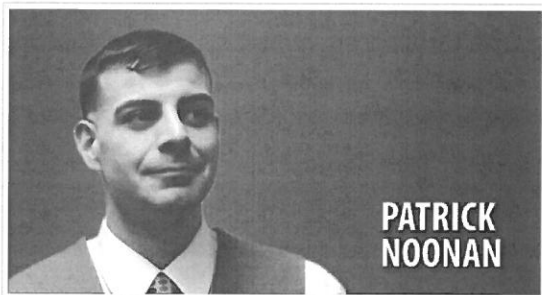


Home, cellphone search results must be suppressed

Commonwealth didn't show voluntary waiver of rights

By: Eric T. Berkman ☉ May 31, 2018



Evidence police obtained while searching a suspected heroin dealer's house and cellphone was not admissible absent proof that the defendant voluntarily consented to the search while in custody after initially refusing to answer questions and requesting a lawyer, a District Court judge has ruled.

Defendant John Joyce was apparently read his Miranda rights at the scene of his arrest. Once he was in custody at the station, he denied the allegations, refused to sign a consent-to-search form, and asked for an attorney. He also allegedly asked how "the process" would work from that point. Police, apparently without re-advising him of his rights, responded that officers were already at his house and that they would search the home either with his consent or with a warrant.

The defendant, after allegedly expressing concern for his mother, who was in the house at the time, and getting reassurance that police would not "trash" the place, signed forms consenting to a search of his home and cellphone.

In a subsequent motion to suppress, the defendant argued that the commonwealth had not proven beyond a reasonable doubt that having already invoked his Miranda rights, subsequent events indicated a knowing and voluntary waiver of those rights.

Judge Julieann Hernon agreed.

"Once in the interview room, there was no evidence that [the defendant] was re-administered Miranda warnings during an interview characterized by the police as aggressive, and involving yelling," Hernon wrote in granting the defendant's motion.

"There was no testimony as to when the yelling or aggressive tactics occurred, but the defendant's assertion of his right to remain silent and right to counsel occurred early in the interview," Hernon continued. "He was concerned about his mother and what would happen to her property during any search. Under those circumstances, I cannot find that the Commonwealth has met its burden of proving that the defendant's consent was given freely and voluntarily."

The seven-page decision is *Commonwealth v. Joyce*, Lawyers Weekly No. 16-001-18. The full text of the ruling can be ordered [here](#).

'Message to police'

David Traub, a spokesperson for the Norfolk County District Attorney's Office, which represented the commonwealth, said the office intends to move forward with the remaining charges against Joyce. He offered no further comment.

But defense counsel Patrick J. Noonan of Brockton called the ruling a “good message” for police departments that once someone invokes his or her Miranda rights, officers have a duty to stop questioning at that point.

“Even if the defendant asks a follow-up question about something innocent, like how the process works, when he’s going to get bailed out, or when he has to go to court, just don’t do it,” Noonan said. “Otherwise, if you’re getting a little cute, [the court is going to say], ‘We have to suppress the evidence.’”

Stanley D. Helinski, a criminal defense attorney in Boston, described the decision as a straight reading of *Commonwealth v. LeClair*, a 2002 Appeals Court decision — affirmed by the Supreme Judicial Court in 2005 — holding that when a defendant initiates further discussion with police after invoking right to counsel, re-interrogation may follow, but the prosecution bears the burden of proving beyond a reasonable doubt that subsequent events showed a knowing waiver of that right.

“When the defendant starts getting nervous and wants to talk, like in this case where he didn’t want his mother bothered, he may choose to cooperate at some point, but the protections put into place are pretty black and white,” Helinski said. “The police just seemed to mess up here.”

Worcester criminal defense attorney James J. Gribouski, who represented the defendant in *LeClair* at the Appeals Court, said that though the *Joyce* ruling cannot be cited as controlling precedent, it can be cited as “guiding and instructional.”

“Clearly, [the officers’] statements went well beyond answering the defendant’s question about how the process would work and were designed to elicit incriminating evidence,” Gribouski said.

He said the case also serves as a reminder to defense lawyers to carefully examine all facets of police interrogation.

“The mere fact that a defendant initiates further conversation with the police after his assertion of his right to remain silent and his right to counsel is not the end of the inquiry,” he said.

Peter J. Aspesi, a defense attorney in Dennis, said the situation in *Joyce* was not particularly unusual. In fact, he said, he had a case in which a client did not invoke his right to remain silent, but he did not waive it either, and the court suppressed his statement.

Meanwhile, Aspesi noted, the House passed a bill recently that funds enhanced training for police officers.

“Hopefully, that will better train officers about these types of things,” he said.



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Voluntary waiver?

On Sept. 1, 2016, Stoughton police were called to a residence after a man died from an apparent heroin overdose.

At the scene, officers recovered a Keno lottery ticket wrapped around brown powder that tested positive for heroin. They also recovered a cellphone.

Authorities searched the phone and discovered a text exchange from the evening before between the decedent, Peter Bukevich, and the defendant. The exchange led police to suspect the defendant had sold heroin to Bukevich.

Detective Kevin Lima and a state trooper, posing as Bukevich, then engaged in a text exchange with the defendant

in which they arranged a meeting in the parking lot of a Walgreens drugstore.

The defendant, who was apparently tailed by police from his house, was met in the parking lot by 10 officers. He was allegedly non-compliant and was tasered before being arrested, placed in handcuffs, and advised of his Miranda rights.

Lima subsequently searched the defendant's vehicle and reportedly seized a lottery ticket folded in a manner that, in the detective's experience, commonly packaged illegal narcotics.

Police took the defendant to the station and placed him in an interrogation room where they advised him he was being charged with distribution of a Class A substance and asked him to sign a consent form to search his house.

At that point, according to one of the officers present, the defendant "denied, denied, denied," asked for an attorney, and stated that he did not want to answer any questions.

As the officers stood up to leave, the defendant allegedly asked how "the process" would work and what would happen if he signed the consent form.

The officers then allegedly told him that police were already at his residence and that they would search the house either with his consent or with a warrant. The defendant apparently asked if his home would be "trashed" and if items would be broken. He also expressed concern about his mother, who was in the house at the time.

Police said they would find what they needed and leave, and the defendant apparently told them where they could locate heroin and pills. The officers later described the interview as "aggressive at times" with "some yelling."

The defendant ultimately signed forms consenting to the search of his home and cellphone and signed a Miranda waiver.

According to the defendant, the police never re-advised him of his Miranda rights at any point before his booking or attempted to clarify whether he was waiving his rights.

He ultimately moved to have evidence seized from his house and his phone suppressed.

Lack of proof

The judge granted the defendant's motion.

In doing so, she distinguished the case from *LeClair*, in which police read the defendant his Miranda rights anew after he made post-invocation statements that called into question his intent to stand by his earlier invocation. The Appeals Court found that, given such further inquiry, admission of the defendant's statements was justified in that case.

"Here, assuming arguendo that the defendant's questioning police as to the search process was an initiation of communication, police were required to clarify whether the defendant was now choosing to waive his rights," Hernon wrote. "The Commonwealth has not met its burden [of] proving beyond a reasonable doubt that the defendant made a knowing, intelligent and voluntary waiver of his rights to remain silent and have counsel present."

Commonwealth v. Joyce

THE ISSUE: Was evidence obtained in a search of a suspected heroin dealer's house and cellphone admissible absent proof that the defendant voluntarily consented to the search while in custody after initially refusing to answer questions and requesting a lawyer?

DECISION: No (Stoughton District Court)

LAWYERS: Rita Muse of the Norfolk County District Attorney's Office (commonwealth)

Patrick J. Noonan of the Law Offices of Gerald J. Noonan, Brockton (defense)

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