SJC-11512

COMMONWEALTH vs. DANIEL LOUIS.

Middlesex. February 1, 2021. - June 28, 2021.

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

Homicide. Firearms. Cellular Telephone. Probable Cause. Constitutional Law, Search and seizure, Probable cause, Assistance of counsel. Search and Seizure, Probable cause, Affidavit. Identification. Evidence, Identification. Practice, Criminal, Capital case, New trial, Assistance of counsel.

Indictments found and returned in the Superior Court Department on November 9, 2010.

The cases were tried before Kathe M. Tuttman, J., and a motion for a new trial, filed on May 16, 2018, was heard by her.

Alan Jay Black for the defendant.
Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

KAFKER, J. In 2012, a jury convicted the defendant of murder in the first degree on the theory of felony-murder,

unlawful possession of a firearm, and attempted armed robbery.[1] On appeal, the defendant argues that his cell site location information (CSLI) and text messages were improperly admitted at trial. He further argues that he was prejudiced by defense counsel's failure to object to in-court and out-of-court identifications made by an eyewitness.

Discerning no error, we affirm the defendant's convictions and the denial of his motion for a new trial. After plenary review of the entirety of the record, we decline to exercise our authority under G. L. c. 278, § 33E, to reduce the verdict of murder in the first degree or order a new trial.

1. Facts. We summarize the facts that the jury could have found at the defendant's trial, reserving certain details for our discussion of the legal issues.

On September 30, 2010, Wallace Duarte, Benjamin Peirce, and Shaquan Jacobs devised a plan to rob Lauren Lob, an individual from whom Duarte had purchased marijuana in the past. At around 3 P.M., the group visited a store to purchase supplies for the robbery. Meanwhile, Jacobs told the group that they could secure firearms for the robbery from the defendant and indicated

[1] The defendant was found not guilty of armed robbery. The defendant had also been charged on two indictments of conspiracy to commit armed robbery, but those charges were not tried before the jury. At sentencing, the prosecutor suggested that those charges might be nol prossed, but the docket does not indicate any action has been taken with respect to those charges.

that the defendant wanted to participate in the robbery. After calling the defendant, the group picked him up in the Roxbury section of Boston. The defendant placed a black duffel bag containing firearms in the trunk of the car and joined the group.

At around 8 P.M., the men and Marina Del Mar, a friend of Peirce, drove to Lob's address in Newton to initiate the robbery. Their plot ultimately failed when Lob did not respond to Duarte's attempts to lure her via calls and text messages and did not answer her door. When the defendant expressed frustration that the plan failed, Peirce suggested that the group instead rob the victim, Adam Coveney, for Percocet tablets to resell.

Peirce initiated a text message conversation with the victim to lure him out of his Waltham apartment. As they neared the apartment, the defendant retrieved a gun from the trunk of the car, and he, Peirce, and Jacobs proceeded toward the building.

At approximately 11 P.M., the defendant shot and killed the victim outside his apartment. The victim was found on the floor of the vestibule area of the apartment complex with a gunshot wound to the abdomen, was transported by ambulance, and died in the hospital. His cell phone contained a text message conversation with Peirce wherein Peirce sought to purchase

Percocet. The last text message from Peirce was received three minutes before the shooting was reported in a 911 call.

Cell phone records obtained from various cellular service providers established a constant stream of communications among the coventurers, and location data placed them in the same areas at relevant times. In particular, Jacobs's and the defendant's cell phones showed telephone and text message communications between 3 P.M. and 4 P.M., with the defendant's cell phone sending signals to a cell tower in Roxbury. The movements of the defendant's cell phone are also consistent with the description of the defendant's movements above: the CSLI from that cell phone demonstrated that the defendant traveled towards Jacobs's home between 4 P.M. and 5 P.M. and stopped near Jacobs's home from 5:30 P.M. to 8:45 P.M. The defendant's cell phone also moved towards the first attempted robbery location between 9:30 P.M. and 10:30 P.M. and sent a signal to a tower near the victim's apartment building shortly after 11 P.M.

2. Discussion. On appeal, the defendant argues that his text messages were improperly admitted in evidence at trial, that CSLI data from his cell phone was unconstitutionally admitted at trial without a warrant or probable cause, and that he was prejudiced by his counsel's failure to file a motion to suppress eyewitness Del Mar's out-of-court identification or to

exclude her second, in-court identification at trial. We address each argument in turn.

a. Metro PCS records. On November 19, 2010, ten days after the defendant was charged, the Commonwealth filed a motion pursuant to Mass. R. Crim. P. 17 (a) (2), 378 Mass. 885 (1979), seeking third-party records from the defendant's cellular service provider, Metro PCS. While the Commonwealth's motion originally requested production of, among other data, the defendant's text messages and CSLI, the prosecutor indicated at the start of the motion hearing that the Commonwealth was no longer seeking the text messages. Upon allowing the motion, the motion judge mistakenly ordered Metro PCS to produce the text messages despite the Commonwealth's oral withdrawal of its request at the hearing. As a result, Metro PCS's production included the defendant's text messages. Nevertheless, the trial judge ultimately denied the defendant's motion in limine to preclude the Commonwealth from mentioning these text messages and permitted the Commonwealth to introduce the messages at trial.

i. Text messages. The defendant appeals from the introduction of his text messages at trial. In his motion for a new trial, the defendant argued that his attorney provided ineffective assistance of counsel. On appeal, however, he claims that there was not probable cause to support the search

under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution.

A. Preservation of objection and standard of review. Before reaching the merits of the defendant's claims, we must first determine the proper standard of review. The Commonwealth suggests on appeal that the defendant's claims should be viewed as challenging ineffective assistance of counsel, while the defendant challenges lack of probable cause directly.

The procedural posture of the case is somewhat complicated but ultimately of no import, as the affidavit submitted in support of the Commonwealth's rule 17 motion for production of the text messages, CSLI, and other data established the requisite probable cause. Defense counsel initially opposed the motion on art. 14 and Fourth Amendment grounds. After the Commonwealth withdrew its request for text messages at the motion hearing, the defense had no reason to continue to pursue any objection to the text messages. When it was revealed that the text messages were produced in error, however, the defendant did not clearly renew his art. 14 and Fourth Amendment objections. His motion in limine and oral argument at trial on this issue only challenged lack of notice to the defense and possible violation of the Massachusetts wiretap statute. Indeed, defense counsel appeared to expressly decline to make a Fourth Amendment or art. 14 challenge at that time, and did not

object to the trial judge's understanding that he was not alleging a lack of probable cause. Because the defendant did not raise these issues before the trial judge, they appear not to have been preserved. See Commonwealth v. Robinson, 83 Mass. App. Ct. 419, 424 (2013).[2]

But because the defendant was convicted of murder in the first degree, our ineffective assistance analysis focuses on whether a motion to suppress the text messages would have been successful. As we explained in Commonwealth v. Fulgiam, 477 Mass. 20, 29, cert. denied, 138 S. Ct. 330 (2017),

> "Where, as here, the defendant has been convicted of murder in the first degree, we review his claim of ineffective assistance of counsel to determine whether the alleged lapse created a 'substantial likelihood of a miscarriage of justice,' a standard more favorable to the defendant than the constitutional standard otherwise applied under Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014). We focus more broadly on whether there was error and, if so, whether any such error 'was likely to have influenced the jury's conclusion.' Id. If the defendant's claim of ineffective assistance of counsel is based on the failure to file a motion to suppress, he must 'show that the motion to suppress would have been successful, and that failing to bring such a motion . . . created a substantial likelihood of a miscarriage of justice.' Commonwealth v. Banville, 457 Mass. 530, 534 (2010)."

The issue here, therefore, is whether the affidavit originally submitted with the Commonwealth's rule 17 motion nonetheless

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[2] He did, however, bring a motion for a new trial alleging ineffective assistance of counsel.

established probable cause as required by art. 14 and the Fourth Amendment. If the affidavit established probable cause, then any motion to suppress would have been unsuccessful and the defendant cannot succeed on his ineffective assistance claim.

B. Probable cause. As always, probable cause must be established based only on the facts contained within the four corners of the Commonwealth's motion and supporting affidavit, including reasonable inferences to be drawn from the facts. See Commonwealth v. Morin, 478 Mass. 415, 425 (2017). "In determining whether an affidavit justifies a finding of probable cause, the affidavit is considered as a whole and in a commonsense and realistic fashion; inferences drawn from the affidavit need only be reasonable and possible, not necessary or inescapable." Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011).

To establish probable cause, the Commonwealth must demonstrate a nexus between the crime under investigation and the subject of its search, here, the cell phone data. See Commonwealth v. Snow, 486 Mass. 582, 586 (2021); Commonwealth v. White, 475 Mass. 583, 589 (2016). The Commonwealth may not simply rest upon the fact that the defendant owns a cell phone or that, in general, coventurers in crime often communicate via cell phone to justify a search of the defendant's text messages. See Snow, supra at 586, 589-590, citing Morin, 478 Mass. at 426.

Similarly, it is not enough to show that the defendant communicated with a person implicated in the crime via cell phone. See Morin, supra at 428. "Rather, even where there is probable cause to suspect the defendant of a crime, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there." White, supra at 590-591.

Here, the affidavit established the requisite nexus between the robbery and the defendant's telephone communications. The affidavit established that the victim's cell phone had a series of text messages that evening from Peirce. The affidavit further attested that Jacobs was heard talking on a cell phone with someone about bringing a gun and that Jacobs told the others that the person with whom he was speaking wanted to participate in the robbery. Later that evening, they picked up the defendant, who was identified elsewhere in the affidavit as the person who brought the gun and shot the victim. Jacobs also stated that he called Peirce and the defendant on the day of the shooting. The defendant provided his cell phone number to the police. Although somewhat scattershot in its presentation, the affidavit established that the coventurers communicated via text message and spoke to each other about and during the commission of both attempted robberies via cell phone. They made calls and

sent text messages to recruit each other to assist with the robberies and to coordinate and plan the crimes. The affidavit further established that both attempted robberies were preceded by telephone communications between at least one coventurer and the intended victim.

All of this together created the required connection between communications on the defendant's cell phone and the crimes at issue in this case, including the text messages. See White, 475 Mass. at 589. See also Snow, 486 Mass. at 589 (finding probable cause where "the defendant made a cell phone call soon after the shooting to the person who rented the car used in the murder, there [was] a reasonable inference that the crime was preplanned, and there [were] records of threatening cell phone communications [between the victim and a coventurer]"). The affidavit was therefore sufficient to establish the requisite nexus for probable cause.

Because the affidavit established probable cause to support a search of the defendant's text messages, any motion to suppress the messages would have been unsuccessful. Accordingly, the failure to file a motion to suppress was not ineffective assistance of counsel and did not create a substantial likelihood of a miscarriage of justice in this case. See Fulgiam, 477 Mass. at 29.

ii. CSLI data.[3] The defendant also argues that the trial judge erroneously admitted historical CSLI data because it was obtained without probable cause. "In the context of historical CSLI, the sought-after evidence is the location of the cell phone itself, not what information may be found in the cell phone's contents. That location can also be reasonably expected to be the location of the person possessing the cell phone. We have repeatedly recognized that cell phones have become 'an indispensable part of daily life and exist as almost permanent attachments to [their users'] bodies.'" Commonwealth v. Hobbs, 482 Mass. 538, 546 (2019), quoting Commonwealth v. Almonor, 482 Mass. 35, 45 (2019). Because this evidence was produced over the defendant's objection and his direct appeal was pending at the time of our decision in Augustine, the probable cause requirement first articulated in that case applies here. See Hobbs, supra at 544 & n.10, citing Commonwealth v. Augustine, 467 Mass. 230, 256-257 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015) (acquisition of historical CSLI data satisfies warrant requirement if affidavit established probable cause).

In the instant case, the probable cause analysis for CSLI is more straightforward than for the text messages. The

[3] Only historical CSLI is at issue in this case. See Commonwealth v. Almonor, 482 Mass. 35, 48-49 (2019) (defining historical CSLI and differentiating it from real-time location data).

affidavit submitted in support of the motion to produce the CSLI established in great detail that the defendant was present at and a part of the planned robberies and subsequent shooting, that he owned the cell phone subject to the desired search, and that he communicated with another robbery suspect via cell phone on the date of the murder. Even if the defendant were not using the cell phone to communicate, which he was, the cell phone itself would have tracked his location. As the motion judge explained:

> "Through statements of the defendants and an examination of [the victim's] cell phone, [the Commonwealth] has assembled evidence that each defendant used his cell phone in the planning, execution, and aftermath of the robbery/homicide, as did two material witnesses (Duarte and Del Mar). Information as to the movements of each of these individuals is material to this case, though for now, the Commonwealth seeks orders only for the defendants' phones" (emphasis added).

Therefore, the Commonwealth satisfied its burden of establishing probable cause to access the defendant's CSLI data. Accordingly, counsel was not ineffective for failing to exclude either the text messages or the CSLI data.

b. Eyewitness identification. The defendant further alleges ineffective assistance as a result of trial counsel's failure to move to suppress eyewitness Del Mar's pretrial identification or to exclude her in-court identification at trial. In reviewing this claim pursuant to G. L. c. 278, § 33E, we "consider whether there was an error in the course of the

trial (by defense counsel, the prosecutor, or the judge) and, if there was, whether that error was likely to have influenced the jury's conclusion." Wright, 411 Mass. at 682.

The trial judge conducted a thorough voir dire prior to allowing Del Mar to identify the defendant at trial. That examination established the following relevant facts. Del Mar viewed the defendant "several times" on the evening of September 30, 2010; she observed the defendant on the street under lamps and sat beside him in the back seat of a car, where it was darker. She had conversations with the defendant and heard him speak. She also described two photographic array identifications. In the first array, on October 1, 2010, the day after the shooting, she was unable to identify any of the photographs. She testified that she was frightened and emotional at the time, having just learned that the victim had died from his injuries. On October 6, 2010, however, Del Mar was able to identify a photograph of the defendant in the second array. She stated at the time that she was sixty-five to seventy-five percent certain that it was the defendant. She reported feeling calmer and being able to think clearly during the second identification. Between her two identification attempts, however, Del Mar viewed an Internet video recording of the defendant's and Jacobs's arraignment, wherein the defendant obscured his face by covering it with his hands. Del Mar

maintained that she recognized the defendant's photograph from the night of the shooting, not the video recording, and that her in-court identification would be based on her memory of that night.

After the voir dire, the trial judge found that any identification that Del Mar would make at trial would be based on her observations of the defendant at the time of the alleged events in this case on September 30, 2010. The judge credited Del Mar's testimony, "with respect to her observations of the defendant on [the video recording], that his face was covered." The judge concluded that any in-court identification by Del Mar would not be substantially tainted by anything she had seen in the video recording, and that any influence on her identification by the recording "would go to the weight not the admissibility of her in-court identification because there's no indication here that there was any improper action by the police in exposing her to anything."

As a result, Del Mar identified the defendant in court as the individual she observed on the night of the shooting. Trial counsel for the defendant questioned Del Mar extensively on cross-examination, addressing her inability to make an unequivocal positive identification of the defendant in either pretrial photographic array and her viewing of the video recording of the defendant's arraignment. The defendant argues

that trial counsel was ineffective in not moving to suppress Del Mar's pretrial identification before trial or to exclude it at trial and in not properly objecting to Del Mar's in-court identification.

These claims are without merit. At the time of the defendant's trial, out-of-court identifications were only inadmissible where a defendant "prove[d] by a preponderance of the evidence, considering the totality of the circumstances, 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" (citation omitted). Commonwealth v. Crayton, 470 Mass. 228, 234 (2014). Alternatively, a defendant could challenge a pretrial identification arising from "especially suggestive circumstances" other than a tainted police procedure under common-law principles of fairness. Id. at 235, quoting Commonwealth v. Jones, 423 Mass. 99, 109 (1996). As for in-court identifications, those could be excluded only where they were "tainted by an out-of-court confrontation . . . that is 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" Crayton, supra at 238, quoting Commonwealth v. Carr, 464 Mass. 855, 877 (2013). Importantly, the absence of a positive pretrial identification did not preclude an in-court identification of the defendant.

See Crayton, supra at 237-238.[4] Accordingly, in most cases, suggestiveness went to the weight, not the admissibility, of an identification. See, e.g., Commonwealth v. Chhoeut Chin, 97 Mass. App. Ct. 188, 199 (2020).

Here, the trial judge concluded that the out-of-court identification was not unduly suggestive. These findings, which are supported by the testimony at voir dire, are dispositive. Specifically, the judge found that Del Mar had substantial exposure to the defendant on the night of the murder, allowing for prolonged observation. The judge also accepted Del Mar's testimony explaining why she could make a positive identification at the second pretrial identification and not the first and concluded that she was not unduly influenced by the video recording of the arraignment. Moreover, Del Mar's failure to make a positive identification during the first identification procedure did not prohibit her from later identifying the defendant. See Crayton, 470 Mass. at 238. See also Commonwealth v. Odware, 429 Mass. 231, 233, 234-236 (1999)

[4] Collins changed this standard. See Commonwealth v. Collins, 470 Mass. 255, 265-266 (2014). After Collins, if an eyewitness has not made "an unequivocal positive identification of the defendant before trial," the eyewitness cannot make an in-court identification of the defendant unless it is a rare case in which there is "good reason" to permit the in-court identification. Id. at 265-267. Our holding in Collins was prospective and does not apply to cases tried before its issuance. See Commonwealth v. Bastaldo, 472 Mass. 16, 31 (2015) (Collins was prospective).

(judge properly admitted eyewitness's identification of defendant at grand jury lineup notwithstanding her failure to identify defendant from photographic array and her earlier observation of police flyer containing defendant's photograph). Given these findings, the judge's allowance of the identification testimony was proper.

Under then-controlling precedent, therefore, any attempt by trial counsel to exclude Del Mar's in-court or out-of-court identifications of the defendant would have been unsuccessful. As the trial judge recognized, to the extent that the video recording of the arraignment was suggestive and influenced either identification, any suggestiveness went to the weight, rather than the admissibility, of the evidence.[5] Accordingly, trial counsel was not ineffective in failing to exclude Del Mar's identifications.[6]

c. Review under G. L. c. 278, § 33E. Finally, we have reviewed the entire record pursuant to G. L. c. 278, § 33E, and we discern no other basis to set aside or reduce the verdict of murder in the first degree or to order a new trial. While our jurisprudence has reflected greater skepticism towards

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[5] We decline to revisit the prospective nature of Collins.

[6] For the same reasons, defense counsel's use of the second identification during his cross-examination of Del Mar was not improper.

eyewitness identifications since the defendant's trial, it is significant that the eyewitness testimony against which the defendant lodges many of his complaints was largely cumulative of other evidence of his guilt. Accordingly, we affirm the defendant's convictions and the denial of his motion for a new trial.

So ordered.