19-P-624 Appeals Court

COMMONWEALTH vs. DEIBY DIAZ-ARIAS.

No. 19-P-624.

Suffolk. April 16, 2020. - September 25, 2020.

Present: Milkey, Shin, & Englander, JJ.

Controlled Substances. Search and Seizure, Affidavit, Probable cause, Warrant, Multiple occupancy building. Constitutional Law, Search and seizure, Probable cause, Admissions and confessions, Voluntariness of statement. Probable Cause. Practice, Criminal, Motion to suppress, Affidavit, Warrant, Admissions and confessions, Voluntariness of statement.

Indictment found and returned in the Superior Court Department on June 16, 2017.

A motion to suppress evidence was heard by Michael D. Ricciuti, J.

An application for leave to prosecute an interlocutory appeal was allowed by Elspeth B. Cypher, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by her to the Appeals Court.

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

Elizabeth C. Lazar (Apriel F. Jordan also present) for the defendant.

ENGLANDER, J. After a months-long investigation into a drug distribution ring in and around Boston, the police obtained and executed a search warrant for the defendant's apartment, which was located in a multiunit building in the Dorchester neighborhood of Boston. There they encountered the defendant, a woman who was apparently his wife, and an infant child. After the police told the defendant that his wife would be considered "liable" if the defendant did not show the police where any drugs were located, the defendant made incriminating statements -- including advising the police where drugs were located. A Superior Court judge ruled that the warrant affidavit did not establish probable cause to search the defendant's particular apartment within the multiunit building. In addition, after an evidentiary hearing the judge suppressed the defendant's statements on the ground that they were compelled against the defendant's will. We reverse both rulings.

Background. 1. The search warrant.[1] The warrant affidavit describes a detailed police investigation that spanned at least January of 2017, through March 9, 2017, when the warrant was executed. The investigation centered on a person known as "Carlos," who could be reached at a particular telephone number.

[1] The facts related to the search warrant are taken from the warrant affidavit, which is fifty-three pages long.

Once called, Carlos would identify a location for a drug transaction, would travel to the location in a vehicle known to the police, and would conduct the exchange.

The affidavit directly links the defendant to this distribution scheme. It details eight controlled drug buys from Carlos, and states that the defendant drove Carlos to, and was observed at the scene of, two of those controlled buys. The affidavit also links the defendant's apartment building at 289 Hancock Street, in Dorchester, to the distribution scheme. It describes how Carlos regularly drove from Lawrence to 289 Hancock Street in the morning, entered the building, remained there relatively briefly, and then left from 289 Hancock Street to travel to and engage in drug transactions. This pattern was observed on many occasions, by visual surveillance and through a global positioning system tracker that was attached to Carlos's vehicle (pursuant to a warrant). In some instances Carlos would leave from 289 Hancock Street in the morning to conduct various stops, return there during the day, and then leave again to conduct additional stops.

As a result of these observations, the question remained: which apartment was Carlos visiting in the multiunit building at 289 Hancock Street? The affidavit concluded that Carlos was visiting the defendant's apartment, and that the defendant's apartment was apartment 2R. The evidence supporting this

conclusion included: (1) the defendant had been observed participating in distributions with Carlos, (2) the defendant had been observed with Carlos outside 289 Hancock Street, and also had been observed entering the building, (3) the police observed the defendant's car parked in the lot at 289 Hancock Street, and (4) according to utility provider Eversource, the defendant was the liable party for utilities for apartment 2R.

The warrant affidavit goes on to describe how the police engaged in a ruse to obtain further information regarding where Carlos went once inside the building. An officer posed as a National Grid gas company employee and went to 289 Hancock Street, where he encountered Carlos as Carlos was exiting the building. The officer asked, "Do you smell gas?" Carlos answered no, but offered to let the officer into the building. The officer then followed Carlos into the common areas of the building, through two separate locked doors. Eventually the officer and Carlos came to the area outside apartment 2R, which Carlos identified as an apartment where he, Carlos, lived. Carlos made a telephone call and the defendant opened the door of 2R, after which the officer, who was standing in the hallway, spoke briefly to the defendant, who was standing in the doorway.

Based primarily upon the above information, the police obtained a warrant to enter and to search 289 Hancock Street, apartment 2R, for drugs and related evidence of drug

distribution. The police executed the warrant in March of 2017. Six or seven officers participated. Upon entering the apartment the police encountered the defendant, as well as an adult woman and an infant child.[2] A Spanish-speaking officer read the defendant the Miranda warnings, in Spanish, and the defendant confirmed that he understood them. The officers then began questioning the defendant, with a detective asking the questions in English and the Spanish-speaking officer interpreting. The officers told the defendant that they had a warrant, that they were looking for drugs, and that it would be "easier" if the defendant pointed out where the drugs were located. The defendant denied having any drugs. The officers then said that if they found drugs in their own search, the woman would also be "liable."[3] The defendant thereafter walked with the officers to

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[2] There was no direct evidence as to the defendant's relationship to the woman and child. The judge in his order describes the woman as the defendant's wife.

[3] The Spanish-speaking officer, Officer Cruz, testified at the suppression hearing. On direct examination he testified as above, using the word "liable." On cross-examination Officer Cruz adopted defense counsel's characterization of what Cruz had said to the defendant, as follows:

> Q.: "But then you I think just testified, and I want to say the exact words, threatened the female; is that correct?"
>
> A.: "Yes."
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> . . .

the kitchen and pointed to a box on top of the refrigerator. An officer located drugs in the box. The defendant said it was fentanyl. The defendant also identified a mixing agent and stated that he had paid $1,000 for the fentanyl.

The defendant moved to suppress both the evidence seized from the apartment and the communications he had with the officers during the search. In a thoughtful decision the motion judge held that the information obtained through the gas company ruse was obtained unconstitutionally and had to be excised from the warrant in evaluating probable cause. The judge then concluded that the remainder of the affidavit did not establish probable cause to search apartment 2R, because it contained insufficient information as to which apartment Carlos visited within 289 Hancock Street -- that is, which was the defendant's apartment. The judge also suppressed the defendant's communications with the officers, concluding that the defendant "did not voluntarily speak. While [the defendant] was fully advised of his Miranda warnings, the coercion exerted on him to

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> Q.: "And so you translate in Spanish, you are aware that Detective Lewis says I'm going to get them in trouble if you don't comply with us; is that right?"
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> A.: "Correct."
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> Q.: Then [the defendant] spilled the beans for lack of a better term; is that correct."
>
> A.: "Yes."

assist the police in conducting the search by wrongfully threatening his wife and child rendered that waiver involuntary."

The Commonwealth was granted leave for an interlocutory appeal.

Discussion. 1. Probable cause for the warrant. We first address whether the warrant affidavit established probable cause to search apartment 2R at 289 Hancock Street. Our review of the sufficiency of the warrant application "always begins and ends with the 'four corners of the affidavit'" (citation omitted). Commonwealth v. O'Day, 440 Mass. 296, 297 (2003). The question is whether the affidavit established probable cause to believe that relevant evidence of the alleged criminal activity would likely be found in the apartment. See id. at 298, 300. Probable cause "does not require a showing that evidence more likely than not will be found." Commonwealth v. Murphy, 95 Mass. App. Ct. 504, 509 (2019). Rather, probable cause is merely that "quantum of evidence from which the magistrate can conclude, applying common experience and reasonable inferences, that items relevant to apprehension or conviction are reasonably likely to be found at the location." Id. Additionally, "[i]n conducting our review, our cases emphasize that we should be practical, and nontechnical: '[i]n dealing with probable cause . . . we deal with probabilities. These are not technical; they

are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" Id., quoting Commonwealth v. Anthony, 451 Mass. 59, 68 (2008).

We conclude that the warrant affidavit established probable cause as to apartment 2R. In so ruling we need not address the interesting issue of whether the officer's ruse was constitutional,[4] because even absent the information from the ruse the warrant affidavit's remaining details were sufficient. As discussed above, Carlos was shown to be a drug dealer, engaged in the regular distribution of drugs by a "courier" type service. He was the seller in eight controlled buys in a two-month period. The affidavit also showed that Carlos did not sleep at 289 Hancock Street but that he regularly came to the building, that he would enter and then exit the building after a relatively brief period, and that frequently, Carlos would leave from 289 Hancock Street to drive around and deliver drugs.

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[4] Several cases in other jurisdictions have addressed ruses similar to the one at issue here. The question is whether the nature of the ruse operates to vitiate consent; when the ruse suggests imminent risk to a person's safety, perhaps it does. See, e.g., the United States Court of Appeals for the First Circuit's discussion of the case law in Pagan-Gonzalez v. Moreno, 919 F.3d 582, 591-595 (1st Cir. 2019). See also United States v. Harrison, 639 F.3d 1273 (10th Cir. 2011).

In this case, even if the ruse were deemed improper because it vitiated consent, there is an added wrinkle in that the ruse allowed the officer to gain access only to a common area within the apartment building; he did not enter the defendant's apartment.

Nothing more was required to establish probable cause to believe that Carlos was using some location within 289 Hancock Street as a staging point for the drug distribution -- it is readily and "practically" knowable or inferable from the extensive facts in the warrant affidavit. See Commonwealth v. Silva, 94 Mass. App. Ct. 270, 273 (2018) (sufficient nexus to apartment building where defendant was observed leaving from it and then traveling to drug purchase sites on multiple occasions). See also Commonwealth v. Escalera, 462 Mass. 636, 646 (2012) (reasoning similarly).

The affidavit also established probable cause specifically as to apartment 2R. True, assuming the ruse information is excised, there is no direct evidence linking Carlos to that particular apartment. But as discussed above, the probable cause standard is a practical standard, not a burden of proof at trial. Here the affidavit showed that the defendant likely lived at 289 Hancock Street. His car was regularly parked there. He was seen there, outside with Carlos. Most importantly, the defendant was the named party on the utility bill for apartment 2R. And of course, Carlos knew the defendant, and had been observed dealing drugs with him. Taken together, these facts gave rise to the reasonable inference that when Carlos went into 289 Hancock Street, he was going to apartment 2R. We reached a similar conclusion, upholding

probable cause to search an apartment in Silva, 94 Mass. App. Ct. at 274. There the defendant's apartment was identified because (1) the utilities for the particular apartment were registered under a name similar to the defendant's name, and (2) when a detective called the telephone number associated with that utility account, the woman who answered identified herself as the defendant. Id.

We are not persuaded by the defendant's arguments to the contrary. The defendant urges that absent the evidence learned from the ruse, all the affidavit showed as to apartment 2R was that the defendant paid the utilities for it, which the motion judge believed was insufficient. But as the Commonwealth points out, the defendant's responsibility for the utilities is significant; it shows a substantial nexus to a property. A person who is responsible for utilities is reasonably likely to be found at that property, at least some of the time. Indeed, utility bills are accepted in Massachusetts as one type of proof that the named payor resides in the Commonwealth -- for purposes of, for example, obtaining a driver's license. See Mass. G. Evid. § 201(b) (2020). Accordingly, in the circumstances here, the utility bill provided significant evidence of where the defendant lived for probable cause purposes -- particularly in light of the additional evidence of the defendant's presence at the building. Accord United States v. Graham, 553 F.3d 6, 13

(1st Cir.), cert. denied, 556 U.S. 1252 (2009) (calling utility bill "rock-solid indicator[] of residence").

The defendant also argues, relying on Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 600 (1991), that even if the utility evidence was sufficient to establish apartment 2R as the defendant's residence, mere evidence of residence is not sufficient to infer that evidence of drug distribution would be present there. However, while evidence that a person has engaged in drug dealing outside their residence is not alone sufficient to justify a search of that person's residence, here there was much greater evidence of a nexus between the drug distribution scheme and 289 Hancock Street. As noted, surveillance showed that Carlos did not sleep at the building but that his drug distribution regularly began from the building, and that he often returned there during the day. While one might imagine an innocent explanation for the observed behavior, one does not have to indulge the innocent explanations in evaluating probable cause. See Silva, 94 Mass. App. Ct. at 274. The evidence found in the apartment should not have been suppressed.

2. The voluntariness of the defendant's communications. We turn now to whether the judge properly suppressed the defendant's statements to the officers who executed the warrant. The defendant, of course, is protected against compelled self-

incrimination by the Fifth Amendment to the United States Constitution and by art. 12 of the Massachusetts Declaration of Rights. When in police custody, a defendant must be given Miranda warnings before being interrogated, and waiver of those rights must be knowing and voluntary. Commonwealth v. Newson, 471 Mass. 222, 229 (2015). Separately, the Commonwealth must show that any incriminating statements were made knowingly and voluntarily. Id. The Commonwealth has the burden of proving voluntariness, beyond a reasonable doubt. Commonwealth v. Monroe, 472 Mass. 461, 468 (2015). The test for voluntariness is "whether, in light of the totality of the circumstances . . . the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act" (citation omitted). Id. Relevant circumstances may include the "details of the interrogation," among others (citation omitted). Id.

Applying these standards, we conclude that the defendant's communications should not have been suppressed. The motion judge appears to have decided otherwise because he concluded that the officer's threat was "wrongful," since in his view there was no evidence that Diaz's wife was involved. Indeed, the judge may have reasoned that where the officer's statement was inaccurate, the conclusion of involuntariness followed as a matter of law. He stated, "[W]here Diaz's wife was not shown to

be involved with Diaz's alleged drug dealing and was caring for an infant who presumably would be left alone if both Diaz and his wife were arrested, the Court finds that Diaz did not voluntarily waive his Miranda rights and did not voluntarily speak."[5]

We do not agree. As a legal matter, the test is a totality of the circumstances test. Monroe, 472 Mass. at 468. There is thus no categorical prohibition on the police telling suspects that their family members may face criminal prosecution, and indeed, our courts have determined that statements are voluntary in the face of more overt threats than those at issue here.

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[5] Although the judge described this as a "finding," in context we consider it a legal conclusion on the ultimate issue before him, not a finding of fact. Such a legal conclusion is subject to de novo review. See Commonwealth v. Tremblay, 480 Mass. 645, 652 (2018); Commonwealth v. Durand, 457 Mass. 574, 596 (2010).

We are aware that the Supreme Judicial Court has at times stated, in the voluntariness context, that it gives "substantial deference" to a judge's "ultimate findings," and even to his "conclusions of law." E.g., Commonwealth v. Walters, 485 Mass. 271, 278 (2020). But our review of the case law indicates that this standard originated in situations where the judge's ultimate conclusion was imbued with subsidiary findings based upon testimonial evidence. We do not read the cases to require us to defer to a motion judge's legal conclusions, which would be inconsistent with Tremblay and many other cases. E.g., Commonwealth v. Medina, 485 Mass. 296 (2020) (voluntariness case). And indeed, the cases also say that we "make an independent determination of the judge's application of constitutional principles to the facts as found." E.g., Commonwealth v. Scott, 440 Mass. 642, 646 (2004); Commonwealth v. Williams, 388 Mass 846, 851 (1983). We apply that standard here.

Thus in Commonwealth v. Raymond, 424 Mass. 382, 395-396 (1997), the Supreme Judicial Court upheld a confession that was obtained after the police threatened the defendant that his mother would be charged as an accessory after the fact to murder. The court concluded: "[A] motive to protect his mother is not sufficient to find his confession involuntary. While the police may not expressly bargain with the defendant over the release of other individuals or make threats of arresting and charging others with no basis, where this type of conduct is absent, the police may bring to the defendant's attention the possibility that his relatives may be culpable" (quotation and citations omitted). Id. at 396. See Commonwealth v. Berg, 37 Mass. App. Ct. 200, 201, 204 (1994) (police threatened to arrest defendant's mother, who was sitting near him at their kitchen table during interrogation, for drug possession). See also United States v. Hufstetler, 782 F.3d 19 (1st Cir.), cert. denied, 136 S.Ct. 191 (2015) (discussing Federal case law and finding statements voluntary despite threats to charge defendant's girlfriend).[6]

[6] Of course, statements that threaten adverse consequences to a suspect's family members are part of the totality of evaluating whether a suspect's will has been overborne. Thus in Monroe, 472 Mass. at 467-468, the Supreme Judicial Court found a suspect's statement involuntary, in part due to threats that he would not be able to see his child. See id. at 469 (noting that "a particular tactic generally will not render a confession involuntary," but that "threats concerning a person's loved one[] may impinge on the voluntariness of a person's confession"). Such statements, however, must be weighed

The judge's statement here that there was "no evidence" against the defendant's wife was also incorrect as a factual matter. The police had learned over two-plus months of investigation that an ongoing drug distribution operation likely was being organized from apartment 2R. They had information that Carlos came and went from the apartment regularly. Upon executing the warrant the police also learned that the wife evidently resided in that apartment, and likely would have been present for whatever activities occurred there, including Carlos's comings and goings. The police may not have known that the defendant's wife was involved (and presence alone would not establish criminality) but their investigation was ongoing, and again, we are in the realm of reasonable inferences; under the circumstances it was not improper for them to suggest that the wife could be involved in drug possession or distribution. Cf. Commonwealth v. Pratt, 407 Mass. 647, 651-653 (1990) (sufficient evidence of wife's constructive possession of, and intent to distribute, contraband, where contraband was found in cottage where she and husband lived).

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together with all other factors. Monroe is plainly distinguishable, for example, as it involved a number of additional factors demonstrating involuntariness not present here, including much more extensive and invasive questioning of an "emotionally disturbed" eighteen year old. Id. at 471.

Reviewing the totality of the circumstances, we cannot agree that the defendant's communications were obtained in violation of constitutional standards. The defendant is an adult, who received his Miranda warnings and confirmed that he understood them. There was no indication that he lacked the ability to understand the officer's questions, or to answer them. The defendant initially denied having any drugs. The officers then made essentially one statement -- in effect threatening the defendant that if he did not cooperate, his wife would or could also be "liable." The defendant then immediately began showing the officers the drugs.

These are not circumstances where an interrogation has been found to compel self-incrimination. This was not a lengthy or pressurized interrogation. The defendant knew -- he had just been advised -- that he had a right to remain silent, and a right to speak to a lawyer. He did not invoke those rights. As discussed, it is not inappropriate for officers to advise a suspect that his family members faced legal risks, and here the officers were not without basis in doing so.[7]

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[7] As discussed, the voluntariness test is focused on whether the defendant's will was overborne; it does not derive from independent concerns about the propriety of police conduct. For that reason it is not clear how important it is whether the statements by the police were, or were not, accurate, although the cases suggest that the good or bad faith of the police may play a role in the analysis. See Raymond, 424 Mass. at 395. In

The officer's single statement is not a sufficient basis, under the circumstances, to conclude that the defendant's statements were involuntary.

Order allowing motion to suppress reversed.

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any event, we need not resolve the issue in this case, as here the statement by the officers was not unjustified.