COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
No.

APPEALS COURT
2019-P-1230

COMMONWEALTH

V.

AKIL CHARLES

ON APPEAL FROM DECISION OF THE MASSACHUSETTS APPEALS COURT

APPLICATION FOR FURTHER APPELLATE REVIEW OF THE APPELLANT AKIL CHARLES

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JULY 2020

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APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the petitioner and requests, pursuant to Mass.R.A.P. 27.1, leave to obtain further appellate review of his conviction and the June 24, 2020 decision of the Massachusetts Appeals Court.[1]

RELEVANT PRIOR PROCEEDINGS

Akil Charles was charged with possession of a firearm (M.G.L. c. 265, §18B), carrying a loaded firearm without a license (M.G.L. c. 269, §10(n)), carrying a firearm without a license (M.G.L. c. 269, § 10(a)), possession of a large capacity firearm (M.G.L. c. 269, § 10(m)), and possession of cocaine with the intent to distribute (M.G.L. c. 94C, §32A(c)). (Tr. 11/13/18, Pg. 22)[2]

On January 29, 2018, the defendant filed a motion to suppress evidence seized during a warrantless search of his clothing while he was being treated for

[1] Commonwealth v. Charles, 2019-P-1230

[2]References to the Record Appendix will be cited as "R. __", by page number. References to the Transcript will be cited by date and page number: "Tr. X/X/XX, Pg. __". References to the Addendum will be cited as "Add. __", by page number. References to Appellant's Brief will be cited as "Br. __", by page number

gunshot wounds at the hospital. (R. 25) On March 19, 2018, the Commonwealth filed an opposition to the defendant's motion to suppress. (R. 28) On July 2, 2019, an evidentiary hearing was held on the motion to suppress. (R. 15) On July 9, 2018, the motion to suppress was denied. (R. 16) On July 12, 2018, the defendant filed a post hearing memorandum in support of the motion to suppress. (R. 44) On August 13, 2018, the defendant filed a notice of appeal regarding the denial of the motion to suppress. (R. 16) On September 21, 2018, the Supreme Judicial Court denied the defendant's request for an interlocutory appeal. (R. 16)

Mr. Charles had a five-day jury trial from November 11, 2018 until November 20, 2018. (R. 17-19) He was found guilty of possession of a large capacity firearm and possession of cocaine with the intent to distribute. (Tr. 11/20/18, Pg. 11) The jury was deadlocked on the remaining three counts. (Tr. 11/20/18, Pg. 9) Mr. Charles received a sentence of three to three and a half years of incarceration for the two convictions. (R. 20) On January 31, the defendant filed a motion to extend time to file a notice of appeal, which was allowed. (R. 74) A notice of appeal was filed on January 31, 2019. (R. 77)

On June 21, 2019, the Appellate Court granted Appellate Counsel's motion to stay proceedings for the purpose of filling a motion for new trial. (R. 113) On July 8, 2019, appellate counsel filed a motion for new trial on the basis of ineffective assistance of trial counsel. (R. 78) On August 5, 2019, the Commonwealth filed an opposition to the motion for post-conviction relief. (R. 100) On August 8, 2019, the motion for new trial was denied without a hearing. (R. 2-3) A notice of appeal regarding the denial of the motion for new trial was

filed on August 15, 2019. (R. 23) The trial court assembled and transmitted the new appeal to the Appellate Court on August 22, 2019. (R. 24) On August 22, 2019, Appellate counsel filed a motion to remove the stay of proceedings and consolidate the two appeals. (R. 114) The motion was granted on August 23, 2019. (R. 114) On June 24, 2020, the Appeals Court affirm the trial court's decision. (Add. 16)

FACTS RELEVANT TO THE APPEAL

On June 19, 2016, police were called to the scene of a shooting. (R. 97) Police encountered two gunshot victims, Douglas King, and the defendant Akil Charles. (R. 97) Mr. Charles was transported to a hospital to receive treatment for his gunshot wounds. (R. 98) While receiving treatment, hospital workers removed his clothes, which were then seized by the police. (Tr. 11/15/18, Pg. 79-80) Police discovered cocaine in his clothes, packaged in sixteen individually wrapped bags, with a total combined weight between 2.19 and 2.75 grams. (Tr. 11/16/18, Pg. 36-37) Police also discovered forty dollars in cash. (Tr. 11/15/18, Pg. 94)

During closing arguments, trial counsel argued that there was insufficient evidence to show intent to distribute, and that the jury should convict Mr. Charles of simple possession only. (Tr. 11/16/18, Pg. 151-152) The trial judge called a sidebar, where it was discussed that no request for a lesser included offense had been made. (Tr. 11/16/18, Pg. 152) The judge then instructed the jury that they did not have the option of convicting Mr. Charles of simple possession. (Tr.

11/16/18, Pg. 152) The jury convicted Mr. Charles of possession with intent to distribute, as well as possession of a large capacity firearm. (Tr. 11/20/18, Pg. 11)

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Given that trial counsel undeniably erred in closing arguments, asking the jury to find the defendant guilty and saying he deserved to be punished despite trial counsel claiming that he was attemping to obtain a full acquittal, was the defendant deprived of the effective assistance of counsel?
2. Given the police went to the hospital with the specific intention of seeking out the defendant and then seized clothes that they suspected, but did not know, would have evidentiary value, should the plain view exception have been applied?

WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further appellate review is appropriate, in the interests of justice, because the Appeals Court decision failed to consider how prejudicial trial counsel's error was during closing arguments, and because the plain view exception did not apply to the seizure of the defendant's clothing.

I. Trial Counsel's Error Deprived the Defendant of the Effective Assistance of Counsel

In affirming the trial court's decision, the Appeals Court found that trial counsel erred in his closing arguments, but that the error did not deprive the defendant of a substantial ground of defense. (Add. 24) The Appeals Court found that it was a valid tactical decision, given the defendant's immigration issues, to

not request a lesser included offense instruction, and pursue an all or nothing strategy. (Add. 22) While pursuing an all or nothing strategy could have been a valid tactical decision, the closing that trial counsel gave deprived the defendant of that strategy. Trial counsel stated in his closing:

> I ask you to find him guilty of simple possession of cocaine. That's what he did. It's a crime. He should be punished for it.

(Tr. 11/16/18, Pg. 151-152)

The Appeals Court agrees that this was an error, but states that it was not significant enough to constitute ineffective assistance of counsel. (Add. 24) The Appeals Court focuses on the rest of trial counsel's closing, in which trial counsel argues the elements that the Commonwealth had not proven. (Add. 24) However, the last thing that the jury heard from trial counsel in his closing was that the defendant was guilty of a crime, and should be punished for it. (Tr. 11/16/18, Pg. 151-152) In doing so, trial counsel abandoned the trial strategy. See Commonwealth v. Westmoreland, 388 Mass. 269, 274-275 (1983) and Commonwealth v. Street, 388 Mass. 281, 287-288 (1983) (ineffective assistance of counsel where trial counsel abandons trial strategy in closing arguments); Commonwealth v. Triplett, 398 Mass. 561, 569 (1986) (ineffective assistance of counsel where trial counsel's summation leaves defendant denuded of a defense)

The right to make a closing argument is a "fundamental constitutional right." Commonwealth v. Miranda, 22 Mass.App.Ct. 10, 12 (1986); Commonwealth v. Martelli, 38 Mass.App.Ct. 669, 671-672 (1995); Herring v. New York, 422 U.S. 853, 862 (1975)(the right to make summation is an integral part of a defendant's fundamental right to the assistance of counsel). The Appeals

Court in this case admits that trial counsel made a mistake in his closing arguments, a mistake that occurred at the end of closing arguments, a mistake was the final part of his closing arguments, the last thing that jury heard. If trial counsel was indeed pursuing an all or nothing strategy, then asking the jury to find the defendant guilty, asking the jury to punish the defendant, cannot possibly be considered something that does not deprive the defendant of a substantial ground of defense, given that it invalidates the entire strategy of the defendant. Due to the ineffective assistance he received, the defendant was denied his right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the Constitution, and Article 12 of the Massachusetts Declaration of Rights.

II. The Seizure of the Defendant's Clothing Was Not Justified Under the Plain View Exception

In affirming the trial court's decision, the Appeals Court found that the seizure of the defendant's clothes at the hospital was justified under the plain view exception. (Add. 18) "In order for the plain view doctrine to apply, Massachusetts cases require that the police come across the item inadvertently." Commonwealth v. Balicki, 436 Mass. 1, 2 (2002) Here the police did not inadvertently come across the clothing, they followed the ambulance that brought Mr. Charles to the hospital with the obvious purpose of investigating the shooting that had recently taken place, including obtaining Mr. Charles' clothes. (Br. 41-42) See State v. Sheppard, 325 N.W.2d 911, 916 (Iowa Ct. App. 1982) (since the officers evidently expected to seize the clothing from defendant, the State cannot use the 'plain view' exception to validate the warrantless search and seizure)

When the police went to the hospital, they knew that a shooting had occurred, and clearly knew that they wished to obtain Mr. Charles' clothing. Were the Court to rule that the circumstances in this case constitutes plain view, it would allow police to follow any individual they believe is involved in a criminal offense, waiting to see an item they believe to be associated with a crime and seize it, essentially invalidating the Fourth Amendment and circumventing the true purpose of the plain view doctrine, "[t]he inadvertent discovery requirement is essential if we are to take seriously the Fourth Amendment's protection of possessory interests as well as privacy interests." Commonwealth v. Balicki, 436 Mass. 1, 10 (2002) Mr. Charles privacy interests were not protected here, as he had no ability to make the police leave the hospital, and no ability himself to leave the hospital should he wish to live through his gunshot injuries.

Even the Federal Court, which has abandoned the inadvertence requirement, recognizes the importance of confining a police search, "[t]he fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure **if the search is confined in area and duration** by the terms of a warrant or a valid exception to the warrant requirement." Horton v. California, 496 U.S. 128, 138 (1990) (emphasis added) There was no confinement here, the police followed Mr. Charles from the scene to the hospital, and waited for the clothes to be available for them to seize. (Br. 41-42) This was not an inadvertent plain view search, it was a calculated effort to obtain evidence without a warrant.

Not only did they not come across the clothing inadvertently, but the clothing did not have an immediately incriminating nature or evidentiary value that would justify a plain view seizure. As there is nothing illegal about bloody clothes, the police seized the clothing with the idea that it would hold evidentiary value in any investigation of the shooting.(Br. Pg. 45) However it is questionable what kind of evidentiary value would be obtained through the clothing. It was already known that the defendant had been shot, seizing his clothes does nothing to further that information. Similarly, as the defendant had been shot it is not a surprise that his blood was on his clothes. Ultimately the clothes held no evidentiary value of any kind. The Appeals Court referred to the suppression hearing testimony that the blood could be the victim's blood, but also could be the suspect's blood as a reason for it to be safeguarded. (Add. 20) However, this analysis requires testing to determine the potential evidentiary value of the clothes, as such their value was not immediately apparent as is needed for the plain view doctrine. See Commonwealth v. Cruz, 53 Mass. App. Ct. 24, 35 (2001) (the officer had to test the cellular telephone to determine that it was a counterfeit telephone, this fact requires the conclusion that the object's incriminating nature was not immediately apparent) Ultimately the police had a hunch that the clothing would have evidentiary value, which is not enough for plain view.

CONCLUSION

For all the reasons set out above, the defendant's Application for Further Appellate Review should be granted.

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By his attorney

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Date: 7/14/2020

CERTIFICATE OF COMPLIANCE

I the undersigned, counsel to the defendant herein, hereby certify that this application for further appellate review complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(1), (3), (4), (9), and (11) -(15), and that length of this brief was determined using number of words.

/s/ Philip Weber

CERTIFICATE OF SERVICE

I, Philip Weber, hereby certify that I have this day served electronically, by the e-filing system, a copy of the foregoing Application for Further Appellate Review upon:

Benjamin Shorey
Suffolk District Attorney's Office
One Bulfinch Place
Boston, MA, 02114

/s/Philip Weber

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1230

COMMONWEALTH

vs.

AKIL A. CHARLES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from his conviction of possession of cocaine with intent to distribute, arguing that evidence obtained after a warrantless seizure of his clothing should have been suppressed. He also appeals from the denial of his motion for a new trial, which was premised on defense counsel's alleged ineffectiveness for failing to request a jury instruction on the lesser included offense of possession of cocaine. We affirm.[1]

Motion to suppress. The facts relating to the motion to suppress are not disputed. On June 16, 2016, the defendant and another man were shot in the Roxbury section of Boston. Boston Police Officer Lawrence Welch responded to the scene and saw the defendant being put into an ambulance. Welch knew that the

[1] The defendant raises no argument on appeal regarding his conviction of possession of a large capacity feeding device.

defendant was suffering from gunshot wounds and followed the ambulance to the hospital. While Welch was in the defendant's room, medical staff took off the defendant's pants and shirt, and a nurse handed them to Welch. Although the defendant did not object, it is unclear whether he was aware of what was happening. The defendant was not then suspected of any crime.

Because there was blood on the pants, the Boston Police Department's rules and procedures required that the pants be placed in paper bags so that the blood could be dried and preserved. Before that was done, officers laid the pants out to be photographed and conducted an inventory search. In the pants pockets, they found sixteen small bags of cocaine, two bags of marijuana, and forty dollars.

Based on these facts, the motion judge denied the motion to suppress on the ground that the defendant did not have a reasonable expectation of privacy in clothing that was removed from him for the purpose of providing emergency medical attention. On appeal the parties debate the correctness of this conclusion at some length. It is not an issue we need decide, however, because the seizure of the clothing was done without a warrant and a defendant can challenge a seizure, as opposed to a search, so long as he had a possessory interest in the property that was seized. The United States Supreme Court has explained the distinction:

> "[The Fourth Amendment to the United States Constitution] protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property."

United States v. Jacobsen, 466 U.S. 109, 113 (1984). Accord United States v. Neely, 345 F.3d 366, 369-371 (5th Cir. 2003); Sheffield v. United States, 111 A.3d 611, 619 (D.C. 2015). Here, the evidence does not show, and the Commonwealth does not claim, that the defendant relinquished his possessory interest in his clothes. Thus, regardless whether the defendant had a privacy interest in the clothes, the seizure was unreasonable unless authorized by an exception to the warrant requirement. See Commonwealth v. Fortuna, 80 Mass. App. Ct. 45, 48-49 (2011); Commonwealth v. Williams, 76 Mass. App. Ct. 489, 492-493 (2010).

Turning to that issue, we agree with the motion judge that the seizure was justified under the plain view doctrine.[2] The plain view doctrine applies where "the police are lawfully in a

[2] The motion judge rejected the Commonwealth's argument that the seizure was justified by exigent circumstances, and the Commonwealth does not renew that argument on appeal. We note that there could have been exigent circumstances if the need to preserve the blood was so urgent that it would have been impractical to get a warrant, see Williams, 76 Mass. App. Ct. at 492, or if the clothes could have disappeared from the hospital in the time it would take to get a warrant. Cf. Jones v. State, 648 So. 2d 669, 676 (Fla. 1994) (no exigent circumstances where clothes could have been safeguarded by officer or hospital security while warrant was obtained). But the Commonwealth did not offer evidence proving that either exigency existed.

position to view the object"; "the police have a lawful right of access to the object"; the object is "incriminating" in character or "is plausibly related to criminal activity of which the police are already aware"; and "the police [came] across the object inadvertently." Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 306-307 (2010). These requirements are met here.

The issue is controlled in all material respects by Fortuna. In Fortuna a detective responded directly to the hospital after receiving a report that a gunshot victim (the defendant) was en route. See 80 Mass. App. Ct. at 46-47. While interviewing the defendant, the detective saw soot on his clothes, which the detective recognized as incriminating in nature. Id. at 47. Hospital staff bagged the clothes and offered the bag to the detective, who accepted it despite not having a warrant. Id. On these facts we concluded that the plain view doctrine authorized the warrantless seizure of the clothes. Id. at 49.

The facts in this case are materially similar. Welch was lawfully in the hospital to investigate the shooting, and hospital personnel handed him the clothes immediately after removing them from the defendant. Cf. Neely, 345 F.3d at 371 (plain view doctrine did not apply where hospital had already bagged clothes and placed them in storage). The blood on the pants, if not plainly incriminating, was "plausibly related to

criminal activity of which the police [were] already aware." Sliech-Brodeur, 457 Mass. at 306-307. As a detective testified at the hearing, the blood could "be the victim's blood" but could "also be the suspect's blood," which is why it must be "safeguard[ed]" and "check[ed]." See Sheffield, 111 A.3d at 620-621 ("It was readily apparent that the bloody clothes were evidence of a crime, regardless of whether [the defendant] was a victim or a suspect"). See also United States v. Davis, 657 F. Supp. 2d 630, 640 (D. Md. 2009) (similar). Furthermore, Welch came upon the bloody clothes inadvertently when they were removed from the defendant at the hospital.[3] Although the defendant argues that the discovery was not inadvertent because Welch followed the ambulance to the hospital intending to investigate the shooting, that argument is foreclosed by Fortuna. "While it is true that [Welch] expected to find evidence of the shooting when he arrived at the hospital, he had no obligation to get a search warrant before coming to a neutral location to interview the apparent victim." Fortuna, 80 Mass. App. Ct. at 49 n.5. Cf. Commonwealth v. Balicki, 436 Mass. 1, 14 (2002) ("anticipation of finding some additional contraband or other evidence of criminality" does not negate inadvertence).

[3] The Commonwealth contends that the inadvertence requirement should not apply outside the search warrant context. We do not reach this issue.

We thus conclude that, as in Fortuna, the seizure of the defendant's clothing was lawful under the plain view doctrine.[4] And once the clothing was lawfully seized, the police were "authorized to conduct an inventory search without a warrant." Commonwealth v. Abdallah, 475 Mass. 47, 51 (2016). The Commonwealth presented evidence that the inventory search was conducted pursuant to the Boston Police Department's written inventory policy, and the defendant does not challenge the propriety of the search. The defendant's motion to suppress the items found in his pants pockets was therefore properly denied.

Motion for new trial. Neither party asked the trial judge to give an instruction on the lesser included offense of possession of cocaine. The Commonwealth concedes that the defendant would have been entitled to such an instruction, had he requested it. The Commonwealth contends, however, that defense counsel made a reasonable strategic decision not to request the instruction. We agree.

Where an "ineffective assistance of counsel claim is based on a tactical or strategic decision, the test is whether the decision was 'manifestly unreasonable when made.'" Commonwealth

[4] Williams, 76 Mass. App. Ct. at 493, on which the defendant relies, is not to the contrary. Because the parties there only "briefly refer[red]" to the plain view doctrine and did not raise it to the judge, we declined "to discuss whether the evidence was in 'plain view' and . . . could have been taken . . . without the police having to obtain a warrant." Id.

v. Kolenovic, 471 Mass. 664, 674 (2015), quoting Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006). Here, defense counsel's affidavit expressly states that "[t]he decision not to request a jury instruction on the lesser included offense of possession . . . was a strategic decision that was made after consultation with the defendant." The affidavit further states that "immigration[] issues were an important part of that decision" -- that is, because even a conviction of simple possession would make the defendant deportable, counsel decided to pursue an all-or-nothing approach and argue for "acquittal on the indictment charging possession with intent to distribute."

Defense counsel's strategy was not manifestly unreasonable. As the motion judge (who was also the trial judge) found, "it was clear from the case proceedings that [the defendant] sought to avoid any conviction for immigration purposes." It was thus entirely rational for defense counsel not to request the lesser-included instruction, especially given the strength of the evidence on possession, and to focus instead on showing why the Commonwealth failed to prove that the defendant had the intent to distribute. See Commonwealth v. Glover, 459 Mass. 836, 844 (2011) (not manifestly unreasonable for counsel to forego theory that "at best could yield conviction of [lesser included offense]"). While the defendant claims that he was already facing immigration issues prior to the case, and that a

conviction of possession "would only be a small mark" on his record, counsel explained in his affidavit that the defendant's "highest priority was avoiding incarceration" because "he believed that if he was taken into custody then it would make it easier for [United States Immigration and Customs Enforcement] to locate him." The trial judge was therefore well within his discretion to conclude that counsel made a rational tactical decision not to request the lesser-included instruction. See Kolenovic, 471 Mass. at 672-673, quoting Commonwealth v. Lane, 462 Mass. 591, 597 (2012) ("Where, as here, the motion judge is also the trial judge, we give 'special deference' to the judge's findings of fact and the ultimate decision on the motion").

The defendant also claims that, even if defense counsel's all-or-nothing strategy was reasonable, it was manifestly unreasonable for him to then argue in closing that the jury should find the defendant guilty of simple possession. Specifically, the defendant challenges the following portion of the closing:

> "So he had personal use right there, and it's powder, they told you. The prosecution cannot prove beyond a reasonable doubt that [the defendant] possessed this gun, or this cocaine, with the intent to distribute because he didn't. And I ask you to find him guilty of simple possession of cocaine. That's what he did. It's a crime. He should be punished for it. And I ask you to find him guilty of only that."

According to the defendant, by telling the jury to return a guilty verdict of simple possession when that option was not available to them, defense counsel "force[d] the jury to convict [the defendant] of the only available option, possession with intent to distribute."

While defense counsel did err in this respect, we conclude that the error did not deprive the defendant of a substantial ground of defense. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Earlier in his closing, counsel argued at length that the Commonwealth failed to prove that the defendant had the intent to distribute. And immediately after the closing, the trial judge asked to see the attorneys at sidebar, noted that the Commonwealth had not requested a lesser-included instruction, and gave the jury the following curative instruction: "[T]here will not be a charge of simple possession of cocaine. [T]he . . . charge is possession with intent. There's not a . . . lesser included offense." Then, in his main charge, the trial judge repeatedly instructed that the Commonwealth was required to prove beyond a reasonable doubt that the defendant had the intent to distribute. Given these instructions, and defense counsel's clear argument that the defendant did not have the requisite intent, we are satisfied that counsel's error did not prejudice the defendant within the

meaning of Saferian. See Commonwealth v. Vazquez, 478 Mass. 443, 450 (2017) (jury presumed to follow judge's instructions).

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Milkey, Shin & Englander, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: June 24, 2020.

[5] The panelists are listed in order of seniority.