

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-511

COMMONWEALTH

vs.

JONATHAN ROSARIO.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This is the Commonwealth's interlocutory appeal from the allowance of the defendant's motion to suppress statements made during custodial interrogation. The motion judge concluded that the Commonwealth failed to demonstrate, beyond a reasonable doubt, that the defendant validly waived his Miranda rights. We agree, and thus affirm.

Background. The following facts are drawn from the motion judge's findings and from our own independent review of the documentary evidence. See Commonwealth v. Tremblay, 480 Mass. 645, 654-655 (2018). On January 27, 2017, the defendant was interviewed at the Haverhill Police Department by Detectives

Jack Moses and Carlos Arriaga¹ about the defendant's alleged involvement in an armed home invasion.² The defendant's primary language is Spanish, and he informed the detectives that he prefers to speak and read in Spanish.

The detectives provided the defendant with a Miranda form written in Spanish, and Detective Arriaga informed the defendant, in English, that he was going to read aloud each Miranda right to him. Detective Arriaga then provided the defendant with Miranda warnings orally, in Spanish, translated as follows:

Q.: "Before asking you a question it is necessary that you understand your rights, do you understand?"

A.: "Yes"

Q.: "Ok, if not, you have the right to remain silent, do you understand? Anything that you say may be held against you, do you understand?"

A.: "Ok"

Q.: "You have the right to talk to a lawyer who can advise you before we ask you any question, and to have him with you during the interrogation, do you understand?"

A.: "Ok"

Q.: "If you don't have a lawyer to pay, the state gets you one. If you decide to question [sic] any questions now without a lawyer present, you will have the right to stop the question as you like, understand?"

¹ We spell Detective Arriaga's name as it appears in the interview transcripts, as well as in a police report drafted by Detective Moses.

² It is undisputed that the defendant was in custody at the time of the interview.

A.: "Mmhh"

Q.: "Ahh . . . Do you understand what I've read to you? Knowing all those rights, do you want to talk to me now?"

A.: "Mmhh"

The defendant nodded to the detective's questions several times during the provision of the Miranda warnings. After Detective Arriaga concluded, he directed the defendant to initial the Spanish Miranda form next to each right and sign the bottom of the form. The defendant initialed and signed the form as instructed. The interview then ensued with Detective Moses asking the defendant, in English, the majority of questions, and Detective Arriaga translating those questions and the defendant's answers where necessary.³ The interview lasted approximately one hour, and the defendant made numerous incriminating statements.

Discussion. "In reviewing a decision on a motion to suppress, we accept the judge's subsidiary findings absent clear error, but conduct an independent review of [the judge's] ultimate findings and conclusions of law." Commonwealth v. Vasquez, 482 Mass. 850, 857 (2019), quoting Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015). We give due deference

³ Throughout the interview, Detective Moses spoke to the defendant in English, and the defendant responded several times by stating that he did not "understand that much English."

to the judge's findings regarding the weight and credibility of witness testimony, id., but otherwise conduct an independent review of the documentary evidence. Tremblay, 480 Mass. at 654-655.

An evidentiary hearing was held on the defendant's motion to suppress at which the motion judge heard testimony from Detective Moses and was provided a video recording of the interview, a formal transcript of the interview translated by a certified interpreter, and the Spanish Miranda form signed by the defendant.⁴ After reviewing the record, the judge concluded that the warnings provided to the defendant were inadequate, and were provided in a manner that made it unclear whether the defendant understood his rights before he waived them. The judge accordingly suppressed the defendant's custodial statements. The Commonwealth contends that this was error. We disagree.

Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Commonwealth v. Bins, 465 Mass. 348, 357

⁴ The Commonwealth did not submit an English translation of the Spanish Miranda form.

(2013), quoting Miranda, supra. These procedural safeguards require that the defendant be warned that "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Bins, supra, quoting Miranda, supra at 479. It is the Commonwealth's burden to demonstrate, beyond a reasonable doubt, not only that the defendant was adequately advised of his rights, but also that the defendant waived these rights "voluntarily, knowingly, and intelligently." Vasquez, 482 Mass. at 862, quoting Commonwealth v. Vuthy Seng, 436 Mass. 537, 543, cert. denied, 537 U.S. 942 (2002).

Here, the prosecution failed to meet its "heavy burden" (quotation omitted). Vuthy Seng, 436 Mass. at 544. First, the warnings given to the defendant did not "effectively convey[] the defendant's rights in a language the defendant could comprehend." Bins, 465 Mass. at 358. Most concerning, the defendant was not adequately informed that a lawyer would be appointed for him if he could not afford one. Rather, the translated warning stated that, "If you don't have a lawyer to pay, the state gets you one." While the translation of Miranda warnings "need not be word for word, the translation cannot be so misstated to the point of being contradictory or equivocal"

(quotations and citation omitted). Vasquez, 482 Mass. at 864. This warning did not unequivocally notify the defendant that, if he could not afford a lawyer, one would be provided to him at no cost, and as a result it was deficient.

Moreover, there were deficiencies in the manner in which the Miranda warnings were provided that raise doubt about whether the defendant fully understood his rights such that he could waive them "knowingly" and "intelligently." See Commonwealth v. Hilton, 443 Mass. 597, 606 (2005) ("In order for a waiver to be 'knowing' and 'intelligent,' the defendant must understand 'the [Miranda] warnings themselves'"). When reciting the Miranda rights to the defendant, Detective Arriaga read a number of them in combination with each other without stopping and waiting for an affirmative verbal response from the defendant to ensure he understood each right. In addition, even when the defendant did verbally respond to whether he understood the right just read to him, his responses were often less than unequivocal. For example, when the detective purported to inform the defendant about his right to appointed counsel, the detective combined this warning with the so-called "fifth" Miranda warning: that the defendant has the right to terminate questioning at any time. See Commonwealth v. Novo, 442 Mass. 262, 271 (2004). Though the detective was not required to provide the latter warning, the defendant responded to both

warnings only by nodding and uttering "Mmhh," making it entirely unclear which right he was responding to and whether he understood both rights individually.

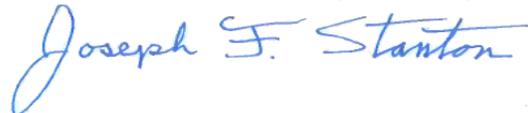
The Commonwealth contends that the totality of the circumstances nevertheless suggest that the defendant understood his rights and waived them voluntarily, knowingly, and intelligently. The Commonwealth points to the fact that the defendant nodded several times throughout the oral provision of his rights, as well as the fact that the defendant could read in Spanish and signed the written Spanish Miranda form. Nodding, however, is not necessarily indicative of understanding, and here, much of the defendant's nodding corresponded to nodding from Detective Arriaga. See Vasquez, 482 Mass. at 864 (nodding along may indicate listening rather than understanding in non-native speakers). Further, the signing of a Miranda form standing alone is not dispositive in most cases, see Commonwealth v. Magee, 423 Mass. 381, 387 n.8 (1996), and it is of no consequence in this case where the Commonwealth failed to include a translation of the Spanish Miranda form in the record. Without such a translation, there is no way for us to discern whether the Spanish Miranda form accurately conveyed the defendant's rights to him. Cf. Commonwealth v. Perez, 411 Mass. 249, 255 (1991) (valid Miranda waiver where defendant signed Spanish Miranda card and court interpreter testified that card

contained all required Miranda warnings). As such, we cannot conclude that the defendant knowingly and intelligently waived his Miranda rights before speaking to the detectives.

Because the Commonwealth failed to demonstrate, beyond a reasonable doubt, that the detectives provided the defendant with his Miranda rights in a "meaningful way," Commonwealth v. The Ngoc Tran, 471 Mass. 179, 186 (2015), and that the defendant understood those rights, and voluntarily, knowingly, and intelligently waived them, see Commonwealth v. Libby, 472 Mass. 37, 54 (2015), his custodial statements were properly suppressed.

Order allowing motion to
suppress affirmed.

By the Court (Wolohojian,
Desmond & Grant, JJ.⁵),



Clerk

Entered: April 6, 2021.

⁵ The panelists are listed in order of seniority.