21-P-1129 Appeals Court

COMMONWEALTH vs. MARK TOMAS REGAN.

No. 21-P-1129.

Suffolk. May 6, 2024. – August 23, 2024.

Present: Milkey, Hodgens, & Toone, JJ.

Homicide. Firearms. Evidence, Firearm, Fingerprints, Expert opinion. Witness, Expert. Constitutional Law, Search and seizure. Search and Seizure, Emergency, Warrant. Practice, Criminal, Instructions to jury, Motion to suppress.

Indictments found and returned in the Superior Court Department on May 15, 2014.

A pretrial motion to suppress evidence was heard by Mary K. Ames, J., and the cases were tried before Jeffrey A. Locke, J.

Joanne T. Petito for the defendant.
Paul B. Linn, Assistant District Attorney, for the Commonwealth.

TOONE, J. Because the victim, Mark Regan, Sr., never missed work, his coworkers were alarmed when he did not show up one morning. Calls to his phone went unanswered, and snow and ice on his car went uncleared. After family and neighbors

raised additional concerns about his age and health, police officers entered his house through a second-floor window and found his bloodstained body on the floor. They also encountered the defendant, the victim's son, who shares his name. After obtaining a warrant, the officers searched the house and found a loaded revolver with latent fingerprints that, according to the Commonwealth's expert, matched those of the defendant.

A Superior Court jury found the defendant guilty of murder in the second degree, unlawful possession of a firearm, and unlawful possession of ammunition. On appeal, the defendant argues that (1) the motion judge erred by denying his motion to suppress the evidence obtained from the home because the officers' warrantless entry violated the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, (2) the trial judge erred by allowing certain unobjected-to testimony by the Commonwealth's fingerprint expert, and (3) the Commonwealth did not meet its burden of proof for the unlicensed firearm and ammunition charges.

On the first issue, we conclude that the officers had an objectively reasonable basis to believe that the victim was in his house and in need of emergency assistance. Although the police may no longer rely on the community caretaking doctrine as a standalone justification to enter a home without a warrant,

see Caniglia v. Strom, 593 U.S. 194, 196 (2021), the emergency aid doctrine remains a valid exception to the warrant requirement. On the second issue, we conclude that while certain statements by the expert may have overstated the accuracy of fingerprint comparisons, they did not result in a substantial risk of a miscarriage of justice. Accordingly, we affirm the defendant's conviction of murder. On the third issue, we vacate the defendant's firearm and ammunition convictions pursuant to the Supreme Judicial Court's decisions in Commonwealth v. Guardado, 491 Mass. 666 (2023) (Guardado I), and Commonwealth v. Guardado, 493 Mass. 1 (2023) (Guardado II), cert. denied, U.S. Supreme Ct., No. 23-886 (June 24, 2024).

Background. We first summarize the facts found by the motion judge in her memorandum of decision denying the defendant's motion to suppress. The victim worked at FedEx in Needham and never missed work or failed to answer his cell phone. After he did not arrive for his morning shift on March 12, 2014, coworkers called him repeatedly, but there was no answer. After the victim failed to arrive for his afternoon shift, his supervisor called 911. He informed the police that the victim was sixty-six years old and his absence was "out of character," expressed concern that the victim might be ill although he was not aware of specific medical problems, and asked them to perform a wellness check.

On the morning of March 14, Boston police Officer Stephen Parenteau received a radio call asking him to conduct a wellness check at the victim's home after an off-duty officer, whose brother was another of the victim's colleagues, raised concerns about his absence and unspecified medical issues. Two other police officers were outside the victim's house when Parenteau arrived. One neighbor told the officers that he had not seen the victim in a couple of days. Another neighbor reported that over the past few nights she had not seen lights or other signs of activity in the house. The officers knocked and rang the doorbell but received no answer. Inspecting the perimeter of the house, they did not see any unlocked or damaged doors, but there was a pile of mail between the storm and main front doors. The victim's car was parked in front of the house and covered with snow and ice from a storm that had ended the morning before.

The victim's brother arrived around 8:30 A.M. The brother was concerned about the victim's health, but did not recall whether he discussed those concerns with the officers outside the house. The brother urged the officers to enter the home, but he did not have a key. The officers waited until their patrol supervisor authorized them to enter, and then used a ladder on the side of the house to enter through an unlocked second-floor window. They saw the victim's body in the hall,

partially wrapped in a bed sheet, with bloodstains on his body and the floor. After they called for emergency medical services, the defendant appeared. Wearing a T-shirt and underwear, he identified himself as the homeowner's son and said he had been in the attic because he was frightened. The officers took the defendant to police headquarters and sealed the scene until a search warrant was approved.

At trial, evidence was presented that only two of the four bedrooms appeared to be lived in, and in one of those bedrooms the police found live .22 caliber cartridges, spent .38 caliber cartridge casings, and papers showing the defendant's name. They also found a .38 caliber Charter Arms revolver hidden in the insulation under the floorboards of the attic. A ballistics expert testified that a bullet fired from the revolver matched the projectiles recovered from the victim's body. A police criminologist testified that three latent fingerprints were found on the revolver and two of them matched the defendant's fingerprints.

Discussion. 1. Motion to suppress. Reviewing a ruling on a motion to suppress evidence, we accept the motion judge's findings of fact absent clear error and defer to her assessment of the credibility of the testimony taken at the evidentiary hearing. See Commonwealth v. Scott, 440 Mass. 642, 646 (2004). We review de novo the application of constitutional principles

to the facts as found. See Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

In denying the defendant's motion to suppress, the judge concluded that the entry "was justified pursuant to the responsibility police have as community caretakers and the emergency aid doctrine." Two years later, the United States Supreme Court held that the police's exercise of their duties as community caretakers is not sufficient to excuse the Fourth Amendment's warrant requirements for entry into a home. Caniglia, 593 U.S. at 196. In Caniglia, the petitioner got a handgun, put it on the table, and asked his wife to "shoot [him] now and get it over with." Id. The next morning, the wife asked the police to conduct a welfare check on her husband. Id. Officers encountered him on the porch, and he agreed to be transported to a hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. Id. at 196-197. After the ambulance left, the officers entered his home and seized the firearms. Id. at 197. The Court ruled that the decision to remove the petitioner and the firearms from the premises was not justified by a community caretaking exception to the warrant requirement. Id. at 197-198. Although it had in an earlier case sustained the warrantless search of an automobile in police custody for a firearm, see Cady v. Dombrowski, 413 U.S. 433, 441 (1973), the Court explained that

there is a "constitutional difference" between vehicles and homes, and while officers are frequently called on to perform noncriminal community caretaking functions on public highways, the recognition of those tasks is "not an open-ended license to perform them anywhere." Caniglia, supra at 199.

Because "the Massachusetts Constitution may not provide less protection to defendants than the Federal Constitution," Commonwealth v. DeJesus, 489 Mass. 292, 296 (2022), the community caretaking doctrine is insufficient after Caniglia to justify a warrantless entry into a home under either the Fourth Amendment or art. 14 of the Massachusetts Declaration of Rights. See Gallagher v. South Shore Hosp., Inc., 101 Mass. App. Ct. 807, 823 & n.28 (2022). We therefore consider whether the other ground cited by the judge, the emergency aid doctrine, justified the officers' entry into the victim's house.[1]

Under the emergency aid doctrine, the police "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Commonwealth v. Townsend, 453 Mass. 413, 425 (2009), quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

[1] We assume without deciding that the defendant had a reasonable expectation of privacy in the victim's house. See DeJesus, 489 Mass. at 296. The issue was not raised at the hearing, and there was evidence that the defendant slept at the house several times per week.

Because the ultimate touchstone of the Fourth Amendment and art. 14 is reasonableness, the warrant requirement is subject to certain exceptions, and the emergency aid exception allows for warrantless entry in "an exigency or emergency" when there is a "need to protect or preserve life or avoid serious injury." Townsend, supra, quoting Commonwealth v. Knowles, 451 Mass. 91, 96 (2008).

The emergency aid exception to the warrant requirement remains valid after Caniglia. In Caniglia, 593 U.S. at 198, quoting Kentucky v. King, 563 U.S. 452, 460 (2011), the Supreme Court noted that it had earlier held that "law enforcement officers may enter private property without a warrant when certain exigent circumstances exist, including the need to 'render emergency assistance to an injured occupant or to protect an occupant from imminent injury.'" Concurring opinions by Chief Justice Roberts and Justice Kavanaugh confirmed that this exception survived the Court's new ruling.[2] Accordingly, courts in other jurisdictions have continued to apply the

[2] See Caniglia, 593 U.S. at 200 (Roberts, C.J., concurring) ("A warrant to enter a home is not required, we explained, when there is a 'need to assist persons who are seriously injured or threatened with such injury.' . . . Nothing in today's opinion is to the contrary, and I join it on that basis" [citations omitted]); id. at 204 (Kavanaugh, J., concurring) ("[T]he Court's decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid").

emergency aid exception after Caniglia. See, e.g., State v. Abu Youm, 988 N.W.2d 713, 720 (Iowa 2023); State v. Samuolis, 344 Conn. 200, 217-218 (2022), and cases cited therein.

Unlike the community caretaking exception, the emergency aid exception applies only when there are exigent circumstances or an emergency. Because the purpose of police entry is not to investigate criminal activity, a showing of probable cause is not necessary to invoke the exception. See Commonwealth v. Duncan, 467 Mass. 746, 750, cert. denied, 574 U.S. 891 (2014); Commonwealth v. Raspberry, 93 Mass. App. Ct. 633, 637-638 & n.8 (2018). Instead, the warrantless entry must satisfy "two strict requirements." Id. at 638, quoting Duncan, supra. "First, there must be objectively reasonable grounds to believe that an emergency exists. . . . Second, the conduct of the police following the entry must be reasonable under the circumstances" (citation omitted). Duncan, supra. Under the first requirement, "[r]easonableness must be 'evaluated in relation to the scene as it could appear to the officers at the time, not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis.'" Townsend, 453 Mass. at 425-426, quoting Commonwealth v. Young, 382 Mass. 448, 456 (1981). For there to be reasonable grounds to believe that an emergency exists, "[t]he injury sought to be avoided must be immediate and serious, and the mere existence of a potentially harmful

circumstance is not sufficient." Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 841-842 (2006). On the other hand, officers do not need "ironclad proof of 'a likely serious, life-threatening' injury" to invoke the exception. Commonwealth v. Entwistle, 463 Mass. 205, 214 (2012), cert. denied, 568 U.S. 1129 (2013), quoting Michigan v. Fisher, 558 U.S. 45, 49 (2009).

Even though performing wellness checks on vulnerable members of the community is among police officers' most important duties, the mere fact that a concerned friend, family member, or neighbor has requested a wellness check does not automatically justify warrantless entry into a home.[3] Instead, the facts known by the police at the time must establish an objectively reasonable basis to believe that entering a home is warranted to address an emergency. Here, the facts established an objectively reasonable basis for the officers to believe that the victim was in his house and in need of emergency assistance. His failure to show up at work or answer his cell phone was so unusual that the police received two separate requests to

[3] In particular, as this court discussed in Gallagher, 101 Mass. App. Ct. at 818-822, State law and regulations establish detailed "procedures for addressing emergency care for an elder at risk of abuse or neglect, with substantial due process protections and protection from unwarranted entry and treatment without consent."

conduct a wellness check at his house.[4] The police were informed that the victim was sixty-six years old and had certain, unspecified medical issues. As officers conducted their second wellness check outside the house, they were approached by the victim's brother, who urged the officers to enter the house, as well as by two of the victim's neighbors, who reported that they had not seen the victim or any indication of his normal activity at the house for days. The officers knocked and rang the doorbell and received no answer. Mail had accumulated inside the victim's door, and his car had not been moved for two nights. Considering these facts in their totality, we conclude that it was objectively reasonable for officers to believe that the victim was in his home and faced an immediate and serious risk to his health and safety. See, e.g., Entwistle, 463 Mass. at 216 ("although it could not reasonably be foreseen precisely what had happened to the missing family, there was a reasonable basis to believe that something unfortunate might have happened that rendered the defendant's wife unable to communicate with

[4] Although the police were initially made aware of the victim's absence two days before they entered the house, that delay does not indicate a lack of emergency where additional facts emerged that changed their analysis. Townsend, 453 Mass. at 427 ("The fact that the officers let some time pass . . . does not automatically negate application of the emergency exception"). Rather, the facts show that the police acted reasonably by taking appropriate steps based on information they gathered over time.

her mother and friends"); Townsend, 453 Mass. at 426 (victim's failure to attend visit with her children, "which previously had never occurred," and other factors established reasonable basis to believe she needed aid).

As for the second requirement, there is no dispute that the police acted reasonably under the circumstances following their entry into the house. After officers asked the defendant to dress and transported him away, they "froze" or secured the house so that no one could enter while they sought a search warrant, and they reentered the house only after a warrant was issued.

Because the officers' entry into the victim's house satisfied the requirements for application of the emergency aid doctrine, we affirm the judge's decision denying the motion to suppress.[5]

2. Fingerprint expert testimony. At trial, the police criminologist testified that he recovered three latent fingerprints on the Charter Arms .38 caliber revolver that officers found hidden in the attic, and he opined that two of those fingerprints matched the defendant's thumb and index

[5] Because we conclude that the entry was constitutionally authorized, we need not address the defendant's argument that all "fruits" of the entry and subsequent search of the victim's house (including after the warrant was issued) should have been excluded at trial. See Wong Sun v. United States, 371 U.S. 471, 487-488 (1963).

finger. He further testified that "[f]ingerprints are unique and persistent, meaning they are unique that no two individuals have ever been found to have the same fingerprints," and after the prosecutor asked whether he had "ever made an erroneous identification," he responded "[t]o my knowledge, no." The defendant argues that these latter statements were improper because they suggested that fingerprint identification evidence is infallible. Because the defendant did not object to either statement, our review is limited to determining whether there was error and, if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Acevedo, 446 Mass. 435, 450 (2006).

"Testimony to the effect that a latent print matches, or is 'individualized' to, a known print, if it is to be offered, should be presented as an opinion, not a fact, and opinions expressing absolute certainty about, or the infallibility of, an 'individualization' of a print should be avoided." Commonwealth v. Gambora, 457 Mass. 715, 729 n.22 (2010). Fingerprint expert witnesses "must clearly frame their findings in the form of an opinion to avoid improper testimony." Commonwealth v. Fulgiam, 477 Mass. 20, 44, cert. denied, 583 Mass. 923 (2017).[6] Here, the

[6] After this case was tried, the Supreme Judicial Court clarified the mechanics of fingerprint testimony. "[A]n expert testifying to a fingerprint match must state expressly that the match constitutes the expert's opinion based on the expert's

trial judge intervened to ensure that the Commonwealth's witness adhered to these requirements. At one point, the judge asked the witness to confirm that he formed an "opinion" on identification, then directed the prosecutor to avoid testimony about the verification step of the latent print analysis because it was "a backdoor way of bootstrapping opinions." See Commonwealth v. Honsch, 493 Mass. 436, 451 (2024), quoting Fulgiam, supra at 46 (urging judges to "use caution in allowing testimony regarding the verification step" in fingerprint analysis).

Notwithstanding the judge's careful supervision, we acknowledge that, considered in isolation, the unobjected-to statements by the witness might be interpreted as overstating the accuracy of forensic fingerprint science. See Commonwealth v. Wadlington, 467 Mass. 192, 205 (2014) (error for prosecutor to elicit testimony that latent print analysis is error-free when conducted properly); Commonwealth v. Joyner, 467 Mass. 176, 184 n.11 (2014) ("the primary question about the accuracy and

---

education, training, and experience." Commonwealth v. Robertson, 489 Mass. 226, 238, cert. denied, 143 S. Ct. 498 (2022). If the expert does not so testify, "the prosecutor must elicit this clarification even if the defendant does not object" by, for instance, clarifying that "a subjective opinion is being sought" and then asking "whether the witness has an opinion 'to a reasonable degree of fingerprint analysis certainty.'" Id. at 238-239, citing Commonwealth v. Pytou Heang, 458 Mass. 827, 848 (2011). See Mass. G. Evid. § 702, Note (Illustrations, Fingerprints) (2023).

reliability of fingerprint identification involves not the uniqueness of different fingerprints but an examiner's ability reliably to discern such differences"). Nevertheless, in the context of the witness's overall testimony, the statements did not give rise to a substantial risk of a miscarriage of justice. See Commonwealth v. Armstrong, 492 Mass. 341, 353-358 (2023); Commonwealth v. Bonnett, 472 Mass. 827, 831 n.5 (2015), S.C., 482 Mass. 838 (2019). The witness did not describe his methodology as infallible, and (with the judge's guidance) he properly framed his findings as an opinion, which reduced the risk that either statement misled the jury. The judge also instructed the jury that they should evaluate the testimony of expert witnesses like any other witness and were not bound to accept any expert's testimony or opinions. Particularly when we consider the strength of the Commonwealth's evidence linking the defendant to the crime, separate from the fingerprint expert's testimony, we are not left with any "uncertainty that the defendant's guilt has been fairly adjudicated" (citation omitted). Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005).[7]

[7] The defendant's argument fares no better when reframed as a challenge to his trial counsel's failure to object to the fingerprint expert's statements at trial. "To prevail on a claim of ineffective assistance of counsel, . . . a defendant also must show that counsel's deficiency resulted in prejudice, which, in the circumstances of counsel's failure to object to an

3. Convictions of unlawful possession of a firearm and ammunition. Lastly, the defendant argues that his convictions of unlawful possession of a firearm and ammunition must be reversed due to the Supreme Judicial Court's decisions in Guardado I and Guardado II. We agree.

Following the Supreme Court's decision in New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022), the Supreme Judicial Court ruled in Guardado I, 491 Mass. at 690-693, that the Commonwealth bears the burden of proving that a defendant lacks a license for firearms and ammunition, and that a judge must instruct jurors as to this burden. In Guardado II, 493 Mass. at 6-9, the court clarified that the appropriate remedy for failing to properly instruct the jury on this issue is a new trial, as opposed to a judgment of acquittal. These decisions apply to this case because the defendant's appeal was pending when they were published. Guardado I, supra at 694.

The Commonwealth concedes that it did not present evidence at trial that the defendant lacked a license for the firearm or

---

error at trial, is essentially the same as the substantial risk standard we apply to unpreserved errors" (citation omitted). Commonwealth v. LaChance, 469 Mass. 854, 858 (2014), cert. denied, 577 U.S. 922 (2015), citing Azar, 435 Mass. at 686-687. Because no substantial risk of a miscarriage of justice resulted from the expert's testimony, there is no basis for an ineffective assistance claim based on counsel's failure to object to that testimony. See Commonwealth v. Curtis, 417 Mass. 619, 624 n.4 (1994); Commonwealth v. Farnsworth, 76 Mass. App. Ct. 87, 100 (2010).

the ammunition. Additionally, the judge, lacking the benefit of Bruen, Guardado I, or Guardado II, did not instruct the jury that nonlicensure is an essential element of the charges. We therefore vacate the defendant's convictions of unlawful possession of a firearm and ammunition and set aside those verdicts. The Commonwealth may retry the defendant on the firearm and ammunition charges if it so chooses. We affirm the defendant's conviction of murder in the second degree.

So ordered.