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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.
BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

~~COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS~~ FRUITS OF UNLAWFUL POLICE INTERROGATION DURING JUNE 18, 2013 SEARCH OF HIS HOME AT 22 RONALD C. MEYER DRIVE, NORTH ATTLEBORO, MA INCLUDING HIS CELL PHONE BEARING 203-606-8969

Introduction. Now comes the Commonwealth which states as follows: The defendant, Aaron Hernandez, was arraigned in Attleboro District Court on June 26, 2013 on charges of first-degree murder and various firearms offenses. He was subsequently indicted by a Bristol County grand jury for the same crimes and is currently awaiting trial. On or about September 12, 2014, the defendant filed a motion to suppress the fruits of an alleged unlawful interrogation by police that occurred during the execution of a search warrant at his residence on June 18, 2013. Specifically, the defendant alleges that police questioned him about the whereabouts of his cell phone. Such questioning, the defendant asserts, amounted to violations of his Fifth Amendment and Sixth Amendment rights. Accordingly, the

defendant argues, any statements that he made regarding the location of his cell phone (he claims that he told police that he had given the phone to his lawyers) must be suppressed. Suppression, however, is not required.

Discussion. The most obvious rejoinder to the defendant's argument is that police had an independent source for the contested statements. See Commonwealth v. Gray, 465 Mass. 330, 347 (2013) (independent source for information upon which search or seizure is predicated erases taint of wrongly obtained information). The relevant facts are as follows: During a meeting with the defendant's attorneys, Michael Fee, Esq. and Robert Jones, Esq., on the evening of June 17, 2013 and into the morning of June 18, 2013, prosecutors indicated their desire to examine the defendant's cell phone. Thereafter, an agreement was reached between counsel that provided that, if police obtained a warrant for the phone, the defendant would surrender it to police and, in the meantime, the defendant's attorneys would ensure that no information on the device was altered. There was no mention by either Fee or Jones that they would take physical custody of the phone. In fact, all of the discussions - including detailed discussions regarding the forensic capacity to discover whether the phone had been altered - plainly

contemplated that the defendant would retain custody of the device.

On the evening of June 18 2013, contemporaneous with the start of the police search of the defendant's residence[1], Bomberg telephoned Fee to inform him that police had, in fact, obtained warrants for, *inter alia*, the phone and were in the process of executing same at the defendant's residence. During that call, *Fee informed Bomberg that the defendant no longer had the phone in his possession, that Fee and Jones had received the phone from the defendant, and that it was at the offices of their law firm*. Fee stated that, if Bomberg would send defense counsel an image of the warrant, he would review it and determine whether the phone would be turned over to police. Bomberg sent the image of the warrant authorizing seizure of the cell phone from "the possession of Aaron Hernandez" whereupon Jones, Fee and outside counsel (as recited in Jones' affidavit appended to his motion to suppress) examined the warrant. Jones informed Bomberg that the phone would be surrendered. Less than two hours later, Jones delivered the phone, without objection, to a state

[1] Police made their initial entry at 7:03PM and Bomberg, who was off-site and informed at 7:06PM that the search had begun, called Fee at 7:07PM.

trooper in the ground floor public lobby of the building in which his offices are located.

According to the defendant's own recitation of the underlying facts, as well as the video evidence depicting the search of the defendant's home, the 7:07PM call from Bomberg to Fee preceded any so-called interrogation of the defendant. Any information obtained from the defendant regarding the location of the phone was, therefore, entirely duplicative of the information received by the government from Fee. To the extent that police had a lawful independent source for the contested statements, the defendant's argument that the information was obtained from him unlawfully is moot.

Alternately, by virtue of the agreement the defendant made with police on the morning of June 18th regarding the surrender of the cell phone upon presentation of a warrant, the defendant waived any constitutional claim that he otherwise might have had relating to police questioning about the whereabouts of the phone during the execution of the warrant. "In determining whether a [Miranda] waiver was made voluntarily, the court must examine the totality of the circumstances surrounding the making of the waiver." Commonwealth v. Edwards, 420 Mass. 666, 670 (1995). The principal inquiry remains whether the defendant, "with a

full knowledge of his legal rights, knowingly and intelligently relinquish[ed] them." Commonwealth v. Cruz, 373 Mass. 676, 687 (1977). The record certainly reflects no evidence of "unfair techniques or tactics" on the part of police that could be said to subvert the validity of the waiver. Commonwealth v. Williams, 388 Mass. 846, 853 (1983). The defendant, counseled by experienced lawyers, received significant consideration for that agreement, including the certain ability to retain his phone while police determined whether they should seek a warrant. There was absolutely no trickery or oppression. Responding to subsequent police questions about the whereabouts of the phone, at least once police had performed their part of the bargain and obtained a warrant, was merely a necessary part of the defendant's bargained-for obligations.

Finally, even if there were no independent source or prior agreement, the defendant would still not be entitled to relief since no interrogation in the constitutional sense occurred here during the execution of the warrant. Whether a particular defendant has been subjected to interrogation is an objective inquiry. See Commonwealth v. Braley, 449 Mass. 316, 324 (2007). In general, interrogation can be any words or actions by the police that are reasonably likely to elicit an incriminating

response. See Commonwealth v. Torres, 424 Mass. 792, 796-97 (1997). However, the U.S. Supreme Court, in Rhode Island v. Innis, 446 U.S. 291, 301-302 (1980), concluded that certain forms of administrative questioning that occur in the context of required police duties, such as questioning "normally required for arrest [or] booking," does not constitute interrogation for Miranda purposes. A similar rule must be applied to basic questions posed during the execution of search warrants - such as requests to identify a particular room within a house, where closets are located, who is present in a building, etc. The safe execution of search warrants would not be possible were police prevented from engaging in such basic administrative questioning.

Moreover, even if police did not have the right to pose administrative questions during the execution of the search warrant, the interrogation lies outside the scope of Miranda in any event because it was not custodial. See Commonwealth v. LeClair, 55 Mass. App. Ct. 238, 242 (2002)(once a suspect invokes his or her right to counsel, police barred from conducting only "further custodial interrogation" without a valid waiver of rights). See also Arizona v. Roberson, 486 U.S. 675, 683-684 (1988); McNeil v. Wisconsin, 501 U.S. 171, 177 (1991). Here, there is no

question that the defendant, who was in the non-threatening setting of his own home, was free to leave and refuse to answer any and all police questions. See Commonwealth v. Groome, 435 Mass. 201, 216 (2001) (a person who is not subject "to custodial interrogation [if he] is free to stop talking with the police and free to leave"). In these circumstances, it is impossible to say that any questioning was custodial.

Conclusion. In light of the foregoing, the defendant's motion to suppress should be denied.

Respectfully submitted,

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