. When Johnson needed the bathroom, they escorted him there.

The totality of the officers' actions in this case imposed more physical control—the factor that the First Circuit found strongest in the Mittel-Carey custody analysis—than the control exercised by the officers in Mittel-Carey itself, making the custodial nature of Johnson's interrogation particularly apparent. Shortly after sunrise, a contingent of armed officers parked in Johnson's driveway, blocking in his car; entered his home; separated him from his partner, the only other person in the house; maintained control of his cell phone; did not permit him to move about the home or outside his home; confirmed that he was not going to work; recorded his interrogation—or not, as they saw fit; and, for a substantial period of time, including nearly all of the interrogation, kept him mostly undressed, wearing only the gym shorts in which he slept. Because of this level of physical control, Johnson recognized what the objective facts made clear—he could not and would not leave without the officers' permission.

Indeed, the agents' interactions with Johnson implicitly confirmed his detention. At no time did the officers tell Johnson he was free to leave or move about the house, nor did they permit him to do so. Recognizing the limits on his movement, Johnson asked to call his employers, explaining to the officers he did not think he was going to work that day. Even though Johnson was not then under any formal arrest, the agents did not respond by correcting Johnson's misimpression and telling him that he was free to leave for work if he wished. Rather, by retrieving

Johnson's employers' phone numbers from his iPhone and providing them to Johnson, the officers confirmed to Johnson that, despite the absence of formal arrest procedures, he was not free to leave and would not be going to work that day.

***11** Theoretically, despite having been told by law enforcement officers that he was not free to move about within his home and, effectively, that he could not leave for work, Johnson could have stood up during his interrogation, shirtless in gym shorts with slippers under his feet, without his phone, wallet, or car keys (useless to him in any event), and walked out the back door into the raw mid-50s April day, where he would likely encounter the officer guarding the rear of his home. But no reasonable person would do that, because a reasonable person in Johnson's position would have believed that he was in custody, "comparable to a formal arrest," Guerrier, 669 F.3d at 6, and therefore not free to leave.[6] Other factors also weigh in favor of finding that Johnson was in custody: the nearly two-hour duration of the interrogation,[7] the agents' statements made to elicit cooperation, and the police vehicles blocking his car into his driveway. Accordingly, evidence of the statements Johnson made at his home without having been informed of his Miranda rights must be suppressed.[8]

2. At the Framingham Police Department

Johnson finally seeks to suppress the statements he made to the polygraph examiner at the Framingham Police Department. Doc. No. 88 at 8. He argues that the agents used a deliberate two-step process by first eliciting statements from him at his home, before informing him of his Miranda rights, and then questioning him again on the same topics at the police station. Id. Allowing as evidence his statements made at the police station, he argues, would therefore violate the prohibition in Missouri v. Seibert, 542 U.S. 600 (2004), on such deliberate two-step strategies. Id.

***12** "[I]n the absence of coercion or improper tactics by law enforcement in obtaining an initial statement, a subsequent statement is admissible if the defendant was advised of his Miranda rights and knowingly and voluntarily waived those rights. However, suppression may be proper when police deliberately employ a two-step interrogation tactic designed to circumvent Miranda warnings." United States v. Faust, 853 F.3d 39, 47–48 (1st Cir. 2017) (citations omitted). The four-justice plurality in Seibert laid out a test based on the circumstances of the two interrogations that considers "(1) the completeness and detail of the questions and answers in the first round of interrogation; (2) the overlapping content of the two statements; (3) the timing and setting of the first and the second interrogations; (4) the continuity of police personnel; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first." Id. at 48. Justice Kennedy, who provided the fifth vote for Seibert, described "a narrower test" in which only "the deliberate use of a two-step interrogation creates a presumptive taint." Id.

Although the First Circuit has "not settled on a definitive reading of Seibert," id., Johnson's argument fails under both the plurality's approach and Justice Kennedy's narrower approach. First, none of the evidence before the Court suggests that the agents used a deliberate two-step strategy to elicit incriminating testimony from Johnson, satisfying Justice Kennedy's test. See United States v. Jackson, 608 F.3d 100, 104 (1st Cir. 2010) ("Under Justice Kennedy's test, the lack of any pre-planned evasion of Miranda defeats" a Seibert claim).

Next, the factors in the plurality's test similarly weigh against suppression. The second interrogation occurred about three hours after the first interrogation ended and was conducted at a different location by an agent who was not present for the first interrogation. At no point during the second interrogation were Johnson's statements during the first interrogation mentioned, and there was no suggestion that the second interrogation was a continuation of the first or otherwise intended to build on the first. The second interrogation focused on whether Johnson ever had sexual contact with minors, while the first one focused on the child pornography that was the subject of the search. See Faust, 853 F.3d 39, 48–49 (no Seibert issue where the second interrogation was in a different setting, had different questions, and did not utilize responses from or otherwise continue the first); United States v. Verdugo, 617 F.3d 565, 575 (1st Cir. 2010) (no Seibert issue where the second interrogation was over an hour after the first and in a different location).

As a result, because Johnson's second interrogation was made after he was informed of his Miranda rights, and because the circumstances of the two interrogations do not require suppression under Seibert, his challenge to the use of the statements he made at the Framingham Police Department fails.

IV. CONCLUSION

In accordance with the foregoing, Johnson's motion to suppress physical evidence, Doc. No. 92, is DENIED. Johnson's motion to suppress statements, Doc. No. 87, is ALLOWED IN PART by suppressing the evidence of Johnson's statements obtained during the search of his home, and OTHERWISE DENIED. The Court will hold a final pretrial conference on June 7, 2019, at 2:00 p.m. in Courtroom 13. Trial will commence on June 10, 2019, at 9:00 a.m.

SO ORDERED.

All Citations

Slip Copy, 2019 WL 917175

Footnotes

1 The following witnesses testified at the hearing: Special Agent Janet Connolly; Special Agent James Richardson; Patricia Kryzak, the defendant's life partner; and Walter Johnson, the defendant. See generally Doc. No. 116.

2 Connolly testified at the hearing that it "wasn't sunny out," Doc. No. 116 at 22, and that she did not "believe that it was a sunny day," id. at 70, while Johnson testified that "it was not a warm morning," id. at 202. The Court takes judicial notice under Fed. R. Evid. 201(b)(2) that weather data from the nearest weather stations to Framingham—those in Norwood, Bedford, and Worcester—indicate that the weather at about 6:00 a.m. on April 27, 2017, was 52 or 53 degrees with overcast skies and mist or fog. Local Climatological Data, National Centers for Environmental Information, https://www.ncdc.noaa.gov/cdo-web/datatools/lcd (last visited February 1, 2019); see also Sharfarz v. Goguen (In re Goguen), 691 F.3d 62, 71 n.6 (1st Cir. 2012) (taking notice of publicly available weather records as evidence of weather conditions). There is no evidence before the Court that suggests the inaccuracy of these records.

3 Johnson further argues that he demonstrated a subjective expectation of privacy by sending the messages to Woodhead anonymously. Doc. No. 93 at 10. But this subjective expectation would be relevant only if Johnson had also demonstrated that his expectation was also recognized as objectively reasonable. Rheault, 561 F.3d at 59. Without that showing, Johnson's manifestation of his subjective expectation is not relevant.

4 Johnson does not separately challenge the validity of the April 26, 2017, warrant, Doc. No. 93-4, that authorized the April 27, 2017, search of his 20 Burdette Avenue home.

5 The circumstances of this case lack some of the coercive details of Mittel-Carey—for example, in this case, the agents did not enter Johnson's bedroom while he slept, they did not unholster any weapons, and the agents' statements about cooperation were meaningfully different. Nonetheless, the agents clearly exhibited a similar or greater "level of physical control ... over the defendant during the search and interrogation." Mittel-Carey, 493 F.3d at 40. Accordingly, after weighing these details, the Court concludes that their absence is not dispositive.

6 The First Circuit has recognized the tension during the execution of a search warrant between officers' physical control of a home, which is both "necessary for evidence preservation and officer safety" and permitted by the Fourth Amendment, and the right against self-incrimination, both protected by the Fifth Amendment and implicated by a custodial interrogation. See Mittel-Carey, 493 F.3d at 40 (describing the need for the government to balance these interests). Even so, neither the Court's ruling nor the law it applies dictate that the execution of every search warrant creates a custodial setting. Indeed, many cases in this Circuit have found, on different facts than those of this case, that an interrogation during the execution of a search warrant was not custodial. Cf. Hughes, 640 F.3d at 436–37 (finding no custody where, during questioning in a "relaxed and non-confrontational" atmosphere, the defendant was allowed to go outside to smoke a cigarette and to determine on his own when questioning would resume); United States v. Nishnianidze, 342 F.3d 6, 14 (1st Cir. 2003) (finding no custody where officers did not "restrain [defendant's] movement"); United States v. Crooker, 688 F.3d 1, 11 (1st Cir. 2012) (finding no custody where defendant "moved freely about his property throughout the search" and "officers asked [defendant] if they could talk to him"); United States v. Kearney, Crim. No. 08-40022-FDS, 2009 WL 4591949, at *4 (D. Mass. Nov. 30, 2009) (finding no custody where officers told defendant "that he was free to leave at any time").

7 The interrogation of Johnson plainly continued during at least some portion of the one hour that the agents elected not to record. During this period, the agents confronted Johnson with the fact that they had not found the folder in which he

had said he stored child pornography and asked him where to find the folder. They also explained the purposes of a polygraph, requested and obtained his consent to a polygraph examination, and suggested that honesty and cooperation could benefit him.

8 Because "failure to give adequate Miranda warnings does not require suppression of the physical fruits of those unwarned statements," United States v. Hinkley, 803 F.3d 85, 91 (1st Cir. 2015), the suppression of evidence of the statements Johnson made at his home does not require suppression of any of the physical evidence found at his home, even if agents would not have found the evidence but for Johnson's statements—a question that the Court need not and does not decide.

CERTIFICATE OF COMPLIANCE

Re: Commonwealth v. Jorge Delgado-Rivera,
No. SJC-12919

I, Jamie Michael Charles, hereby certify that the foregoing brief complies with the rules of court which pertain to the filing of briefs, including, but not limited to: Rule 16(a)(13) (addendum); Rule 16(e) (references to the record); Rule 18 (appendix to the briefs); Rule 20 (form and length of briefs, appendices, and other documents); and Rule 21 (redaction).

Compliance with the applicable length limit of Rule 20 was ascertained by use of Courier New size 12 font which produced not more than 10.5 characters per inch on a total of 21 non-excluded pages.

By: \s\ JAMIE MICHAEL CHARLES
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Dated: March 27, 2020

CERTIFICATE OF SERVICE

Re: Commonwealth v. Jorge Delgado-Rivera,
No. SJC-12919

I, Jamie Michael Charles, hereby certify that on this day I served the Commonwealth's brief and record appendix on the defendant by causing PDF copies of both documents to be sent via Tylerhost and electronic mail to his attorney:

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Signed under the pains and
penalties of perjury:

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Dated: March 27, 2020