SJC-12764

COMMONWEALTH vs. RICHARD DILWORTH.

June 16, 2020.

Supreme Judicial Court, Superintendence of inferior courts.

The Commonwealth appeals from a judgment of a single justice of this court denying its petition, filed pursuant to G. L. c. 211, § 3, for relief from an interlocutory order of the Superior Court in an underlying criminal case. We affirm.

Background. The defendant, Richard Dilworth, has been indicted on numerous firearm and ammunition charges including carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a); possession of ammunition without a firearm identification card, in violation of G. L. c. 269, § 10 (h) (1); and possession of a large capacity feeding device, in violation of G. L. c. 269, § 10 (m). The charges resulted after Boston police officers, acting in an undercover capacity, became "friends" with Dilworth on the social media application Snapchat and viewed videos of Dilworth with what appeared to be a firearm. In January 2018, officers arrested Dilworth and recovered a loaded firearm from his waistband. Dilworth was charged with several crimes as a result of the seizure of the firearm and released on bail. He was then seen again on Snapchat with what appeared to be a firearm and was again arrested, in May 2018. Police officers found a firearm in his possession at the time of the second arrest, and he was again charged with several crimes as a result.

Dilworth subsequently filed, in the trial court, a "Rule 17 Summons Motion for Discovery: Selective Prosecution" pursuant to Mass. R. Crim. P. 17 (a) (2), 378 Mass. 885 (1979), seeking Boston police department records concerning social media

surveillance on Snapchat.[1] He maintained that the department was using Snapchat as an investigatory tool almost exclusively against black males, and he sought discovery that he believed would support a claim of racial discrimination. More specifically, he sought "police/incident reports or Form 26 reports . . . from June 1st, 2016 to October 1, 2018 for investigation that involve the use of 'Snapchat' social media monitoring." In his motion he stated that "[b]ased on preliminary information gathered by the defense, the targets of this type of investigation are almost exclusively people of color, and within this are also disproportionately Black."

A judge in the Superior Court concluded that Dilworth had made the necessary threshold showing that the evidence sought is material and relevant to his defense. The judge allowed the motion, with certain modifications. He ordered that a summons issue directing the Boston police department to provide all Form 26 reports prepared by the department between August 1, 2017, and July 31, 2018, that reference use of Snapchat as an investigative tool in cases where the subject of Snapchat monitoring has been charged with an offense as a result of that monitoring.[2] The Commonwealth thereafter filed a motion for reconsideration, which the judge denied, and then subsequently filed its G. L. c. 211, § 3, petition.[3] In the petition, the Commonwealth argued that the judge erred in concluding that Dilworth had met his initial burden in asserting selective prosecution that would warrant the discovery requested. The single justice denied the petition without a hearing on the basis that the matter does not warrant the exercise of this Court's extraordinary power pursuant to G. L. c. 211, § 3.

Discussion. A single justice considering a petition filed pursuant to G. L. c. 211, § 3, performs a two-step inquiry. See Commonwealth v. Fontanez, 482 Mass. 22, 24 (2019). The first

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[1] The defendant also filed a motion for discovery pursuant to Mass. R. Crim. P. 14, as appearing in 442 Mass. 1518 (2004). The judge denied that motion and it is not at issue here.

[2] The judge excluded from the summons all documents from investigations related to human trafficking, sexual assault, and murder (most of which the defendant had previously agreed to exclude from his request).

[3] The Commonwealth also filed a motion to stay production of the relevant discovery; that motion appears to still be pending in the trial court.

step requires the single justice to decide "whether to employ the court's power of general superintendence to become involved in the matter," id., or, stated differently, to "decide, in his or her discretion, whether to review 'the substantive merits of the . . . petition," id., quoting Commonwealth v. Baldwin, 476 Mass. 1041, 1042 n. 2 (2017). The single justice need not take the second step (which is to resolve the petition on its substantive merits) "if the petitioner has an adequate alternative remedy or if the single justice determines, in his or her discretion, that the subject of the petition is not sufficiently important and extraordinary as to require general superintendence intervention." Fontanez, supra at 24-25. See Commonwealth v. Rodriguez, 484 Mass. 1047, 1049 (2020).

Our role on appeal, then, in reviewing the single justice's decision in this case, is to determine whether she abused her discretion by declining to intervene. Where a single justice has "expressly declined to exercise this court's general superintendence powers to consider the alleged errors on the merits," the appeal to the full court "is strictly limited to a review of that ruling." Commonwealth v. Samuels, 456 Mass. 1025, 1027 n.1 (2010). We give considerable deference to the single justice's exercise of discretion, and it is not for us to substitute our judgment for that of the single justice. See, e.g., L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) ("An appellate court's review of a . . . judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result"). See also Rodriguez, 484 Mass. at 1049; Fontanez, 482 Mass. at 24-25. Having conducted this narrow review, we conclude that the single justice did not abuse her discretion in denying the Commonwealth's petition.

The Commonwealth argues that the single justice abused her discretion because the petition presented a novel issue and because the motion judge's ruling has had an effect on other cases in the trial court.[4] While a single justice might be

[4] In its petition, the Commonwealth alleged that in at least seven other pending cases in Suffolk County, judges had ordered or requested "similar discovery" on the basis of the judge's ruling in this case. Now, on appeal, the Commonwealth states that the number of such cases has grown to at least twenty-two. The Commonwealth provides no details about these other cases, and provided none to the single justice, other than to aver generally that the number of cases indicates that the judge's

warranted in finding exceptional circumstances when, for example, the Commonwealth's petition raises a novel or systemic issue or concerns a ruling that effectively forecloses the prosecution, Fontanez, 482 Mass. at 26, the single justice is not compelled do so every time one of those criteria is present. Each case must be examined by the single justice on its own, to determine whether general superintendence intervention is necessary in that particular case.

Here the motion judge did not rule on the substantive merits of Dilworth's selective prosecution claim. All he did at this interlocutory juncture was to make a discretionary discovery ruling that enabled Dilworth to gather information that would substantiate his claim (or not). That was the limited matter before the single justice. The motion judge's ruling did not "foreclose[] the Commonwealth's ability to prosecute a serious crime" or, for that matter, have any detrimental effect on the prosecution at all. Fontanez, 482 Mass. at 26. Should Dilworth, at some later point, present a selective prosecution defense that leads to a successful motion to suppress or a motion to dismiss, the Commonwealth will be free to appeal from any such ruling. At this early juncture, however, the Commonwealth has not demonstrated that the judge's ruling presents the type of exceptional circumstances that required the single justice to employ the court's extraordinary general superintendence power.[5]

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ruling has had a systemic impact. See Commonwealth v. Rodriguez, 484 Mass. 1047, 1049 n.2 (2020), citing Gorod v. Tabachnick, 428 Mass. 1001, 1001, cert. denied, 525 U.S. 1003 (1998) ("No less than on other litigants, it is incumbent on the Commonwealth not merely to make allegations but to substantiate them in the record before the single justice").

[5] The legal issue in this case, as the Commonwealth articulates it, is whether a defendant seeking discovery pursuant to Mass. R. Crim. P. 17, 378 Mass. 885 (1979), for purposes of a possible selective prosecution defense must demonstrate that an undercover police officer's "friending" of an individual on Snapchat implicates the Fourth Amendment to the United States Constitution or art. 14 of the Massachusetts Declaration of Rights. Dilworth counters that this framing of the issue, and the principal basis of the Commonwealth's opposition to the motion, puts the "cart before the horse" by claiming that Snapchat friending does not implicate any constitutional right and by suggesting, therefore, that there

Conclusion. The single justice did not abuse her discretion in denying the Commonwealth's petition without reaching the merits.

Judgment affirmed.

The case was submitted on briefs.

Cailin M. Campbell, Assistant District Attorney, for the Commonwealth.

Matthew Spurlock, Committee for Public Counsel Services, for the defendant.

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could never be an equal protection violation (in the form of selective prosecution) in such a case.

In ruling as we do that the single justice did not abuse her discretion by declining to intervene at the discovery stage, we express no view on the merits of the Commonwealth's claim, on the motion judge's statement that a claim of selective prosecution might lie even if there has been no infringement of the defendant's constitutional rights, or on the judge's assessment that Dilworth has made the necessary threshold showing for obtaining discovery under rule 17.