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SJC-12720

COMMONWEALTH vs. TOMAS BARILLAS.

Essex. November 4, 2019. - March 6, 2020.

Present: Gants, C.J., Gaziano, Lowy, Budd, Cypher, & Kafker,  
JJ.

Cellular Telephone. Constitutional Law, Search and seizure.  
Search and Seizure, Search incident to lawful arrest,  
Inventory.

Indictments found and returned in the Superior Court  
Department on May 4, 2017.

A pretrial motion to suppress evidence was heard by James F. Lang, J.

An application for leave to file an interlocutory appeal was allowed by Gaziano, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him.

Catherine Langevin Semel, Assistant District Attorney, for the Commonwealth.

Matthew Spurlock, Committee for Public Counsel Services (Denise Regan, Committee for Public Counsel Services, also present) for the defendant.

CYPHER, J. The defendant, Tomas Barillas, was arrested on outstanding warrants after police received a tip connecting him

to the murder of Jason Arias. After conducting a patfrisk, police seized a cell phone from the pocket of the defendant's shorts. At the Lynn police station, police learned that the cell phone belonged to the defendant's thirteen year old brother, James,<sup>1</sup> who eventually consented to a search of the device. Before trial, the defendant moved to suppress all evidence derived from the warrantless seizure and search of the cell phone under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution. After an evidentiary hearing, a Superior Court judge allowed the defendant's motion on the grounds that the seized cell phone was not handled properly pursuant to a valid written inventory policy and that the police had conducted an investigatory search of the seized cell phone. A single justice of this court granted the Commonwealth's application for leave to pursue an interlocutory appeal and ordered that the appeal be entered in this court. See Mass. R. Crim. P. 15 (a) (2), as appearing in 474 Mass. 1501 (2016). We affirm the motion judge's order allowing the motion to suppress.

Background. We summarize the judge's extensive factual findings and "supplement[], as relevant, with uncontroverted testimony implicitly or explicitly credited by the judge, in

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<sup>1</sup> A pseudonym.

support of his findings, after evidentiary hearings."

Commonwealth v. Vasquez, 482 Mass. 850, 852 (2019).

On March 24, 2017, shortly after midnight, State police Trooper Matthew Wilson, a homicide investigator with the district attorney's office, was dispatched to investigate a fatal stabbing in Lynn. Wilson worked in conjunction with a Lynn police detective, Lieutenant Thomas Reddy. During the course of the investigation, Reddy and Wilson learned that the defendant had outstanding warrants in connection with three different criminal cases for larceny and drug offenses. They located the defendant at his mother's two-family home.

When the police arrived, the defendant's father, Eduardo, was outside. He told the police that he had been trying to get the defendant or James to open the door. The police also attempted to convince the defendant or James to answer the door. Eventually, James spoke to his father on the telephone and told his father that he wanted to come out but that the defendant would not let him. The officers convinced James to come outside. Once James was out of the home, the police entered and searched for the defendant. Wilson found the defendant hiding under a tarp in a common basement.

During the arrest, Wilson conducted a patfrisk of the defendant, seized a cell phone from the defendant's pocket, and transferred it to his own pocket. Following the arrest, the

defendant was transported to the Lynn police station, where he was booked by Lynn police officers. Eduardo agreed that he and James would come to the police station to be interviewed. Eduardo had his car there, so one of the officers asked him if he wanted to meet them at the station. Eduardo hesitated, so the officers offered to transport Eduardo and James to the station.

After arriving at the station, James and his father waited for about twenty minutes before Wilson and Reddy joined them in a large room used by the Lynn police detectives. Wilson still had the seized cell phone in his pocket. He had not relinquished the cell phone to the booking officer, nor had he filled out a State police custodial property inventory form.

Wilson testified that the first question he asked James was whether he had a cell phone. James replied that Wilson had his cell phone. Confused by this remark, Wilson told James that he only had one cell phone and that he had taken it from the defendant. Wilson took the cell phone out of his pocket and showed it to James. James said, "That's my cell phone." To test the veracity of this claim, Wilson asked him for the code to open the cell phone, and James provided it. The code worked to unlock the device.

Once an interview room was prepared to audio-visually record the interview, Wilson resumed questioning James about the

cell phone. Eduardo remained with his son during the interview. Wilson asked James about a crack on the device, and James explained that one crack resulted from the telephone falling off a bunk bed and that the defendant had caused a second crack in the cell phone. In response to further questions about the cell phone, James stated that he had received the cell phone about one year earlier, when it was new. James provided the cell phone number. He also identified the cell phone service provider and explained that his mother pays the telephone bills and that the defendant used the cell phone "very often" but not as often as he did. Eduardo said that the defendant used James's cell phone "all the time."

Wilson then presented a voluntary consent to search form from the Lynn police department. James and Eduardo signed the form. Another officer immediately conducted a "hand search" of the device, and within minutes discovered a video recording of the defendant talking about the crime. A later forensic search revealed evidence of calls and text messages between the victim and the defendant on the night of the stabbing. The police extracted the material and returned the device two days later to James's mother.

Discussion. The defendant filed a motion to suppress the evidence obtained from the cell phone. The defendant's original motion challenged Wilson's search of the cell phone on the

grounds that the police did not have probable cause to search the cell phone and that no valid exception to the warrant requirement applied. The motion also challenged James's consent to the search of the cell phone. The Commonwealth did not dispute that it did not have probable cause to seize and search the cell phone.

After two days of hearing, which were separated by one month and which focused primarily on James's consent to search the cell phone, the defendant filed an amended motion to suppress. In the amended motion the defendant argued that the cell phone had not only been unlawfully searched, but that it had also been unlawfully seized. The judge accepted the amended motion and conducted a third day of hearing. The Commonwealth recalled Wilson. The hearing focused on Wilson's seizure of the cell phone, and the Commonwealth submitted the State police inventory form without objection.

The judge allowed the motion to suppress after concluding that Wilson had not seized the cell phone pursuant to a written inventory policy and that the police had made investigative use of the cell phone before obtaining consent to search it.

The Commonwealth argues on appeal that the cell phone was properly seized during a search incident to arrest or pursuant to a valid inventory policy. The Commonwealth also argues that James's assertion that the cell phone belonged to him

independently justified the officer's subsequent actions, including verifying his ownership of the cell phone and subsequent consent. "In reviewing a decision on a motion to suppress, 'we accept the judge's subsidiary findings of fact absent clear error "but conduct an independent review of [the] ultimate findings and conclusions of law.'" Commonwealth v. Ramos, 470 Mass. 740, 742 (2015), quoting Commonwealth v. Colon, 449 Mass. 207, 214, cert. denied, 552 U.S. 1079 (2007). The judge's ultimate findings and legal conclusions are subject to de novo review. See Commonwealth v. Thomas, 429 Mass. 403, 405 (1999).

The judge concluded that "it is clear for a number of reasons that Trooper Wilson did not seize the phone pursuant to the State Police written policy governing inventory seizures and searches of arrestees' property." He found that the Lynn police policy applied but that even if the State police inventory policy had governed, Wilson had not adhered to it. Additionally, he concluded that Wilson made impermissible investigative use of the cell phone and, as a result, any evidence obtained from the later consensual search must be suppressed.

1. Search incident to arrest. On appeal, the Commonwealth argues that Wilson seized the defendant's cell phone as a potential weapon during a search incident to arrest. The

defendant notes, and we agree, that during the motion hearing the Commonwealth only "gestured briefly" toward the search incident to arrest doctrine, focusing instead on the inventory search exception. Whether the Commonwealth adequately raised this argument is not dispositive of the motion in the circumstances of this case. Whether the cell phone was seized under the search incident to arrest exception or whether it was seized pursuant to an inventory exception, the result is the same: the seizure of the cell phone was proper but the search of the cell phone was not.

Nevertheless, as law enforcement officers frequently encounter this situation, we take this opportunity to review the constraints of the search incident to arrest exception as applied to cell phones. See G. L. c. 276, § 1. "A search incident to a custodial arrest is well established as an exception to the warrant requirement under both the Fourth Amendment and art. 14." Commonwealth v. Mauricio, 477 Mass. 588, 592 (2017). "Under both Fourth Amendment and art. 14 jurisprudence, the purpose of the search incident to arrest exception is twofold: (1) to prevent the destruction or concealing of evidence of the crime for which the police have probable cause to arrest; and (2) to strip the arrestee of weapons that could be used to resist arrest or facilitate escape." Id. General Laws c. 276, § 1, specifically limits a

search incident to a lawful arrest to two types of property: "fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, . . . [and] weapons that the arrestee might use to resist arrest or effect his escape."

As such, under the first exception set forth in the statute, if a police officer has reason to believe that a cell phone found on an arrestee might contain evidence of the crime of arrest, the officer may seize that cell phone and secure it until a valid search warrant is obtained.<sup>2</sup> See Riley v. California, 573 U.S. 373, 403 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple -- get a warrant"). Here, where the arrest was based on outstanding warrants for larceny and drug offenses and not murder, the Commonwealth does not contend that there was reason to believe that the cell phone contained evidence of the offenses underlying the outstanding warrants.

The Commonwealth focuses instead on the second property exception under G. L. c. 276, § 1, and argues that the cell phone was seized as a weapon. Arguably, any hard object left in

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<sup>2</sup> In the circumstances of this case, we are not presented with the question whether any other exception to the warrant requirement applies, such as exigency.

the possession of a suspect who is being arrested and transported may be used as a weapon, and it is not unreasonable to remove the item from the person. In Riley, 573 U.S. at 385, the United States Supreme Court considered "how the search incident to arrest doctrine applies to modern cell phones." In reviewing the doctrine, the Court noted that "searches of a person incident to arrest, 'while based upon the need to disarm and to discover evidence,' are reasonable regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" Id. at 386, quoting United States v. Robinson, 414 U.S. 218, 235 (1973). The Court recognized that "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." Riley, supra at 387. However, "[o]nce an officer has secured a phone and eliminated any potential physical threats, . . . data on the phone can endanger no one," and accordingly, the Court limited the search of a cell phone as a weapon to an "examin[ation of] the physical aspects of a phone . . . say, to determine whether there is a razor blade hidden between the phone and its case." Id. Similarly, we held "that digital cameras may be seized incident to arrest, but . . . the search of data contained in digital cameras falls outside the scope of the search incident to arrest exception to the warrant requirement." Mauricio, 477 Mass. at 594.

Thus, it was permissible to seize the cell phone as part of a search incident to custodial arrest. See Commonwealth v. Alvarez, 480 Mass. 1017, 1018 (2018) (cell phone seized during valid search incident to arrest).<sup>3</sup> The search of the content of the cell phone, whether seized as evidence or as a potential weapon or means of escape, presents a different question. See Riley, 573 U.S. at 387 ("Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape").

2. Inventory search. The Commonwealth argues that Wilson's seizure of the cell phone was warranted under the State police inventory policy. The defendant argues that the State police inventory policy cannot govern the inventory search of an arrestee in the custody of the Lynn police. It appears that the significance of the dispute over which policy governs is rooted in the fact that the State police inventory policy authorizes the search and removal of any property from the clothing or

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<sup>3</sup> In some circumstances, where the cell phone may contain evidence of the crime for which the suspect is arrested, seizure of the cell phone may be warranted to prevent destruction of evidence on that ground. See, e.g., Commonwealth v. Cruzado, 480 Mass. 275, 282-283 (2018) ("exigent circumstances" supported warrantless seizure of cell phone where police had probable cause to believe that it contained evidence of crime and because of "the risk of someone taking or tampering with [it]"). See also Riley v. California, 573 U.S. 373, 388 (2014) ("[defendants] concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant . . . [t]hat is a sensible concession").

person of one who comes into the custody of the State police without specifying the appropriate time of seizure, while the Lynn police inventory policy provides more definitive guidance regarding timing (e.g., "as soon as is reasonably possible after arriving at the station").

We agree with the motion judge's ultimate finding that the Lynn police inventory policy applied in these circumstances. The defendant was arrested by at least one Lynn police officer, taken to the Lynn police station, and booked by the Lynn police. Wilson himself testified that the defendant was in Lynn police custody. If, instead, we assumed that the State police policy applied, we would conclude as the motion judge did: that neither policy was followed and that the police made investigative use of the cell phone.

There is no dispute that "before a person is placed in a cell, the police, without a warrant, but pursuant to standard written procedures, may inventory and retain in custody all items on the person." Commonwealth v. Vuthy Seng, 436 Mass. 537, 550, cert. denied, 537 U.S. 942 (2002). Inventory searches are intended to be noninvestigatory and are for the purpose of safeguarding the defendant's property, protecting the police against later claims of theft or lost property, and keeping weapons and contraband from the prison population. See id. at 550-551. "This inquiry is fact driven, with the overriding

concern being the guiding touchstone of [r]easonableness" (quotations and citation omitted). Commonwealth v. Abdallah, 475 Mass. 47, 52 (2016). An inventory policy "must be written" and "explicit enough to guard against the possibility that police officers would exercise discretion." Commonwealth v. Rostad, 410 Mass. 618, 622 (1991).

This court repeatedly has upheld the suppression of evidence where investigatory use is made of items seized for a purported inventory purpose. See, e.g., Mauricio, 477 Mass. at 596 (search of digital camera exceeded bounds of inventory search exception because it was investigatory in nature); Commonwealth v. White, 469 Mass. 96, 101-102 (2014) (while lawfully seized container could be opened in accordance with inventory policy, search warrant was required to examine pills for investigative purposes); Vuthy Seng, 436 Mass. at 553-554 (viewing information on front of bank card was permissible because it "declare[d] its nature to anyone at sight," but recording account numbers written on back of card made it impermissible investigative search).

Here, had the cell phone been seized to be inventoried under the Lynn police inventory policy, it should have been promptly provided to the booking officer at the time of booking to be secured in a property envelope and stored in the appropriate property locker in accordance with the policy. If

it is discovered that the property inventoried actually belongs to a third person, or if a third person claims the property, the inventory policy should provide guidance for determining the ownership of the item and the handling the item. If the police want to search the inventoried property for evidence of a crime, they need to obtain consent from the appropriate person (as determined by the inventory policy) or a search warrant.

The Commonwealth initially failed to introduce the appropriate governing inventory policy, the Lynn police inventory policy.<sup>4</sup> The motion judge denied the Commonwealth's motion to reopen the evidence to introduce that policy, and the Commonwealth, appropriately recognizing that this was a matter committed to the discretion of the motion judge, does not challenge this ruling. Although our analysis need go no further, we also address the failure to adhere to the State

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<sup>4</sup> The motion judge issued his decision allowing the motion to suppress on November 15, 2018. On December 4, 2018, the Commonwealth filed a motion to reconsider and reopen the evidence in order to "establish the inevitable discovery of the cell phone on the defendant's person at booking." To support this argument, the Commonwealth attempted to introduce the Lynn police inventory policy. In denying the motion, the judge reasoned that the additional evidence "would not alter the court's suppression ruling." The judge concluded that the Commonwealth would not be able to establish that the eventual search of the cell phone was inevitable. In other words, the Commonwealth may have been able to establish that the cell phone would have been inevitably seized but it would not have been able to establish that the search of the cell phone was inevitable, pursuant to the inventory policy or consent.

police policy and the investigatory use of the cell phone. See Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (requiring exclusion of evidence that was seized during inventory search if search was not conducted pursuant to written inventory policy). See also J.A. Grasso, Jr., & C.M. McEvoy, *Suppression Matters Under Massachusetts Law* § 15-1 (2018) (Grasso & McEvoy) ("an inventory search . . . requires standard, written police procedures in order to limit police discretion to conduct a warrantless general search").

Once he seized the cell phone, Wilson placed the cell phone in his pocket and carried it with him after his arrival at the police station.<sup>5</sup> He did not prepare the required custodial property inventory form, and he did not "properly secure the subject's property" as required by the State police policy or in a manner that would be expected if it were inventoried property.<sup>6</sup>

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<sup>5</sup> The judge found that Wilson was at the Lynn police station for "twenty minutes or so" before he went to speak with the defendant's brother and father. The Commonwealth disputes this twenty-minute wait time. This finding is supported by the record. However, the specific wait time has no bearing on the subsequent investigative use Wilson made of the cell phone.

<sup>6</sup> The Commonwealth cites an Appeals Court case to support its argument that these "after-the-fact procedural deficiencies" cannot "void an otherwise valid inventory search." See Commonwealth v. Torres, 85 Mass. App. Ct. 51, 53, 55 (2014). However, as the Appeals Court carefully noted, "[w]here the validity of an inventory search itself is being challenged, there may well be situations where such noncompliance could play

See Grasso & McEvoy, supra at § 15-2(a) ("An inventory search is essentially a caretaking function and is non-investigatory").

Most significantly, as the motion judge describes, Wilson made investigative use of the cell phone. He did so during his first conversation with James, after James told him that the cell phone seized from the defendant belonged to him; Wilson took the cell phone out of his pocket, showed it to the defendant's brother, and asked him for the cell phone's code.<sup>7</sup> He then entered that code to verify ownership of the cell phone. Wilson continued to make investigative use of the cell phone during the initial portion of the recorded interview when he held the cell phone and asked direct questions about its ownership and usage. See Mauricio, 477 Mass. at 595-596 ("The Commonwealth argues that [the detective's] 'sole objective was to identify [the digital camera's] true owner.' But this objective confirms rather than refutes the conclusion that the examination of the digital camera was an investigatory search rather than a benign inventory [search] . . .").

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an important factor in determining whether suppression was required." Id. at 54 n.3.

<sup>7</sup> The judge observed that the conversation about the seized cell phone appears to have been unplanned and spontaneous. There is nothing in the record to indicate that Wilson intentionally withheld the cell phone from the inventory process.

Given these facts, we conclude that even if Wilson was, as it appears, at first only attempting to establish ownership of the cell phone, "the search exceeded the scope of and was inconsistent with the purposes underlying the inventory search exception to the warrant requirement, and is thus at odds with our law."<sup>8</sup> Mauricio, 477 Mass. at 596. See Vuthy Seng, 436 Mass. at 554; Commonwealth v. Sullo, 26 Mass. App. Ct. 766, 772 (1989) ("In making an inventory -- taking from the person, noting what is received, and placing it in safekeeping -- the police are to act more or less mechanically, according to a set routine, for to allow then a range of discretion in going about a warrantless search would be to invite conduct which by design or otherwise would subvert constitutional requirements").

We affirm the judge's order allowing the defendant's motion to suppress.

So ordered.

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<sup>8</sup> In light of our resolution of the issues, we need not decide whether James's consent to the search of the cell phone that he shared with the defendant provided the police with authority to search the cell phone, or more particularly to search the areas of the cell phone that James told the police the defendant used.