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20-P-240 Appeals Court

COMMONWEALTH vs. WALKER BROWNING.

No. 20-P-240.

Suffolk. March 19, 2021. – June 14, 2021.

Present: Vuono, Hanlon, & Shin, JJ.

Robbery. Constitutional Law, Search and seizure, Investigatory stop, Probable cause, Arrest, Identification. Due Process of Law, Seizure of motor vehicle, Identification, Identification of inanimate object. Search and Seizure, Motor vehicle, Probable cause, Threshold police inquiry, Arrest, Fruits of illegal search. Evidence, Result of illegal search, Identification of inanimate object, Identification, Photograph. Identification. Bus. Practice, Criminal, Motion to suppress. Threshold Police Inquiry.

Indictments found and returned in the Superior Court Department on February 14, 2019.

Pretrial motions to suppress evidence and identifications were heard by Elaine M. Buckley, J.

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

Barry A. Bachrach for the defendant.

Ian MacLean, Assistant District Attorney, for the Commonwealth.

HANLON, J. The defendant, Walker Browning, was indicted for armed robbery, unarmed robbery, and assault and battery by means of a dangerous weapon. After a judge in the Superior Court denied his motions to suppress, he appeals, arguing that he was illegally seized when Boston police detectives boarded the bus he was traveling on, and that the identification procedures they later employed were unnecessarily suggestive. We affirm.

Background. "We recite the facts as found by the motion judge, 'supplemented by evidence in the record that is uncontroverted and that was implicitly credited by the judge,'" reserving certain details for later discussion. Commonwealth v. Leslie, 477 Mass. 48, 49 (2017), quoting Commonwealth v. Warren, 475 Mass. 530, 531 (2016). In September 2018, Boston police officers were investigating a series of recent robberies in the Mattapan section of Boston, on and around Blue Hill Avenue. There had been six or seven reports of a Black male in his twenties robbing women who were walking alone in that area late at night, usually after they had left a bus or the Massachusetts Bay Transportation Authority (MBTA) station at Mattapan Square. The robberies were occurring around approximately 10 P.M. and

into the early morning hours in late August and into September of 2018.

As part of the investigation, the detectives collected surveillance video recordings (videos) from businesses between Mattapan Square and the intersection of Blue Hill Avenue and Morton Street. Based on the robbery reports, combined with the videos, the officers developed a profile of the robber as a dark-skinned Black male in his early twenties, about five feet, seven inches or five feet, eight inches tall, with a slight build. They also noted that, on most of the videos, the suspect was carrying a black North Face backpack; on at least one video, he was wearing Adidas sneakers.

Detective Juan Seoane, while reviewing the videos, believed that he recognized the suspect, but could not identify him. Seoane testified at the hearing on the motions to suppress, "[W]hen I was watching the video, I knew the person. I just couldn't identify him, yet. . . . Especially, when we pulled the . . . video [from an area jewelry store], which was the most clear one . . . I made a comment, 'I know this guy. I deal[t] with him before. I just cannot place where.'"

On September 10, 2018, police officers "saturated" the Mattapan Square area in an effort to apprehend the suspect. Around 11 P.M., they received a report of a robbery in the area of Walk Hill Street; the report indicated that an individual had

stabbed a woman and stolen her purse. Seoane and Detective Matthew Fogarty, traveling in an unmarked police vehicle, immediately left the Area B-3 police station at the intersection of Morton Street and Blue Hill Avenue and began to patrol the nearby area of Walk Hill Street and Blue Hill Avenue.[1]

Roughly fifteen to twenty minutes after they received the report of the robbery,[2] Fogarty and Seoane were driving south on Blue Hill Avenue toward the town of Milton when they observed an MBTA bus leaving the bus stop near Hazelton Street by the Mattapan branch of the Boston Public Library; the bus was headed in the opposite direction, that is, roughly north on Blue Hill Avenue.[3] Earlier, in a video recorded immediately after a previous robbery, the detectives had seen the suspect trying to board a bus near the library. When they saw the bus, the detectives made a U-turn and "fell in" behind it; however, they did not turn on their unmarked vehicle's lights or sirens. The bus then pulled over at the bus stop at the intersection of Blue

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[1] In her findings of fact, the motion judge explicitly "credit[ed] and fully accept[ed] the testimony of Boston Police Detectives Fogarty and Seo[a]ne and adopt[ed] their testimony as part of [her] findings."

[2] There had been no reports that any other suspect had been stopped.

[3] Hazelton Street intersects Blue Hill Avenue one block north of Walk Hill Street, as one travels toward downtown Boston.

Hill Avenue and Morton Street. As the detectives passed it, Fogarty observed three individuals on board. One was a woman; one was a man, facing out into the street and he appeared to be approximately six feet, three inches or taller. The third individual was a Black male with a gray hood pulled over his head, sitting about three rows from the back of the bus. Fogarty testified that the individual generally matched the description of the suspect. "He matched the age description, as well as the complexion. He had a hood over his head, and he had the same physical stature. So, you know, that [five feet, seven inches, five feet, eight inches], slight build that we had seen in all the surveillance videos." Fogarty told Seoane, "We have to look at him."

As the bus pulled in at the bus stop, Seoane stopped "kind of towards the front corner" of the bus to let Fogarty out of the vehicle; Fogarty then walked in front of the bus and onto the sidewalk. Meanwhile, Seoane parked "a few spots up, in front of the bus." He noticed two people standing at the bus stop, but he was unsure whether they were waiting to board the bus.

Fogarty boarded the bus, showed the bus driver his badge, which was on his waistband, asked the driver how he was doing, and walked down the aisle of the bus. As Fogarty walked toward the back of the bus, the individual with the hood did not look

up, but kept his head "fixated on the back of the rail of the chair in front of him[, a]nd, even as [Fogarty] approached, he never raised his head." When Fogarty reached the back of the bus and turned to walk to the front, he noticed that the individual had a black North Face backpack like the one Fogarty had observed in the videos.[4] By this time, Seoane had entered the bus and was walking toward Fogarty. Fogarty made eye contact with Seoane and pointed to the backpack. Seoane pointed at the same individual's shoes, which were brown Adidas sneakers like those the officers had observed in a video.

Seoane then approached the individual, who was later identified as the defendant, and said, "Hey buddy, how you doing?" Seoane testified that when the defendant looked up, "I kn[e]w exactly who he [was], from [a] previous encounter and from the video, everything comes to that at once, as the person that I recognize[d] in the video before." In his capacity as a crisis negotiator, Seoane had previously interacted with the defendant for approximately forty minutes; Seoane had given the defendant his card at that time and then spoken with him more than once following that first interaction: specifically,

[4] Fogarty described the backpack as the backpack he had seen in the videos, that is, it had "[a] very similar design with the black North Face in the middle and a reflector on the bottom."

Seoane had encouraged the defendant to seek counselling and had offered to help him find employment.

When Seoane spoke to the defendant, the defendant responded, "What's up[?]" and Seoane believed that the defendant recognized him. As Seoane testified, "He [said] hello to me. He was very cordial, and then, he got, he stood up, and I asked him, 'Do you have any weapons on you?'" The defendant responded that he had a knife, and the detectives recovered it; they then asked the defendant to step off the bus with them, and he did. The detectives then read the defendant the Miranda warnings and walked him across the street to the police station.[5]

Beginning on September 11, 2018, police officers conducted five photographic arrays with the various robbery victims in an attempt to identify the suspect. Seoane assembled the arrays; each one had one photograph of the defendant and seven "filler" photographs of people who fit the defendant's description, taken from a police booking photograph database. Each array was presented by a "blind" administrator, i.e., "a detective who [was] unfamiliar with the case." Several victims identified the defendant in the arrays. One victim was shown two arrays on

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[5] The defendant was not handcuffed, as neither detective had handcuffs with him.

September 11, 2018, one around 12 A.M. and one around 9 A.M.[6] Another victim was unable to identify the defendant in an array, but she did identify the defendant's shirt as one that her assailant had worn. Specific facts relating to the identification procedures are discussed in more detail, infra.

The defendant was indicted on three counts of armed robbery, in violation of G. L. c. 265, § 17, two counts of unarmed robbery, in violation of G. L. c. 265, § 19 (b), and two counts of assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (b). He filed motions to suppress all of the evidence that resulted from his seizure and the identifications resulting from the out-of-court identification procedures; after a hearing, the judge denied the motions in a thoughtful memorandum. The defendant filed a petition for interlocutory appeal with a single justice of the Supreme Judicial Court, who allowed the petition and ordered the matter to proceed in this court.

Discussion. We accept the motion judge's findings of fact unless those findings are clearly erroneous. Commonwealth v. Jones-Pannell, 472 Mass. 429, 438 (2015). However, "[w]e conduct an independent review of the judge's application of

[6] Fogarty testified that the two showings were apparently due to "lack of communication" between different shifts of police officers.

constitutional principles to the facts found." Commonwealth v. Matta, 483 Mass. 357, 360 (2019), quoting Commonwealth v. Pinto, 476 Mass. 361, 363 (2017). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (citation omitted). Commonwealth v. Tremblay, 480 Mass. 645, 655 n.7 (2018).

1. Stop and seizure of the defendant. "Under the Fourth Amendment [to the United States Constitution] and art. 14 [of the Massachusetts Declaration of Rights], an individual has the right to be free from all unreasonable searches and seizures." Commonwealth v. Tavares, 482 Mass. 694, 702 (2019). "'[Article] 14 provides more substantive protection than does the Fourth Amendment in defining the moment' of seizure. Commonwealth v. Lyles, 453 Mass. 811, 812 n.1 (2009), citing Commonwealth v. Stoute, 422 Mass. 782, 786-789 (1996). Accordingly, we analyze the seizure under 'the more stringent standards of art. 14 with the understanding that, if these standards are satisfied, then so too are those of the Fourth Amendment.' See Lyles, supra, citing Commonwealth v. Williams, 422 Mass. 111, 115 n.9 (1996)." Commonwealth v. Evelyn, 485 Mass. 691, 697 (2020). Under that, more stringent standard, a seizure occurs when "an officer has, through words or conduct, objectively communicated that the

officer would use his or her police power to coerce that person to stay." Matta, 483 Mass. at 362. "[W]hile the attending circumstances of a police encounter are relevant, a 'seizure' must arise from the actions of the police officer." Id. at 363.

The defendant here argues first that the police improperly seized the bus and thus impermissibly seized him without reasonable suspicion when the detectives stopped their vehicle in front of the bus and then boarded it. The motion judge found that "the bus had stopped for its route at a designated bus stop and . . . the police did NOT stop the bus as part of the investigation." We see no error.

First, the officers did not in fact stop the bus. They were traveling in an unmarked vehicle, and they did not activate lights or sirens or otherwise indicate that the bus driver should pull over. Rather, the bus pulled into a designated bus stop as part of its scheduled route. Furthermore, there was no testimony, and the motion judge did not find, that the officers ever blocked the bus or otherwise prevented it from leaving. The record is clear that the officers briefly stopped near the front driver's side of the bus to let Fogarty out of the unmarked vehicle. Seoane then pulled a few "spots" ahead of the bus to park. Contrast Commonwealth v. Thompson, 427 Mass. 729, 733, cert. denied, 525 U.S. 1008 (1998) ("A stop occurred when

[o]fficers . . . positioned their cruiser behind the Buick, blocking its exit").

Second, the defendant was not seized in the constitutional sense after the detectives boarded the bus because the detectives did not "objectively communicate[]" their intention to "use . . . police power to coerce [the defendant] to stay" on the bus. Matta, 483 Mass. at 362. It is true, as the United States Supreme Court has noted, that police interactions on buses present unique concerns and that Court's analysis is instructive here. When officers engage a suspect on a bus, that person may prefer to stay on the bus, rather than leave and avoid the officers, for fear of being stranded on the journey. Florida v. Bostick, 501 U.S. 429, 435 (1991). A suspect in the cramped confines of a bus may also feel intimidated by a police presence because there is nowhere to go on the bus. Id. However, in that context, the degree to which a suspect feels free to leave "is not an accurate measure of the coercive effect of the encounter." Id. at 436. The inability to leave the cramped confines of a bus is the "natural result" of taking a bus, not of police coercion. Id.

In the circumstances presented here, we have no doubt that if the encounter had occurred on the street rather than in the bus, it would be constitutional. See United States v. Drayton, 536 U.S. 194, 204 (2002) ("The fact that an encounter takes

place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure"). A number of factors support that conclusion. First, there is no evidence that the detectives were in uniform.[7] While Fogarty did show the bus driver his badge, there is no evidence that either officer drew his weapon, used it in a threatening way, or even displayed a weapon at any time. See Bostick, 501 U.S. at 432 (indicating that whether officer drew weapon was one factor to consider when determining whether defendant was seized). The officers spoke briefly to the driver and then to the defendant in a nonconfrontational way. They never announced that they would be conducting a search of the bus or that the passengers were required to remain on the bus. Compare Drayton, supra (no seizure where "[n]othing [officer] said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter").[8] Furthermore, while

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[7] In fact, given that the detectives were traveling in an unmarked vehicle, that neither officer had handcuffs on his person, and that Fogarty had his badge on his belt -- as he did when he testified -- it appears unlikely that either detective was dressed in uniform. Specifically, Fogarty testified, "I enter[ed] the bus. I wear my badge on my waistband, which is where it is today."

[8] As the Court in Drayton continued, "Indeed, because . . . fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances." Drayton, 536 U.S. at 204.

Detective Seoane acknowledged on cross-examination that he had testified in the grand jury that "we kind of told the bus driver to hold on," there is no indication that the bus driver delayed his departure as a result or that the passengers were prevented from disembarking. The encounter was brief, and Seoane testified that he recognized the defendant within three or four seconds of boarding the bus. The fact that two people did not board the bus until the detectives and the defendant left the bus is irrelevant. The relevant inquiry is whether the detectives "objectively communicated" to the defendant that they would use their "police power to coerce [him] to stay." Matta, 483 Mass. at 362. We conclude they did not.

In sum, we agree with the motion judge that the defendant here was not stopped in the constitutional sense until the detectives asked him to get off the bus. At that point, it is clear that the officers had probable cause to arrest him. The motion judge so found, and the defendant does not argue otherwise. A robbery had taken place nearby, a very short time earlier; Seoane recognized the defendant from a video taken in the vicinity of an earlier, similar robbery; the defendant matched the physical description given of the robber in several prior incidents; and his backpack and sneakers matched those described in prior robberies and depicted on the surveillance videos. Finally, the defendant was leaving the area of the

robbery on a bus, as the robbery suspect had attempted to do at least one time before. See Commonwealth v. Davis, 481 Mass. 210, 214-215 (2019) ("A warrantless arrest is lawful under the Fourth Amendment to the United States Constitution and art. 14 of the Declaration of Rights if supported by probable cause. [P]robable cause exists, where at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense. A determination whether probable cause exists concerns the probability that an offense has been committed. These [determinations] are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act. Under this standard, police are not required to resolve all of their doubts before making an arrest." [Quotations and citations omitted]).

2. Identification procedures. "Where an identification arises from a police procedure . . . we review a judge's findings of fact to determine whether they are clearly erroneous but review without deference the judge's application of the law to the facts as found." Commonwealth v. Johnson, 473 Mass. 594, 602 (2016). The defendant first argues that the identifications must be suppressed as "fruit of a poisonous tree" because he was

unlawfully seized while riding the bus. Commonwealth v. Greenwood, 78 Mass. App. Ct. 611, 619, cert. denied, 565 U.S. 913 (2011), citing Wong Sun v. United States, 371 U.S. 471, 487-488 (1963). This argument fails because we have concluded that the defendant was not seized unlawfully.

The defendant next argues that the photographic arrays used by detectives in this case were unnecessarily suggestive. We disagree. "Where an out-of-court eyewitness identification arises from an identification procedure that was conducted by the police, the identification is not admissible under art. 12 of the Massachusetts Declaration of Rights if the defendant proves by a preponderance of the evidence that the identification was 'so unnecessarily suggestive and conducive to irreparable misidentification that its admission would deprive the defendant of his right to due process.'" Johnson, 473 Mass. at 596-597, quoting Commonwealth v. Walker, 460 Mass. 590, 599 (2011). A judge must consider the totality of the circumstances when determining whether an identification was unnecessarily suggestive. Johnson, supra at 597.

The defendant contends that the arrays were unnecessarily suggestive because his face was presented at a different angle than the other subjects and his face appears more "sinister" than the other subjects. We have reviewed the exhibits containing the arrays and agree with the motion judge that the

filler photographs showed "men of similar skin tone, age and complexion." The defendant's head is turned slightly to his right in his booking photograph. However, some of the subjects in the filler photographs also had their heads slightly turned to one side or had tilted their chins up so that they appear to be looking down their noses. Additionally, the background color in the defendant's photograph is not inconsistent with the other backgrounds and does not make the defendant appear more "sinister." Finally, while the defendant does have a slightly darker skin tone than several, but not all, of the subjects in the filler photographs, we cannot say that the difference rises to the level of being suggestive. Significantly, the "Witness Preparation Form" that accompanied the arrays cautioned, inter alia, "[P]hotographs may not always depict the true complexion of a person. It may be lighter or darker than shown in the photograph." We see no error in the judge's finding that the arrays were not unnecessarily suggestive on this ground.

The defendant next contends that it was unnecessarily suggestive to show two arrays to one victim. See Commonwealth v. Carter, 475 Mass. 512, 518 (2016) ("We discourage the use of repeated arrays containing a suspect's photograph, and the use of repeated arrays could make identification procedures unnecessarily suggestive if the police do not have good cause for the use of such procedure" [citation omitted]). Here,

however, the motion judge fully credited Fogarty's testimony that one victim was shown two arrays only due to a "lack of communication" between the officers. The two arrays were conducted hours apart by two different "blind" presenters. During the first array, conducted around 12 A.M. by Detective Al Young, the victim was "[one hundred percent] sure" when she identified the defendant's photograph. The second was conducted around 9 A.M. or 10 A.M. by Detective Monique Quinnes-Hamilton, and the victim again identified the defendant's photograph, this time with seventy percent certainty. On those facts, and especially given the fact that the victim's first identification was unequivocal, we cannot say that the repeated arrays were unnecessarily suggestive. Cf. Commonwealth v. German, 483 Mass. 553, 560 (2019) (deviation from best practices does not automatically render identification unnecessarily suggestive).

Finally, the defendant argues that it was unnecessarily suggestive to ask one victim to identify an article of the suspect's clothing. The Supreme Judicial Court has held that the identification procedure used to identify an inanimate object need not be the same as the procedure to identify a suspect. Commonwealth v. Thomas, 476 Mass. 451, 467 (2017). However, the identification of an object may raise due process concerns where identifying the object effectively would identify the defendant as the perpetrator of the crime and where the

police "needlessly and strongly suggested to the witness that the object was the object at issue." Id.

Here, the motion judge found that one victim did not see the suspect's face when she was robbed, and for that reason was unable to pick him out of a photographic array. However, during her initial description of the suspect, the victim described a multicolor shirt that he had worn. Fogarty, who was familiar with the video, then showed her footage from the night she was robbed (with the suspect's face covered). The victim was able to identify herself in the video and then identify her assailant by his shirt. Fogarty then retrieved the shirt that the defendant had been wearing under his hoodie when he was arrested, and the victim also identified that as the shirt that the man who robbed her was wearing.

We see no error. As this court recently has held, "although 'the police should take reasonable steps to avoid unnecessary suggestiveness in what will generally be a showup procedure, that is, the showing of the object alone or a single photograph of the object,' Thomas, [476 Mass.] at 467, 'it has never been the case that identification of an object must be subject to the same precautions given the identification of a person.' [Commonwealth v.] Simmons, [383 Mass. 46,] 51 [(1981), S.C., 392 Mass. 45, cert. denied, 469 U.S. 861 (1984)], quoting Commonwealth v. Carter, 271 Pa. Super. 508, 516 (1979)."

Commonwealth v. Alves, 96 Mass. App. Ct. 540, 550 (2019). See Commonwealth v. Amaral, 81 Mass. App. Ct. 143, 149 (2012).

As in Alves, here "[t]here was no evidence that [Fogarty] made any improper statements to [the] witness, nor of anything else beyond the mere fact of [the] witness being shown a single shirt that might have 'strongly suggested' the shirt was the defendant's. . . . On this record, we do not think the defendant has borne his burden of demonstrating that this was an 'extreme' case that rose to the level of a violation of due process." Alves, 96 Mass. App. Ct. at 550-551.

Order denying motion to suppress affirmed.