SJC-12930

COMMONWEALTH vs. WASHINGTON PEARSON.

Middlesex. November 6, 2020. - February 12, 2021.

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

Constitutional Law, Search and seizure. Search and Seizure, Fruits of illegal search, Probable cause, Warrant. Probable Cause. Evidence, Result of illegal search. Practice, Criminal, Motion to suppress, Warrant.

Indictments found and returned in the Superior Court Department on October 25, 2012, and December 10, 2013.

Pretrial motions to suppress evidence were heard by Elizabeth M. Fahey, J., and the cases were tried before Douglas H. Wilkins, J.

Following review by the Appeals Court, 96 Mass. App. Ct. 299 (2019), the Supreme Judicial Court granted leave to obtain further appellate review.

Edward Crane for the defendant.
Timothy Ferriter, Assistant District Attorney, for the Commonwealth.

BUDD, C.J. At the conclusion of two separate jury trials in the Superior Court in Norfolk County and Middlesex County,

the defendant, Washington Pearson, was convicted of multiple offenses arising from a burglary spree in both Brookline and Cambridge. Prior to the trials, the defendant moved in each case to suppress evidence seized from his residence during the execution of a search warrant, arguing that the warrant was tainted by discoveries made during an earlier unlawful entry of his residence by police. Both motion judges agreed that the earlier entry was unlawful, but each judge concluded that the evidence seized during the execution of the warrant was exempt from exclusion as "fruit of the poisonous tree" under the independent source doctrine.

The convictions were affirmed by the Appeals Court in separate opinions. See Commonwealth v. Pearson, 96 Mass. App. Ct. 299 (2019) (Pearson II) (Middlesex cases);[1] Commonwealth v. Pearson, 90 Mass. App. Ct. 289 (2016) (Pearson I) (Norfolk cases). We granted the application for further review of the Middlesex convictions, 484 Mass. 1104 (2020). We now vacate the Middlesex convictions, with the exception of a conviction of intimidation of a witness, and remand the matter to the Superior Court for an evidentiary hearing on the motion to suppress. In

[1] There was a dissent to a portion of this opinion. See Pearson II, 96 Mass. App. Ct. at 308-313 (Henry, J., dissenting in part). As we discuss infra, we agree with the dissent.

so doing, we provide clarification regarding the application of the independent source doctrine.

Background. 1. Facts. We summarize the relevant facts from the motion judge's findings in the Norfolk cases, which were later adopted by the motion judge in the Middlesex cases and are supported by the record. See Commonwealth v. Estabrook, 472 Mass. 852, 857 (2015). In early 2012, there was a rash of residential burglaries in Brookline and Cambridge, resulting in the theft of jewelry, credit cards, electronics, and other items. Aided by, among other things, a driver's license belonging to the defendant's wife that was left behind at one of the burgled homes, video surveillance footage captured at local retail stores of a woman and a man using the stolen credit cards to make purchases, and positive photographic identifications made by a clerk employed at one of the stores, police officers focused on the defendant and his wife as suspects and applied for warrants for their arrest.

Without waiting for the warrants to issue, police officers proceeded to a house in Lynn where they understood the defendant and his wife were residing. When the defendant's wife opened the front door, the officers inaccurately represented that they had a warrant for her arrest,[2] and took her into custody. At the

[2] The Commonwealth does not contest that the warrants had not yet issued at the time the arrests were made. It is not

defendant's wife's direction, the officers then proceeded to a second-floor bedroom, where they observed some of the stolen and fraudulently purchased items. Eventually, the officers also located the defendant in the third-floor bathroom and placed him under arrest.

After the defendant and his wife were booked, they both agreed to be interviewed by police. During her interview, the defendant's wife made various inculpatory statements. Meanwhile, back at the house in Lynn, which had been secured by police, a man identifying himself as the stepfather of the defendant's wife and as the owner of the house informed the police that his stepdaughter and the defendant had been residing there for several weeks. Later, that same individual alerted the officers to several items in a trash can outside the house, including a prescription bottle labeled with the name of one of the victims of the burglaries.

Thereafter, a Brookline police detective sought and secured a warrant to search the Lynn premises.[3] According to the affidavit filed in support of the warrant, police made the decision to seek the warrant after the defendant's wife informed

---

clear, however, whether police knew that to be the case at the time of the arrests.

[3] The search warrant also covered two motor vehicles connected with the defendant and his wife.

them that she could not consent to a search because the house belonged to her stepfather. The affidavit also included references to the evidence the police observed when they initially entered the home to make the arrests, including the stolen and fraudulently purchased items. Predictably, those items were again "discovered" during the execution of the search warrant and seized.

2. Prior proceedings. In late 2012, the defendant was indicted in both Norfolk County and Middlesex County for an array of offenses, including multiple counts of breaking and entering in the daytime with the intent to commit a felony, larceny over $250, identity fraud, and improper use of a credit card. In 2013, he also was indicted in Middlesex County for intimidation of a witness, arising from alleged threats made against his codefendant wife, who eventually testified for the Commonwealth pursuant to a cooperation agreement. The Middlesex and Norfolk cases were not joined for trial, and the Norfolk cases proceeded on a faster track.

The defendant filed a motion in the Norfolk cases to suppress, among other things, all items seized during the execution of the search warrant, arguing that because the officers were not in possession of an arrest warrant at the time they entered the home to arrest the defendant, the evidence observed during that time was the product of an unlawful search.

The motion judge agreed that the initial entry was unauthorized; however, after excising the information obtained as a result of the unlawful entry from the affidavit supporting the warrant application, the judge concluded that the remaining information was sufficient to establish probable cause for the search. Accordingly, pursuant to the independent source rule, the judge denied the motion with respect to the evidence recovered at the time of the search.[4] See Commonwealth v. Tyree, 455 Mass. 676, 692 (2010) ("Evidence obtained during a search pursuant to a warrant that was issued after an earlier illegal entry and search is admissible as long as the affidavit in support of the application for a search warrant contains information sufficient to establish probable cause to search the premises 'apart from' observations made during the initial illegal entry and search" [citation omitted]). The defendant subsequently was convicted on all counts, and the Appeals Court affirmed. See Pearson I, 90 Mass. App. Ct. at 289, 294.

The defendant fared no better in the Middlesex prosecution. In deciding the defendant's motion to suppress, which was based on the same arguments that the defendant had made in the Norfolk

[4] The motion judge in the Norfolk cases also denied the motion to suppress with respect to statements the defendant made after his arrest, but allowed it as to statements made in the course of his arrest. The motion judge in the Middlesex cases followed suit.

cases, the motion judge in the Middlesex cases adopted the factual findings and legal conclusions reached by the motion judge in the Norfolk cases. The defendant subsequently was convicted on all counts in the Middlesex cases; the convictions were affirmed on appeal.[5] See Pearson II, 96 Mass. App. Ct. at 300. We allowed the defendant's application for further appellate review, limited to the question whether the independent source exception applies to the evidence obtained as a result of executing the search warrant.

Discussion. "[T]he exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure." Commonwealth v. Fredericq, 482 Mass. 70, 78 (2019), citing Wong Sun v. United States, 371 U.S. 471, 487-488 (1963). However, there are exceptions to this general rule, including, as relevant here, that information "received through an illegal source is considered to be cleanly obtained when it arrives through an independent source." Murray v. United States, 487 U.S. 533, 538-539 (1988), quoting United States v. Silvestri, 787 F.2d 736, 739 (1st Cir. 1986).

The purpose of the "independent source" doctrine, recognized under both the Fourth Amendment to the United States

[5] The sentences in the Middlesex cases were enhanced after the trial judge found the defendant to be a habitual offender under G. L. c. 279, § 25 (a).

Constitution and art. 14 of the Massachusetts Declaration of Rights, has been described by the United States Supreme Court in this way:

> "[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."

Murray, supra at 537, quoting Nix v. Williams, 467 U.S. 431, 443 (1984). See Commonwealth v. DeJesus, 439 Mass. 616, 624 (2003).

1. The standard. The Commonwealth bears the burden of showing by a preponderance of the evidence that the challenged evidence is admissible pursuant to the independent source exception to the exclusionary rule. See Estabrook, 472 Mass. at 865. To do so, the Commonwealth must make two showings: (1) the officers' decision to seek the search warrant was not prompted by what they observed during the initial illegal entry, and (2) the affidavit supporting the search warrant application contained sufficient information to establish probable cause, "apart from" any observations made during the earlier illegal entry. See DeJesus, 439 Mass. at 625, 627 n.11, citing Murray, 487 U.S. at 541-543.

We begin by noting that our articulation of the independent source test in prior cases appears to have led to some

confusion. In DeJesus, 439 Mass. at 628 n.11, we acknowledged the first prong of the standard, but only in a footnote because the defendant had not challenged the applicability of that prong. Subsequently, on occasion we have discussed the second prong of the test without any mention of the first. See Tyree, 455 Mass. at 692, quoting DeJesus, supra at 625. See also Estabrook, 472 Mass. at 866, citing Tyree, supra. We clarify that the standard comprises two separate prongs, each of which must be analyzed to determine whether the independent source exception to the exclusionary rule applies.

a. First prong. On its face, the first prong of this test, whether the officers' "decision to seek the warrant was prompted by what they had seen during the initial [unlawful] entry," involves a subjective inquiry. Murray, 487 U.S. at 542. Federal circuit courts, including the United States Court of Appeals for the First Circuit, have uniformly concluded as much. See, e.g., United States v. Rose, 802 F.3d 114, 123-124 (1st Cir. 2015); United States v. Hill, 776 F.3d 243, 252 (4th Cir. 2015); United States v. Markling, 7 F.3d 1309, 1317-1318 (7th Cir. 1993); United States v. Restrepo, 966 F.2d 964, 972 (5th Cir. 1992); United States v. Herrold, 962 F.2d 1131, 1141 (3d Cir. 1992). Other jurisdictions also have adopted a subjective approach to the first prong. See, e.g., Evans v. United States, 122 A.3d 876, 884 (D.C. 2015); Kamara v. State, 205 Md. App.

607, 627-628 (2012); State v. Holland, 176 N.J. 344, 363-364 (2003); State v. Krukowski, 2004 UT 94, ¶¶ 12-13; State v. Hilton, 164 Wash. App. 81, 90-91 (2011).

However, on direct appeal from the Norfolk convictions, the Appeals Court departed from this approach and determined instead that "[t]he appropriate inquiry under State jurisprudence is . . . whether it was objectively reasonable for police to seek a warrant under the circumstances" (emphasis added). Pearson I, 90 Mass. App. Ct. at 291-292. See id., quoting Commonwealth v. Ceria, 13 Mass. App. Ct. 230, 235 (1982). The Appeals Court reasoned that such a departure was appropriate as it provided greater protection against searches and seizures under art. 14 than is provided under the Fourth Amendment. Pearson I, supra, citing Commonwealth v. Blevines, 438 Mass. 604, 607 n.4 (2003). We are not convinced. As the dissenting justice in Pearson II pointed out, framing the first prong as an objective inquiry "deprives the defendant of the opportunity to challenge whether the particular police officers would have sought a warrant had they not earlier entered the home illegally" regardless of whether it would have been objectively reasonable for them to do so. Pearson II, 96 Mass. App. Ct. at 310 (Henry, J., dissenting in part). As we are persuaded that the objective approach to the first prong adopted in Pearson I provides less protection than does the inquiry made in connection with a Fourth Amendment

analysis, it cannot be permitted to stand. See DeJesus, 439 Mass. at 627 n.11.

A purely subjective approach to the first prong, on the other hand, could incentivize post hoc attestations from police that they intended to seek a search warrant regardless of what they discovered in the course of the earlier unlawful conduct. The Supreme Court anticipated this concern in Murray, 487 U.S. at 540 n.2, noting that "[t]o say that a . . . court must be satisfied that a warrant would have been sought without the illegal entry is not to give dispositive effect to police officers' assurances on the point. Where the facts render those assurances implausible, the independent source doctrine will not apply." The First Circuit has since interpreted this as requiring a hybrid approach to the first prong:

> "While the first prong of Murray is articulated as a subjective test, nonetheless, it should not be proven by purely subjective means. In making the factual determination as to the police officer's intent, the . . . court is not bound by after-the-fact assurances of their intent, but instead must assess the totality of the attendant circumstances to ascertain whether those assurances appear 'implausible.' Murray, 487 U.S. at 540 n.2; see Restrepo, 966 F.2d at 971-72; see also Devenpeck v. Alford, 543 U.S. 146[, 154] (2004) ('Subjective intent of the arresting officer, however it is determined [and of course subjective intent is always determined by objective means] . . . .')."

United States v. Dessesaure, 429 F.3d 359, 369 (1st Cir. 2005). See Restrepo, 966 F.2d at 972 (noting that first prong is "subjective" inquiry but that "court must infer motivation from

the totality of facts and circumstances"). Thus, in order to determine whether law enforcement officers would have sought a search warrant regardless of the initial illegal entry and search, a court objectively must assess the "totality of the attendant circumstances" to ascertain whether the officers' stated reasons for seeking the warrant are "implausible."[6] Dessesaure, supra, quoting Murray, 487 U.S. at 540 n.2.

Here, in the affidavit supporting the search warrant application, a police detective conceded that the decision to seek a warrant was made after the initial unlawful entry. The defendant argues, therefore, that the Commonwealth cannot demonstrate that police would have sought a search warrant had the illegal entry not occurred. The Commonwealth counters that there is no evidence in the record demonstrating that the detective would not have sought the warrant had the officers not made the initial illegal entry.[7] Because the record on this

---

[6] In DeJesus, 439 Mass. at 627 n.11, this court noted that in the circumstances of that case, there was "no doubt that the police were committed to [the] investigation . . . and would have sought the search warrant with or without th[e] observation[s]" made during the illegal entry. We emphasize, however, that although being committed to an investigation prior to an unauthorized search is a relevant consideration, the inquiry must focus on whether police were committed to securing a search warrant "even if what actually happened had not occurred." Dessesaure, 429 F.3d at 369, quoting Murray, 487 U.S. at 542 n.3.

[7] The Commonwealth additionally contends that the defendant waived this argument by failing to raise it at the suppression

point is inconclusive, we remand the matter to the Superior Court for an evidentiary hearing and determination as to whether the first prong of the independent source exception to the exclusionary rule applies; that is, whether police would have sought a search warrant absent the observations that officers made during the initial unlawful entry.

b. Second prong. The second prong of the independent source test that must be satisfied in order for the exception to the exclusionary rule to apply requires a determination whether, absent the tainted information, the affidavit nevertheless contained probable cause sufficient to issue the search warrant. DeJesus, 439 Mass. at 627. That is, whether the affidavit, so modified, provides "sufficient information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that the items reasonably may be expected to be located in the place to be

---

hearing. We disagree. It is the Commonwealth's burden to prove that the independent source doctrine applies in this case, and the Commonwealth has not yet done that, as only one prong of the two-prong test has been evaluated. We further note that the Commonwealth failed to raise this argument in the Appeals Court, thereby waiving its own waiver claim. See Commonwealth v. LaBriola, 430 Mass. 569, 570 n.1 (2000) (waiver argument not considered because Commonwealth did not raise it at its first opportunity). At any rate, as it appears that we have not mentioned the first prong of the independent source rule since 2003, we cannot fault the defendant for failing to raise it prior to his appeal.

searched" when the search warrant was issued. Id. at 626, citing Commonwealth v. Wilson, 427 Mass. 336, 342 (1998).

Here, after striking references to observations made during the initial illegal entry, the motion judge in the Norfolk cases determined that the affidavit provided adequate probable cause to support a warrant. The motion judge in the Middlesex cases later adopted that determination. Upon our own review of the affidavit excluding the tainted material, we agree. See Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018) (documentary evidence is reviewed de novo).

Conclusion. The Middlesex convictions, with the exception of the conviction for intimidation of a witness, which stands on its own, are vacated.[8] The matter is remanded for further proceedings consistent with this opinion.

So ordered.

[8] Because our grant of further appellate review was limited to the issue whether the search was tainted by the prior illegal entry, we do not address the intimidation of a witness conviction. The Appeals Court's affirmance of that conviction therefore stands.