Case Number: SU-2022-0063-CA
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STATE OF RHODE ISLAND
SUPREME COURT

STATE OF RHODE ISLAND	:	
	:	
v.	:	**SU-2022-0063-CA**
	:	**(P1-2020-1885AG)**
MARKLYN BROWN	:	

ON APPEAL FROM AN ORDER ENTERED IN PROVIDENCE COUNTY SUPERIOR COURT

BRIEF OF APPELLANT STATE OF RHODE ISLAND

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KEY TO THE TRANSCRIPT

The transcript in this case consists of one volume from the suppression hearing which the State will refer to as follows:

Tr. 12/9/21:	Suppression Hearing Heard Before The Honorable Justice Robert B. Krause December 9, 2021

TRAVEL OF THE CASE

The defendant, Marklyn Brown, was indicted by a Providence County grand jury on murder, conspiracy, assault, and firearms charges in July 2020. (Ind. No. P1-2020-1885AG). On December 9, 2021, the Superior Court (Krause, J.) granted defendant's motions to suppress statements he made to the Providence Police during an interview and during a recorded conversation that he had with his mother at the police station. The State appealed and the matter was placed on the plenary calendar following a prebriefing conference on October 11, 2022.

STATEMENT OF FACTS

On February 4, 2020, the Providence Police obtained an arrest warrant for defendant after identifying him as a suspect in the September 29, 2019, murder of nineteen-year-old Berta Pereira-Roldan on Detroit Avenue. On February 6, two days before defendant's twenty-sixth birthday, police arrested him at the home he shared with his mother and younger siblings and transported him to the police station. (Tr. 12/9/21, 68-69). Providence Police Detective Theodore Michael thereafter escorted defendant to an interview room and "advise[d] him that we would be doing a video recording." (Tr. 12/9/21, 69-70). The interview spanned approximately seven hours, beginning at 9:43 a.m., with several breaks, including lunch and bathroom breaks, and a fifty-minute meeting between defendant and his mother, which occurred in the same interview room. (Tr. 12/9/21, 75). *See also*

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Transcript of Interview (Attached as Exhibit A). It is undisputed that the officers advised defendant of his *Miranda* rights and that defendant waived those rights and agreed to speak with the detectives. (Tr. 12/9/21, 73-74).

On November 1, 2021, defendant filed a motion to suppress the entirety of his interview, claiming the police violated his constitutional rights against self-incrimination and to counsel.[1] Five weeks later, on the morning of the hearing on December 9, Brown also filed a motion to suppress his conversation with his mother, which Brown claimed was recorded without consent in violation of both his Fourth Amendment right to privacy and laws regulating electronic surveillance.

At the conclusion of a hearing on the motions to suppress, the Superior Court suppressed all but the first 22 pages of the interview transcript of defendant's statements to the police, and pages 153-160, after concluding that defendant invoked his right to remain silent when he stated: "I want to talk to my mom. That's all I want to talk to. * * * Yeah, 'cause that's the only person I really want to talk to as of, like, right now. Only person I want to talk to." (Tr. 12/9/21, 83). The court found that language "explicitly restrictive" and determined that defendant "clearly implied" that he did not want to talk to the detectives any longer. (Tr. 12/9/21, 83).

[1] The defendant never requested to speak with an attorney and the defense did not pursue this aspect of the motion to suppress at the hearing, therefore it was never addressed by the trial justice.

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In addition to pages 23-117 and pages 160-281, the court also suppressed defendant's fifty-minute conversation with his mother—pages 117 to 153 of the interview transcript. (Tr. 12/9/21, 87-95, 97, 99). Both the defense attorney and the court apparently accepted Detective Michael's uncontradicted testimony that he "did advise him [defendant] that we would be doing a video recording," as he initially led him to the interview room, where defendant later met with his mother. (Tr. 12/9/21, 69, 88). But the court took issue with the fact that Brown was not later reminded that there was still a video recording once his mother arrived. (Tr. 12/9/21, 88).

> [DEFENSE COUNSEL]: Judge, what I would point out is the statutes are clear. Somebody has to be given actual notice that the interview is being recorded. Even if Mr. Brown was given actual notice that his interview with the police was being recorded - -
>
> THE COURT: He wasn't. With the mother he wasn't.
>
> [DEFENSE COUNSEL]: No. I was going to say, even if he was with the police, was being recorded, he was not given any notice, nor was the mother that their interview was being recorded.

(Tr. 12/9/21, 88). The court also found that by simply leaving defendant and his mother alone in the interview room and saying, "we are leaving this room," any subjective expectation of privacy defendant had, was also reasonable. (Tr. 12/9/21, 92-94).

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ARGUMENT

The state is only challenging the suppression of defendant's conversation with his mother. Whether that conversation with his mother should have been suppressed—pursuant to either the Fourth Amendment or electronic surveillance statutes—requires this Court to determine whether defendant had a reasonable expectation of privacy when speaking to his mother in the interview room.[2] The Superior Court erred in holding that he did.

Standard of Review. When reviewing a decision granting or denying a motion to suppress, this Court defers to the trial justice's factual findings, applying a clearly erroneous standard. *See State v. Depina*, 245 A.3d 1222, 1226 (R.I. 2021). A

[2] Despite the fact that citizens of this state have "a double barreled source of protection which safeguards their privacy from unauthorized and unwarranted intrusions: the fourth amendment of the Federal Constitution and the Declaration of Rights which is specified in the Rhode Island constitution" (*State v. Luther*, 351 A.2d 594, 594-95 (R.I. 1976)), even Rhode Island's wiretap statute mirrors the Fourth Amendment's "reasonable expectation of privacy" parameters. "'Oral communications' means any oral communication uttered by a person *exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation*, but the term does not include any electronic communication." R.I. Gen. Laws § 12-5.1-1 (10) (emphasis added); *see also State v. Marini*, 638 A.2d 507, 514-15 (R.I. 1994) ("Clearly, defendant's statements at the police station were not 'wire communications' as defined in § 12-5.1-1(a). Furthermore, the term 'oral communications,' as defined in §12-5.1-1(b), means 'any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.'"); *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (legislative history of wiretap statute shows that it intended the definition of oral communication to parallel the *Katz* "reasonable expectation of privacy test.").

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decision is clearly erroneous, despite evidence to support it, when this Court finds that a mistake has been made "on the basis of the entire evidence." *State v. Morillo*, 285 A.3d 995, 1003 (R.I. 2022). However, with respect to questions of law and mixed questions of law and fact involving constitutional issues, this Court conducts a *de novo* review of the record. *Id.*

The determination of whether there is a reasonable expectation of privacy depends upon a two-tiered analysis: 1) the defendant must have a subjective expectation of privacy, "*and* 2) that expectation must be one 'that society accepts as objectively reasonable.'" *State v. Bertram*, 591 A.2d 14, 19 (R.I. 1991) (quoting *California v. Greenwood*, 486 U.S. 35, 39 (1988)) (emphasis in original); *see also Katz v. United States*, 389 U.S. 347, 353 (1967). In reaching its conclusions, the court should look to the "totality of the facts and circumstances of each case." *State v. Patino*, 93 A.3d 40, 51 (R.I. 2014).

Subjective Expectation of Privacy. After initially waiving his *Miranda* rights, the trial justice found that defendant asserted his right to remain silent by requesting to speak with his mother, who was the only person he wanted to talk to.[3] (Tr.

[3] Although the state is not pursuing its challenge to the trial justice's determination that police questioning should have ceased at that point, when the totality of the circumstances are then considered in the context of the statements to his mother it should be noted that defendant's request was tempered with the qualifying statement, "as of, like, right now." (Exhibit A, p. 22). *See State v. Sabetta*, 680 A.2d 927, 932 (R.I. 1996) ("We are of the opinion that the words 'right now' operated to qualify and limit defendant's intent to remain silent only in regard to the moment.").

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12/9/2021, 83, 91). In conjunction with that, the hearing justice found that defendant had a subjective expectation of privacy based upon the fact that he was left alone with his mother in the interview room and the detectives told defendant they were leaving the room, to which he responded, "Fair enough. I appreciate that." (Tr. 12/9/21, 92). However, defendant did not request and the officers did not represent that the conversation would be private or that the recording, which defendant had been informed of at the beginning of the interview, would end, as discussed further *infra*.

[DETECTIVE]: Boss. Mom's here.

Mr. Brown: All right. How can I speak with her?

[DETECTIVE]: We're gonna bring Mom in here.

Mr. Brown: Okay.

[DETECTIVE]: We're gonna leave this room.

Mr. Brown: Fair enough. I appreciate that.

Exhibit A, pp. 116-17.

Additionally, in concluding that the defendant had an expectation of privacy, the trial justice did not consider all the facts of the case, as is required. *State v. Patino*, 93 A.3d at 51. After the meeting with his mother, one of the detectives asked defendant how "the f*** would I know" that defendant's mother was trying to help him to which defendant responded, "Camera." Exhibit A, p. 260.

> MR. BROWN: There's a camera in this room, and it's probably being voice-recorded. I know what you guys do in an interrogation room.

Exhibit A, p. 260.

The defendant also told the detective that he had "seen dudes getting interrogated in this room." Exhibit A, p. 261. "Them videos come out, trust me." Exhibit A, p. 261.

> MR. BROWN: They come out and we see them, a-, all, all the dudes that, that, you know what I'm saying, snitch. Uh, w-, we're gonna call it what it is. They sit right here. Camera's right ABOUT where it's at. And they…

Exhibit A, p. 261.

As he referenced the camera, defendant motioned his head upward to the right to the precise spot in the room where the camera was located, as can be observed on the video, which was transmitted as part of the record below. *See* Video, at 8:11:54.

The prosecutor referenced these statements, or attempted to, during the discussion regarding the admissibility of defendant's statements to his mother. Since defendant did not testify at the suppression hearing, the prosecutor indicated that "the only insight we have into what was in Mr. Brown's mindset on that day is what he tells Detective Zuena on page 260 and 261—," but the trial justice responded, "I don't think we have to go to page 261" and referred to the point when detectives left the room. (Tr. 12/9/21, 91).

> [PROSECUTOR]: I think, Judge, when you look at this in concert and with what Marklyn Brown says later on, about he knows how these

> interview rooms operate he knows how the police work, he knows - - he has seen the interview room - -
>
> THE COURT: Oh, I think you're jumping from first to home, without even going near second and forgetting about third before you get to Page 216 [sic].
>
> [PROSECUTOR]: Well, Judge, those are the only two points in time where we have a glimpse of what might be going on through their mind.
>
> THE COURT: Maybe you can't even consider what he says at page 260.
>
> [PROSECUTOR]: Understood, Judge. I'm just pointing out that that's the only area where we have an insight into his thoughts about—
>
> THE COURT: If you can even consider it.

(Tr. 12/9/21, 93).

Because he granted defendant's motion to suppress his statements to the police after finding he invoked his right to silence, the trial justice refused to consider those statements when deciding whether to suppress the defendant's statements to his mother. (Tr. 12/9/21, 91, 93). However, the exclusionary rule is "not intended to assuage the harm caused to persons who suffer as a result of an illegal search and seizure, . . . it instead serves to deter unlawful police conduct by prohibiting the use of illegally obtained evidence during the prosecution's *case-in-chief*." *State v. Huy*, 960 A.2d 550, 556 (R.I. 2008) (emphasis added) (citations omitted); *see also State v. Ditren*, 126 A.2d 414, 420 (R.I. 2015) (the exclusionary rule does not apply to

probation violation hearings, wherein the defendant is not entitled to the full panoply of rights inherent in a criminal trial).

The New Hampshire Supreme Court, in determining whether an individual could claim a "legitimate expectation of privacy in a particular place," indicated that they "view[ed] the facts from 'the omniscient perspective – what a judge considering a motion to suppress knows, ex post reality.'" *State v. Gates*, 249 A.3d 445, 451 (N.H. 2020) (quoting 6 Wayne R. LaFave, *Search and Seizure: A Treatise on The Fourth Amendment* § 11.3, at 162 (5th ed. 2012)). The exclusion of defendant's statements to the police from the state's case-in-chief did not preclude the trial justice from considering evidence relevant to defendant's subjective state of mind during the suppression hearing, where he was charged with considering the totality of the circumstances safely away from a jury's consideration. *Id*.

And while defendant's statements were made after the meeting with his mother, they referenced his expectations, or lack thereof, of privacy in the interrogation room not only before the meeting with his mother but even before arriving at the police station. The defendant indicated that, "I know what you guys do in an interrogation room" and that he had seen videos of "dudes getting interrogated in this room." (Tr. 12/9/2021, 260-61). He did not simply deduce, after the fact, that the room was not a private sanctuary and the trial justice erred in failing to consider these comments in his subjective expectation of privacy analysis.

However, even *assuming arguendo* that defendant had a subjective expectation of privacy in the police interview room, that expectation is not one society is prepared to accept as reasonable considering the circumstances of this case.

Reasonable Expectation of Privacy. "Justice Harlan, the *Katz v. United States* reasonable-expectation-of-privacy approach architect, stated that the question whether society would recognize a subjective expectation of privacy as reasonable 'must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.'" *United States v. Alabi*, 943 F. Supp. 2d 1201, 1276 (D.N.M. 2013) (quoting *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting)). "Generally, the federal courts continue to find a suspect has no reasonable expectation of privacy in areas controlled by the police." *Belmer v. Commonwealth*, 553 S.E.2d 123, 128 (Va. App. Ct. 2001). The United States Supreme Court's pronouncements in *Lanza v. New York*, 370 U.S. 139, 143 (1962) that "a jail shares none of the attributes of privacy of a home, an automobile, an office or a hotel room" and that "[i]n prison, official surveillance has traditionally been the order of the day" has survived the subsequent *Katz* decision. *See Hudson v. Palmer*, 468 U.S. 517, 527 (1984) (post-*Katz* decision citing *Lanza* with approval).

In *Belmer*, a juvenile's mother's boyfriend told police that the juvenile wanted to speak to an attorney and at that point, the detective "simply left them alone in the

room." *Belmer*, 553 S.E.2d at 129. As in the case *sub judice*, he "did not tell them to feel free to discuss the incident privately." *Id*. The Virginia appellate court held that despite defendant's subjective expectation of privacy, "[s]imply leaving a suspect alone with another individual while in police custody does not create a reasonable expectation of privacy that society is prepared to recognize" and that because the "only 'lulling' done by the detective was leaving appellant with his mother and her boyfriend, we cannot find as a matter of law that appellant's expectation of privacy was reasonable." *Id*.

> The whispered conversation between appellant, his mother, and her boyfriend occurred in the police station's interview room, a room designed for the disclosure, not the hiding, of information. The room had a one-way mirror. Detective Gandy did not suggest appellant could speak freely to his mother and her boyfriend without fear of eavesdropping. The police were in the middle of an investigation into an armed robbery, and appellant knew he was an object of that inquiry. He had no reason to believe this interrogation room was a 'sanctuary for private discussions.'

Belmer, 553 S.E.2d at 128-29.

Numerous state and federal courts have held that suspects did not have a reasonable expectation of privacy when simply left in interrogation rooms and police cars. Likewise, here, announcing that they were leaving the room, before then leaving the room, was legally insufficient to lull defendant into a reasonable expectation of privacy in the absence of misleading assurances. *See Ahmad v. Superior Court*, 215 Cal. App. 3d 528, 534-35 (1989) (no reasonable expectation of

privacy when minor's mother was escorted into interview room at police station, the investigating officer "indicated he would return in a few minutes and closed the door," in absence of representations or inquiries regarding privacy or confidentiality); *Davis v. State*, 121 So. 3d 462, 487 (Fla. 2013) (surreptitious recording of defendant with parents left alone in interview room was admissible since case "did not involve any specific or deliberate assurances of privacy"); *United States v. Swift*, 623 F.3d 618, 623 (8th Cir. 2010) (no expectation of privacy in interrogation room at police station where defendant recognized the likelihood that officers were watching him and co-defendant); *United States v. Delibro*, 347 F.App'x 474, 475 (11th Cir. 2009) (no basis to suppress defendant's conversation with his mother since there was no reasonable expectation of privacy within the "confines of an actively monitored interview room" at the police station where defendant was "well aware that law enforcement could be monitoring his conversations"); *Dickerson v. State*, 666 S.E.2d 43, 47 (Ga. Ct. App. 2008) ("simply leaving a suspect alone with [his mother] while in police custody does not create an expectation of privacy that society is prepared to recognize as reasonable"); *State v. Scheineman*, 77 S.W.3d 810, 813 (Tex. Crim. App. 2002) ("Although appellee was in custody, the complained-of statement was not made in response to interrogation by law enforcement but rather while appellee was alone with his co-defendant, nor was he conferring with his attorney while in police custody" and "[w]e do not believe

that society is prepared to recognize a legitimate expectation of privacy in conversations between arrestees who are in custody in a county law enforcement building, even when only the arrestees are present and they subjectively believe that they are unobserved").

"[A]s Fourth Amendment protection is also dependent on society recognizing the expectation as reasonable, it is not enough that a defendant desired or anticipated privacy." *Easterling v. Commonwealth*, 580 S.W.3d 496, 503 (Ky. 2019). The defendant in *Easterling* argued that the video recording of him talking with his family members in a police interrogation room, after invoking his Sixth Amendment right to an attorney, should be suppressed. The Kentucky Supreme Court held that, despite the lack of two-way glass or a sign indicating that conversations would be recorded, society's view is that a reasonable expectation of privacy does not exist in a police interrogation room. *Easterling*, 580 S.W.3d at 504; *see also Cuomo v. State*, 98 So. 3d 1275, 1281-82 (Fla. Dist. Ct. App. 2012) (following invocation of defendant's right to silence, police simply permitted a meeting with his mother and did not cross the line of what is permissible by actively manipulating circumstances and assuring privacy); *Larzelere v. State*, 676 So. 2d 394, 405 (Fla. 1996) (state did not act wrongfully when recording conversation between mother and son co-defendants when "appellant did not ask to speak to her son privately; they were simply placed in a cell together before a hearing."); *Lundberg v. State*, 127 So. 3d

562, 567 (Fla. Dist. Ct. App. 2012) (no deliberate fostering of expectation of privacy even though officer did vacate the room to grant defendant's request to speak with his girlfriend); *see*, *e.g.*, *United States v. Clark*, 22 F.3d 799, 802 (8th Cir. 1994) ("a person does not have a reasonable or legitimate expectation of privacy in statements made to a companion while seated in a police car"); *State v. McAdams*, 559 So. 2d 601, 602 (Fla. Dist. Ct. App. 1990) (after being Mirandized and opting to make no statement, defendants were placed in back of police car and recorded conversation did not violate any statutory or constitutional rights since there could be no expectation of privacy in a police car absent police conduct fostering an expectation of privacy); *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994) ("no reasonable expectation of privacy in a police car" even for someone not in custody).

The police, here, made no misrepresentations or false assurances regarding defendant's privacy. *Cf. Cox v. State*, 26 So. 3d 666, 676 (Fla. Dist. Ct. App. 2010) (detectives "repeatedly and convincingly assured [defendant] that no such recording was being performed" and offered co-defendant leniency if he could elicit incriminating statements from defendant); *People v. A.W.*, 982 P.2d 842, 848-49 (Colo. 1999) (detectives affirmatively told defendant that nobody was behind the two-way glass and that nobody would be listening to his conversation with his father); *State v. Calhoun*, 479 So. 2d 241, 243 (Fla. Dist. Ct. App. 1985) (defendant expressed desire to speak with his brother privately and police initiated second

meeting with brother); *North v. Superior Court*, 502 P.2d 1305, 1311 (Cal. 1972) (conversation between defendant and his wife occurred in detective's private office). In fact, they informed defendant that the conversation would be recorded when they initially led him to the interview room. He did not ask, nor did they offer to stop the recording when his mother came to speak with him. *Cf. State v. Munn*, 56 S.W.3d 486, 495 (Tenn. 2001) (defendant asked that the recording be turned off to speak with his mother by himself). At least in the *Miranda* context, "[p]olice are not required to rewarn suspects from time to time." *Berghuis v. Thompkins*, 560 U.S. 370, 386 (2010).

In this case, defendant did not even have a subjective expectation of privacy, as is apparent from his admissions to the detectives regarding his pre-existing familiarity with police interrogations. The trial justice erred by not considering those statements regarding his subjective belief at the pre-trial suppression hearing, regardless of whether those statements would be excluded from the state's case-in-chief at trial. But more importantly, defendant did not have a reasonable expectation of privacy that society is prepared to recognize in the police station interrogation room. He was *Mirandized* and Detective Michael told defendant that the interview would be recorded. (Tr. 12/9/21, 69). And once defendant's mother arrived at the station, the police merely said that they were leaving the room and then physically did so. They made no false representations nor offered any assurances of privacy.

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For these reasons, the court erred in granting Brown's motion to suppress his conversation with his mother.

CONCLUSION

For the reasons discussed above, as well as those that the State may hereafter raise, the State respectfully requests that this Court sustain its appeal, vacate the Superior Court decision, and remand the matter to the Superior Court.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT & COMPLIANCE WITH RULE 18(B)

1. This brief contains 3,878 words, excluding the parts exempted from the word count by Rule 18(b).

2. This brief complies with the font, spacing, and type size requirements stated in Rule 18(b).

/s/ Virginia M. McGinn

CERTIFICATE OF SERVICE

I certify that, on April 21, 2023, I filed this brief through the electronic filing system and served a copy through that system on Assistant Public Defender Kara Maguire. This document is available for viewing and/or downloading from the Rhode Island Judiciary's electronic filing system.

/s/ Brianna Messa-Mastronardi