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SJC-11598

COMMONWEALTH vs. RENE GOSSELIN.

Bristol. April 10, 2020. - November 19, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, & Kafker, JJ.[1]

Homicide. Cellular Telephone. Constitutional Law, Assistance of counsel, Subpoena, Grand jury, Privacy. Grand Jury. Subpoena. Privacy. Search and Seizure, Expectation of privacy, Warrant. Practice, Criminal, Capital case, Assistance of counsel, Motion to suppress, Grand jury proceedings, Subpoena.

Indictment found and returned in the Superior Court Department on June 25, 2008.

A pretrial motion to suppress evidence was heard by Robert C. Cosgrove, J.; the case was tried before Thomas F. McGuire, Jr., J., and a motion for a new trial, filed on September 27, 2016, was heard by him.

Theodore F. Riordan for the defendant.
Mary E. Lee, Assistant District Attorney, for the Commonwealth.

[1] Chief Justice Gants participated in the deliberation on this case prior to his death.

LOWY, J. In 2012, a jury convicted the defendant, Rene Gosselin, of murder in the first degree in connection with the death of Frederick Thompkins. In this direct appeal from the conviction, with which we have consolidated his appeal from the 2019 denial of his motion for a new trial, the defendant claims that his trial counsel was ineffective for not moving to suppress (1) the defendant's optical records, which he alleges the police obtained unconstitutionally after the prosecutor misused the grand jury subpoena power; and (2) the defendant's cell site location information (CSLI), which the police included in its warrant application to search the defendant's home, where they located evidence critical to the jury's verdict. The defendant finally asks us to vacate his conviction or to order a new trial pursuant to G. L. c. 278, § 33E. We affirm the trial judge's denial of the motion for a new trial and decline to exercise our authority pursuant to G. L. c. 278, § 33E.

1. Background. a. Facts. On February 15, 2008, the police found the victim's decomposing body on the floor of his apartment, surrounded by a pool of blood. Experts estimated that the victim had been dead for about a week. At the crime scene, the police found a pair of eyeglasses with the right lens popped out and with the victim's bloody fingerprint on the left lens. The police also found a bloody footprint with the word "Vans" clearly visible; the footprint matched a size thirteen

Vans MacGyver shoe. The police never recovered the victim's primary cell phone.

The victim sold cocaine and marijuana discerningly by limiting his customer base and by only admitting into his apartment customers whom he knew. The defendant was a customer and someone who visited with the victim at his apartment from time to time. The defendant was also the only person who wore size thirteen shoes out of the approximately twenty people whom the police interviewed shortly after discovering the victim's body. According to the victim's cell phone records, the defendant and the victim called each other repeatedly in the week leading up to the victim's death, and the defendant was the last person the victim called on February 8, 2008, before he died.

The victim's cell phone records indicated that following the victim's final outbound call at 4:56 P.M. on February 8 to the defendant, the victim received four subsequent calls, some of which came from the defendant, and all of which went to voicemail. The records further indicated that the victim's cell phone connected to only one tower near the victim's apartment for all 210 calls made between February 1, 2008, and 5:46 P.M. on February 8, 2008. Starting with a 5:46 P.M. call, which came from the defendant, the victim's cell phone pinged off different towers from the 210 earlier calls. In fact, during the 5:46

P.M. call, the victim's cell phone pinged off two different towers, which indicated that the cell phone was moving.

Given that the defendant was the only person the police interviewed who wore size thirteen shoes, and considering the pattern of the victim's final calls, the defendant became a suspect following his first interview with the police. In furtherance of their investigation into the defendant, the Commonwealth submitted a motion to obtain the defendant's CSLI pursuant to the Federal Stored Communications Act, 18 U.S.C. § 2703(d), which a Superior Court judge granted on March 3, 2008. The CSLI indicated that the defendant's cell phone connected to a tower located just blocks away from the victim's apartment during the 4:56 P.M. call, and that the defendant's cell phone connected to the same towers as the victim's cell phone during the 5:46 P.M. call.

Using the CSLI to bolster other evidence that the police had already gathered, the Commonwealth obtained a warrant to search the defendant's apartment for evidence, specifically including the victim's primary cell phone and anything related to size thirteen Vans MacGyver shoes. On March 5, 2008, while officers were interrogating the defendant for a second time at the police station, other officers executed the search warrant at his apartment. Inside the apartment, the police found a shoebox for size thirteen Vans MacGyver shoes filled with the

defendant's paperwork and an empty eyeglasses case from Walmart Vision Center.[2] They did not recover any Vans MacGyver sneakers or the victim's cell phone.[3]

Near the beginning of the March 5 interrogation, the defendant admitted that he repeatedly called the victim in the days before February 8 because he owned a pair of eyeglasses with a lens that always popped out and had left them at the victim's apartment. Immediately thereafter, an assistant district attorney issued a grand jury subpoena to the defendant's optometrist at the Walmart Vision Center in North Dartmouth (Walmart), requesting call records[4] and any other information related to the defendant's eyeglasses, even though a grand jury had not yet convened to consider the defendant's case. That afternoon, State police troopers consulted an

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[2] Prior to trial, the defendant filed a motion to suppress the shoebox, contending that the apartment building's shared basement, where the police found the shoebox, was outside the scope of the warrant. The motion judge denied the motion to suppress, and we see no reason to differ based on our review pursuant to G. L. c. 278, § 33E.

[3] The officers interviewing the defendant confronted him with the empty shoe box, asking him if he knew what the box was. The defendant responded, "Obviously it was Vans, right? You got Vans footprints somewhere?" He further exclaimed, "You're bringing my shoes in here," and admitted that he at one point owned size thirteen Vans MacGyvers even if he did not know when he purchased them or where the actual shoes were.

[4] The defendant had called Walmart on February 8 at 5:37 P.M.

optician, who confirmed that the eyeglasses recovered from the crime scene matched the defendant's prescription and frame style received from Walmart pursuant to the grand jury subpoena.

The grand jury indicted the defendant on June 25, 2008, and the jury convicted the defendant on May 4, 2012.

b. Procedural history. More than two years before trial, defense counsel filed a motion to suppress, arguing that the search warrant affidavit did not provide enough information for the issuing magistrate to find probable cause that the defendant was responsible for the victim's murder or that evidence of the crime would be found in the defendant's apartment. The motion judge denied this motion on March 17, 2010.[5] More than four years after his conviction, the defendant filed a motion for a new trial, arguing that he had received ineffective assistance of counsel because his trial attorney had not additionally sought to suppress the optical records or the defendant's CSLI. The trial judge denied the new trial motion on January 9, 2019, because he concluded that any motions to suppress the optical records or the CSLI would have failed, such that any error was nonprejudicial and trial counsel was therefore not ineffective.

[5] Although defense counsel did not move to suppress the CSLI, at trial he successfully moved to limit how the Commonwealth could use the CSLI. The trial judge prohibited the Commonwealth from introducing evidence that would have estimated the locations of the defendant's and the victim's respective cell phones relative to the cell towers.

The judge nonetheless agreed with the defendant's argument that the Commonwealth had issued the grand jury subpoena for the improper purpose of furthering a police investigation and that the Commonwealth had followed an improper procedure by allowing Walmart to produce the records to the State police troopers who presented the subpoena, rather than to a court.

2. Discussion. a. Standard of review. When we analyze an appeal from the denial of a motion for a new trial consolidated with a direct appeal from a conviction of murder in the first degree pursuant to G. L. c. 278, § 33E, we do not ask whether counsel's behavior fell below that of an "ordinary, fallible lawyer," because that standard is less favorable to the defendant than the review we deploy pursuant to § 33E. Commonwealth v. Morales, 453 Mass. 40, 43-44 (2009), quoting Commonwealth v. Satterfield, 373 Mass. 109, 115 n.10 (1977). Rather, we assess whether any error occurred, based on the defendant's substantive claims, and if so, whether that error likely influenced the jury's conclusion so as to create a substantial likelihood of a miscarriage of justice. See Morales, supra at 44, citing Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014). One such error would be if defense counsel failed "to litigate a viable claim of an illegal search and seizure." Commonwealth v. Comita, 441 Mass. 86, 90 (2004), quoting Commonwealth v. Pena, 31 Mass. App.

Ct. 201, 204 (1991). Whether trial counsel so failed depends on whether the defendant can "demonstrate a likelihood that the motion to suppress would have been successful" when filed. Comita, supra at 91. We analyze that likelihood objectively, "given what [the attorney] knew or should have known at each relevant moment in time," Commonwealth v. Hardy, 464 Mass. 660, 665 (2013), quoting Ouber v. Guarino, 293 F.3d 19, 27-28 (1st Cir. 2002), and without "the advantage of hindsight," Commonwealth v. Adams, 374 Mass. 722, 729 (1978). There was no error.

b. Propriety of the grand jury subpoena. The defendant contends that his trial counsel provided ineffective assistance because he did not move to suppress the optical records that the Commonwealth received from Walmart in compliance with the grand jury subpoena for two reasons: (1) the Commonwealth issued the subpoena following improper procedure and for an improper purpose; and (2) the defendant had a reasonable expectation of privacy in his optical records, such that the subpoena violated his constitutional right against unreasonable searches and seizures.[6]

[6] Even if the defendant's allegations concerning the propriety of the grand jury subpoena had merit, suppression would be an improper remedy because the errors did not prejudice his defense, given that he had sufficient notice of the contents of the optical records prior to trial. See Commonwealth v.

i. Proper procedure for and purpose of a grand jury subpoena. The defendant argues that the Commonwealth followed improper procedure and issued a subpoena for an improper purpose, because the subpoena sought third-party records without judicial authorization, because the subpoena authorized the third party to produce the records to the issuing officer in lieu of bringing the records to the court, because the Commonwealth issued the subpoena the day before the grand jury first heard evidence on the defendant's case and weeks prior to the Commonwealth introducing the evidence to the grand jury, and because the prosecutor intended the subpoena to further a police investigation. No contention has merit.

In the context of a grand jury investigation, the Commonwealth may subpoena certain documents in the possession of third parties pursuant to G. L. c. 277, § 68, for the purpose of presenting evidence to the grand jury prior to the defendant's indictment without prior judicial approval and without producing them directly to the court. See Commonwealth v. Mitchell, 444 Mass. 786, 798 n.17 (2005); Commonwealth v. Lampron, 441 Mass. 265, 270-271 (2004) ("a subpoena for documents in the possession of a nonparty may be issued by a prosecutor over his or her own signature" pursuant to G. L. c. 277, § 68). Cf. Commonwealth v.

Burgos, 470 Mass. 133, 148 (2014); Commonwealth v. Smallwood, 379 Mass. 878, 888 (1980).

Odgren, 455 Mass. 171, 178-179 (2009) (discussing historical development of G. L. c. 277, § 68).[7] The procedure was proper.

The Commonwealth must issue the subpoena under G. L. c. 277, § 68, for a proper purpose, namely, "to present a witness or evidence to a court or grand jury," Mitchell, 444 Mass. at 798 n.17, so as to further the grand jury's function, which is to determine whether there was sufficient probable cause to issue an indictment, Commonwealth v. Cote, 407 Mass. 827, 832 (1990). See Matter of a Grand Jury Investigation, 427

[7] The defendant mistakenly contends that the Commonwealth must comply with the requirements of Mass. R. Crim. P. 17 (a), 378 Mass. 885 (1979), which requires seeking prior judicial approval and producing the records to the court, when subpoenaing third-party records for a grand jury. The Commonwealth only must do so postindictment, even though a defendant must comply with the rule when subpoenaing third-party records prior to trial at all stages of the criminal case. See Commonwealth v. Odgren, 455 Mass. 171, 179, 187 n.28 (2009) ("The result we reach in this case -- that, apart from grand jury proceedings, the Commonwealth must obtain judicial approval before seeking the production of records from a third party in advance of an evidentiary hearing or trial -- is compelled by the authorities . . . , including Mass. R. Crim. P. 17 [a]. Under our current law, the only way for a prosecutor, postindictment, or a defendant to subpoena third-party records without first obtaining judicial approval is to subpoena the records for production on the first day of trial, on the theory that the party subpoenaing the records wishes to use them at trial"). See also Preventive Med. Assocs., Inc. v. Commonwealth, 465 Mass. 810, 820 (2013) ("a party to a pending criminal case seeking pretrial production of third-party records under rule 17 [a] [2] -- whether the party be the Commonwealth or the defendant -- must file a motion seeking prior judicial approval"). A prosecutor may also issue a grand jury subpoena postindictment if the grand jury investigation is continuing and if the purpose of that subpoena is to aid that investigation in determining whether to indict the defendant further.

Mass. 221, 226 (1998). Prosecutors abuse their subpoena authority when they seek third-party records under G. L. c. 277, § 68, for matters that are not or will not come before a grand jury by "us[ing] an evidentiary hearing intended for one purpose to subpoena records for another, unrelated purpose" or to obtain evidence from third parties in preparation for trial. Odgren, 455 Mass. at 184. See Commonwealth v. Chamberlain, 86 Mass. App. Ct. 705, 709 (2014) (ethical or statutory violation when "the records could not have been intended to be produced at a grand jury, as none had been convened at the time").

The prosecutor issued the grand jury subpoena for the defendant's optical records on a day the grand jury were sitting and one day before the grand jury convened to consider the defendant's case. To the extent that the prosecutor also hoped to obtain evidence tying the defendant to the crime scene while the police interrogated the defendant, that does not mean that the Commonwealth issued the subpoena for an improper purpose, if it, in good faith, intended to present evidence to a sitting grand jury. Even though the subpoenaed documents were not immediately presented to the grand jury, the Commonwealth soon thereafter informed the grand jury about the evidence and formally introduced the documents to the grand jury thereafter. Prosecutors collect and analyze evidence in advance of presenting it to the grand jury, and there is nothing improper

about presenting that evidence in context. See Supreme Judicial Court Committee on Grand Jury Proceedings: Final Report to the Justices, at 29 (June 2018) (prosecutors may review grand jury materials prior to presentation, to prevent nonresponsive or inappropriate information from reaching grand jury).

ii. Suppression. Whether the Commonwealth issued the subpoena with improper procedure or for an improper purpose is a "statutory or ethical violation, not a constitutional one," Chamberlain, 86 Mass. App. Ct. at 709, for which suppression is not ordinarily the proper remedy, see Commonwealth v. Smallwood, 379 Mass. 878, 888 (1980). See also Odgren, 455 Mass. at 188. Moreover, the optical records are not privileged.

Nonetheless, the defendant contends that the subpoena, which neither is a search warrant nor demonstrates probable cause, violated his constitutional rights because it constituted a search of his optical records for which he had a reasonable expectation of privacy. See Commonwealth v. Doe, 408 Mass. 764, 768 (1990) ("Although grand juries have broad authority to conduct inquiries, they may not override constitutional rights . . ." [citations omitted]). See also Odgren, 455 Mass. at 188 (for subpoena that violated defendant's constitutional right, "evidentiary exclusion . . . might be appropriate"). Medical records and hospital records are summonsed into court by statute, without application of the protocol for privileged

records. See Commonwealth v. Dwyer, 448 Mass. 122, 136 (2006); G. L. c. 233, §§ 79, 79G. Pursuant to the third-party doctrine, the Commonwealth did not search, in the constitutional sense, the defendant's ophthalmological records when subpoenaing them from Walmart because he has no reasonable expectation of privacy in his optical prescription retained by Walmart in order to complete his purchase of eyewear. See Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018) (discussing third-party doctrine); Commonwealth v. Augustine, 467 Mass. 230, 244 (2014), S.C., 472 Mass. 448 (2015) (same).

The defendant nevertheless compares his ophthalmological records to CSLI, for which we have determined that people have a reasonable expectation of privacy under art. 14 of the Massachusetts Declaration of Rights, see Augustine, 467 Mass. at 232, and for which the United States Supreme Court found the same under the Fourth Amendment to the United States Constitution, see Carpenter, 138 S. Ct. at 2220-2221. Neither Augustine nor Carpenter formally abrogated the third-party doctrine; they merely declined to extend it to CSLI because its "unique nature" creates "an all-encompassing record of the holder's whereabouts." Carpenter, supra at 2217. See Augustine, supra at 251 ("we do not reject categorically the third-party doctrine and its principle that disclosure to a third party defeats an expectation of privacy"). Unlike CSLI

and other modern technological information, the government cannot use optical records to go "rummaging through the complex digital trails and location records created merely by participating in modern society." Commonwealth v. McCarthy, 484 Mass. 493, 499 (2020), citing Commonwealth v. Almonor, 482 Mass. 35, 46 (2019) (police using cell phone to reveal real-time location violates art. 14). Because the government can aggregate long periods of CSLI to create a "complete mosaic" of a person's life, people must have a reasonable expectation of privacy in that mosaic even if they do not have a reasonable expectation of privacy in each individual movement collected by the CSLI. McCarthy, supra at 503-504. Optical records, on the other hand, cannot provide a similar mosaic. We decline to abrogate the third-party doctrine for optical records, and therefore, the grand jury subpoena did not violate the defendant's constitutional rights and suppression is not warranted.[8]

For the reasons stated supra, trial counsel accordingly did not provide ineffective assistance by failing to file a motion

[8] The defendant also attempts to analogize to a situation in which a defendant unwillingly provided information to a medical provider, who then, without the defendant's knowledge or consent, turned the records over to the police for a criminal investigation. See Ferguson v. Charleston, 532 U.S. 67, 70-71, 78 (2001) (joint program created by police and hospital for purpose of collecting information from expectant mothers for law enforcement investigation). The analogy is inapposite.

to suppress the optical records based on the grand jury subpoena because such a motion would have been futile at the time of trial. See Comita, 441 Mass. at 90.

c. Suppression of the CSLI. The defendant asserts that his trial counsel provided ineffective assistance because he did not move to suppress the CSLI evidence, an error that caused a substantial likelihood of a miscarriage of justice because the search warrant for the defendant's home, which produced critical inculpatory evidence, would have lacked probable cause absent the CSLI. We disagree, because the search warrant affidavit demonstrated probable cause even with the CSLI evidence excised, and therefore the failure of trial counsel to file a motion to suppress did not create a substantial likelihood of a miscarriage of justice.

We assess whether the search warrant affidavit would have satisfied probable cause absent the unconstitutionally obtained CSLI.[9] See Commonwealth v. Estabrook, 472 Mass. 852, 865 (2015). We must therefore determine "whether there are enough facts in the affidavit traceable to sources independent of the illegally

[9] While the issue is a close one, we need not resolve whether there was probable cause within the four corners of the § 2703 warrant, because probable cause was satisfied in the search warrant with the CSLI excised from the affidavit in support of the search warrant. For the same reason, we need not reach whether Augustine applies retroactively to the defendant's case.

obtained CSLI to establish probable cause for the search warrant." Id. at 866.[10] "An affidavit in support of a search warrant . . . must demonstrate 'probable cause to believe [1] "that a particularly described offense has been, is being, or is about to be committed, and [2] that [search] will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit such offense."'" Id. at 870, quoting Augustine, 467 Mass. at 256. We review the affidavit de novo, evaluating its four corners "in a commonsense and realistic fashion," making reasonable inferences where

[10] A case currently pending before this court on further appellate review raises the issue whether, in cases such as Commonwealth v. Estabrook, 472 Mass. 852, 865-870 (2015), we have inappropriately omitted an additional, subjective prong of the independent source analysis discussed in Murray v. United States, 487 U.S. 533, 537 (1988), namely, whether the officers would have sought the warrant absent information obtained in the initial illegal search. See Commonwealth vs. Pearson, No. SJC-12930. The defendant has not raised such an argument here. Nonetheless, having considered the issue as part of our plenary review under G. L. c. 278, § 33E, we conclude that this case does not require us to resolve the open questions regarding the applicability and contours of such a subjective prong. Even examining the evidence in the light most favorable to the defendant, the officers would have sought the warrant for the defendant's apartment in the absence of the CSLI data. The defendant was the only suspect investigated with size thirteen shoes, the police knew from the victim's cell phone records that the last outbound call made by the victim was to the defendant, and, among other evidence, the defendant admitted that he had left a pair of eyeglasses at the victim's apartment, which the police found with a bloody fingerprint on the lens. There was no substantial likelihood of a miscarriage of justice.

appropriate to ensure that there is a sufficient nexus between the items sought and the criminal activity, and to ensure that the items would reasonably be expected to be in the place to be searched (citation omitted). Commonwealth v. Hobbs, 482 Mass. 538, 544 (2019).

The search warrant affidavit met these requirements without the CSLI. In ruling on the defendant's pretrial motion to suppress, the motion judge found sufficient evidence to establish probable cause and noted that any inference about the defendant's location drawn from the CSLI was "not essential to the magistrate's finding probable cause." The warrant affidavit recounted evidence that the victim limited whom he admitted into his apartment and how he did so, that there was no sign of forced entry, and that the defendant had no apparent defensive wounds, which constituted reasonable grounds to infer that the victim knew his assailant. The affidavit also described the distinctive Vans shoe sole impression, which the police believed with a reasonable degree of certainty came from a size thirteen Vans MacGyver shoe. The police had interviewed at least twenty people in connection with the murder, and the defendant was the only person known to them who had size thirteen shoes, and he was a customer and at least an acquaintance of the victim. Given that the victim maintained a tight circle of clientele and friends whom he allowed into his apartment, and that size

thirteen shoes are relatively uncommon, it was reasonable for the issuing magistrate to infer that the defendant may have made the footprint, indicating that he stepped through the crime scene at or about the time of the murder. The affidavit also included information that the defendant and the victim had recently argued about a drug sale, that the victim had likely died sometime around February 8, 2008, and that the last outgoing call from the victim's cell phone was made to the defendant at 4:56 P.M. Moreover, the warrant affidavit indicated that the defendant may have lied when he told the police that he called the victim numerous times around the time of the murder to plan a snowmobiling trip, a plan that the victim's best friend disputed.

The warrant affidavit sought authority to search the defendant's apartment for, among other things, (1) the victim's cell phone, which was missing and could have critical evidence about who saw the victim near the time of his death; and (2) evidence related to the size thirteen Vans MacGyver shoeprint. Taken together, the information in the warrant affidavit, after excising the CSLI, demonstrated probable cause to believe that the defendant might have committed the crime and that a search of his apartment would produce evidence related to the crime. See Estabrook, 472 Mass. at 870. Moreover, the affidavit alleged a sufficient nexus between the items sought,

such as the Vans MacGyver shoes and the victim's cell phone, and the victim's murder. See Hobbs, 482 Mass. at 544. Finally, the affidavit provided sufficient information for a magistrate to have reasonably inferred that the evidence sought would be at the defendant's apartment, because the victim's CSLI indicated that his cell phone moved following the murder and because people ordinarily keep shoes at their apartment. See id.

Because the search warrant affidavit satisfied probable cause when excising the unconstitutionally obtained CSLI, the defendant has failed to demonstrate any prejudice.[11] See Estabrook, 472 Mass. at 865. The defendant's trial counsel was thus not ineffective for failing to move to suppress the CSLI because the court would have denied that motion, such that any error did not result in prejudice to the defendant, let alone cause a substantial likelihood of a miscarriage of justice. See Morales, 453 Mass. at 44; Comita, 441 Mass. at 90.

d. Review pursuant to G. L. c. 278, § 33E. We have reviewed the entire record comprehensively and find no basis to set aside the verdict of murder in the first degree or to order a new trial.

[11] For the same reason, the search did not violate the defendant's Fourth Amendment rights. See Murray, 487 U.S. at 537 (explaining independent source doctrine).

3. Conclusion. For the reasons stated supra, the defendant has failed to demonstrate that his trial counsel was ineffective. We affirm his conviction and the order denying his motion for a new trial.

So ordered