

Commonwealth at the time of the hearing on the Omnibus Pretrial Motion. The Commonwealth also provided, as exhibits, copies of the amended information, the search warrant of Defendant's residence, the Waiver of Rights and Consent to Search form (Waiver) signed by Defendant, and the transcript from the preliminary hearing at which the alleged victims testified. As the underlying facts supporting the charges against Defendant are irrelevant to the present motion, the Court shall not outline those facts, specifically the preliminary hearing testimony.

Miller testified at the hearing on the Omnibus Pretrial Motion, his testimony established the following. He was notified by Children and Youth of allegations of sexual assault committed by Defendant. N.T. 1/7/20, at 13. Miller then set up interviews with the alleged victims at the Child Advocacy Center. *Id.* at 13-14. Based on the children's interviews, Miller obtained a search warrant for Defendant's residence. *Id.* at 14. The search warrant for Defendant's residence identified the items to be searched for and seized as:

Any electronic device(s) capable of taking/capturing photographs to include any and all cellular phone devices, smart phone cell phone, or similar smart pad thinking/tablet devices. Any/all computer, lap-top computers which may have been used to transmit a photograph via text message and computer/mobile app. Also any media device used to transfer, store retain photograph images. . . . Sex Toys namely dildos.

Commonwealth's Exhibit #2, at 1.

Officers arrived at the residence in business attire, with the exception of a PSP patrol unit on scene, and encountered Defendant's wife. N.T. 1/7/20, at 15, 28. Approximately seven officers were on scene, who were all armed, and four police vehicles, some marked and some unmarked. *Id.* at 28-29. Miller located two firearms in Defendant's bedroom while conducting the search warrant, and prior to encountering Defendant. *Id.* at 16-17. The upstairs bedrooms were all searched and nothing of evidentiary value was discovered. *Id.* at 32. Miller then used

Defendant's home phone to call Defendant's cell phone, which he received the number from Defendant's wife. *Id.* at 32-33. During the call, Miller identified himself as law enforcement and asked Defendant "if he was willing to come back and speak with [Miller] to talk about what was going on and not invade the privacy of his entire household and [he told Defendant] what [he] was looking for." *Id.* at 17, 33. Defendant indicated that he would return to the residence and that he had contacted his attorney, who had instructed him not to speak with police. *Id.* at 18, 20, 41-42. When Defendant arrived, Miller "identified [himself] to [Defendant], explained why [he] was there, informed [Defendant] he was not under arrest" and that he was free to leave. *Id.* at 18, 42. As Miller believed Defendant was not under arrest and/or detained, he did not instruct Defendant of his *Miranda* rights. *Id.* at 43. Additionally upon Defendant's arrival, Miller asked Defendant if he had any weapons on him. *Id.* at 36. Defendant stated that he did not have any weapons just his cell phone, which he took out of his jacket pocket. *Id.* at 20, 37. Miller asked if he could take a look at his cell phone and Defendant handed to Miller. *Id.* at 37. Miller then instructed Defendant that he would be conducting a pat down for weapons since firearms were found in the residence. *Id.* at 20. A pat down was conducted and no weapons were found on Defendant. *Id.* at 38-40. Defendant was instructed that he was a suspect in an alleged sexual assault. *Id.* at 43-44. When asked about the location of the sex toys, Defendant initially did not respond and denied their existence on numerous occasions. *Id.* at 19, 45-46. Miller then told Defendant the description of the sex toys they were looking for and Defendant stated the sex toys would be located in his truck at a garage down the road. *Id.* at 19, 47.

Defendant agreed to take officers to the garage and Miller followed Defendant, who drove himself. *Id.* Defendant then signed the Waiver to search his truck after Miller asked for

his consent to retrieve the items from the truck verbally. *Id.* at 19, 22-23. The pertinent portions of the Waiver read:

I have been told that I do not have to give my consent. I understand that I have the right to refuse this request, and that the police may not be able to conduct this search without a search warrant unless I give my consent. Nonetheless, I voluntarily give my consent to the police to conduct this search.

* * * * *

No one, including anyone from the Pennsylvania State Police or any other police officer, has threatened me in any way, nor has anything been promised to me in return for giving my consent to conduct this search.

Commonwealth Exhibit #3.

During the interactions, Defendant was never restrained, put in handcuffs, threatened, or made any promises. N.T. 1/7/20, at 24.

Akers testified at the hearing on the Omnibus Pretrial Motion, his testimony established the following. Akers participated in the search of Defendant's residence on December 20, 2017. Defendant told officers when he arrived that he had contacted his attorney who told him not to speak with the officers. *Id.* at 57. Shortly after Defendant arrived at his residence, Akers "told [Defendant] he was not in custody, he was not under arrest, he was free to go, here's a copy of the search warrant." *Id.* at 58. On the day of the search of Defendant's residence and vehicle, he was not taken into custody and was not arrested until some time later.²

Motion to Suppress Statements

Defendant contends any statements he made should be suppressed as he had invoked his right to counsel and/or his right to remain silent. Additionally, the officers did not properly apprise him of his *Miranda* warnings. The right to counsel guaranteed under the Sixth

² Switzer also testified at the hearing on Defendant's Omnibus Pretrial Motion, but his testimony is irrelevant to the present issues.

Amendment “attaches at critical stages only after the government initiates adversarial judicial proceedings.” *Commonwealth v. Bland*, 115 A.3d 854, 855 (Pa. 2015). Although not specifically indicated in the Constitution, the United States Supreme Court has found a Fifth Amendment right to counsel is impliedly derived from right against self-incrimination. *Id.*; see also *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Once a defendant invokes such a right to counsel, any interrogation must cease. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The Pennsylvania Supreme Court has held that such a right only attaches in conjunction with a custodial interrogation. *Bland*, 115 A.3d at 863 (“to require a suspension of questioning by law enforcement officials on pain of an exclusionary remedy, an invocation of the *Miranda*-based right to counsel must be made upon or after actual or imminent commencement of in-custody interrogation”).

Defendant’s contention that he asserted his right to remain silent/right to counsel is only relevant if Defendant was subject to a custodial interrogation. As stated above, Defendant is not entitled to invoke a right, which has yet to attach and use such premature invocation to shield himself from statements he made voluntarily. But if Defendant was subject to a custodial interrogation, both his invocation of right to counsel and his second contention, that officers failed to properly apprise him of his *Miranda* warnings, would entitle him to suppression of his statements.

When an individual is subject to a custodial interrogation, he must be informed of his right to remain silent, that anything he says can be used against him in a court of law, that he has the right to an attorney, and that if he cannot afford an attorney one will be appointed at no cost to him. *Miranda*, 384 U.S. at 478–79. A custodial interrogation is defined by a two part inquiry, the circumstances surrounding the interrogation and whether, given those

circumstances a reasonable person would have felt free to terminate the interaction and leave. *Commonwealth v. Yandamuri*, 159 A.3d 503, 520 (Pa. 2017). Whether an interrogation is custodial must be determined by a totality of the circumstances. *Id.* An officer's statement to a defendant that he is free to leave does not *per se* mean that he is not subject to a custodial interrogation, but it does weigh into the totality of the circumstances. *Id.* at 520-21. Not all interactions with police are custodial in nature, contrary an interaction will be found to be custodial only when it so restricts a defendant's movements such that it is the functional equivalent of an arrest. *Commonwealth v. Pakacki*, 901 A.3d 983, 988 (Pa. 2006) (a defendant being patted down is not subject to a custodial interrogation, as presumably he would be free to leave after the brief detention); *see also Commonwealth v. Coleman*, 204 A.3d 1003, 1008 (Pa. Super. 2019) (the defendant was not in custody when he voluntarily accompanied officers to the station, the officer did not show, use, or threaten force, and the defendant was told he was free to leave at any time).

Defendant points to a number of facts, which he contends supports a finding of custodial interrogation. First that Defendant "was directed to come back to his residence to speak to the police." Defendant's Brief in Support of Omnibus Motion 2/18/20, at 7. This is not an accurate portrayal of the record, which clearly states that Miller asked "*if he was willing* to come back and speak with" him. N.T. 1/7/20, at 17-18, 33-34 (emphasis added). This fact weighs in favor of a voluntary interaction as Defendant was not directed home, regardless of Defendant's contention that officers did not tell him he did not have to return. Additionally, Defendant points to the fact there were seven armed officers and four police vehicles. Although this fact does tend to weigh in favor of custody, Defendant was not in contact with all seven officers and it is clear from the testimony of Miller and Akers that most of Defendant's police

interaction occurred solely with Miller. No evidence was presented that officers showed any force against Defendant, that Defendant was threatened, or that his movements were restricted in any way. Contrary to Defendant's position, he was instructed on multiple occasions by multiple officers that he was free to leave and was not under arrest. His movements were not restricted and he drove himself to the garage after voluntarily stating he would show them where the sex toys were located. Lastly, it is important to note Defendant was not in an interrogation room or subject to questioning in an unknown atmosphere, but was on his own property and free to move around. Even after the search of the vehicle and seizure of the sex toys, Defendant was permitted to return home and was not taken into custody. The Court finds that based on the totality of the circumstances, Defendant was not subject to a custodial interrogation, and therefore his right to counsel/right to remain silent had not attached and similarly he was not entitled to *Miranda* warnings.

Motion to Suppress Physical Evidence

Defendant next alleges that seizure of his phone pursuant to a pat down was improper therefore the physical evidence obtained must be suppressed. At the outset, this Court agrees with the Commonwealth and the record reflects that the cell phone was not obtained as a result of the pat down. The portion of the record relevant to Miller's seizure of the cell phone is:

[Miller] I asked him if he had anything on him that I should be aware of, weapons or anything, and he told me the only thing he had was his phone and I just patted him down to make sure he didn't have any weapons on him.

[Defense] And the phone was in his pocket?

[Miller] Yes.

[Defense] And when you – did he tell you he had the phone on him first or did you feel the phone in the pat down?

[Miller] He told me that he had it.

[Defense] And how did the phone get removed from his pocket?

[Miller] He handed it to me.

[Defense] Okay. And did you ask him to hand over the phone?

[Miller] No. When he told me he had his phone in his pocket he pulled it out and showed me the only thing he had in his pocket was his phone.

[Defense] Okay. So he showed you that it was in his pocket and he held it out. How did it get from his hand to yours?

[Miller] He handed it to me.

[Defense] And you didn't ask for it?

[Miller] He told me that and I asked him if I could take a look at it and he handed it to me.

N.T. 1/7/20, at 36.

Pennsylvania law is clear that an object in plain view may be seized when officers are lawfully in their location when the item is viewed; the item could be seen plainly from that location; the incriminating nature of the item was readily apparent; and officer could lawfully access the item. *Commonwealth v. Anderson*, 40 A.3d 1245, 1249 (Pa. Super. 2012). This Court would find, and seemingly the Commonwealth would agree, that if the cell phone was obtained as a result of the pat down, the item would need to be suppressed. The distinction in the present case, as shown by the uncontradicted testimony, is that a pat down was not conducted prior to Defendant taking the cell phone out of his jacket pocket and upon Miller asking handing the cell phone to him. When Miller views the cell phone he is lawfully at Defendant's residence conducting a valid search warrant, Defendant takes the item out in plain sight, and the item is lawfully obtained by Defendant simply handing it to Miller. Additionally, the incriminating nature is readily apparent as cell phones belonging to Defendant are listed in the items to be search for and seized in the search warrant. *See Commonwealth's Exhibit #2*, at 1. Therefore, the seizure of the cell phone was not unlawful and any evidence obtained as a result thereof shall not be suppressed.

Next Defendant contends the evidence obtained as a result of the search of his vehicle should be suppressed as the consent was tainted. Defendant raises two issues with the consent to search his vehicle. First, the pat down was an illegal search which tainted the subsequent

search of the vehicle, and second, Defendant's consent was not voluntary under the totality of the circumstances.

“To establish a valid consensual search, the prosecution must first prove that the consent was given during a legal police interaction, or if the consent was given during an illegal seizure, that it was not a result of the illegal seizure; and second, that the consent was given voluntarily.” *Commonwealth v. Reid*, 811 A.2d 530, 544 (Pa. 2002). If there is no causal connection between the illegal seizure and the subsequent consent then the evidence is not *per se* suppressed. *Id.* at 545. The burden then rests on the Commonwealth to demonstrate by a totality of the circumstances that consent was voluntary and not the result of coercion. *Commonwealth v. Newton*, 943 A.2d 278, 284 (Pa. Super. 2007); *see also Commonwealth v. Strickler*, 757 A.2d 884, 901 (Pa. 2000) (“[T]he Commonwealth bears the burden of establishing that a consent is the product of an essentially free and unconstrained choice—not the result of duress or coercion, express or implied, or a will overborne—under the totality of the circumstances.”).

As for Defendant's first claim, this Court agrees with the Commonwealth that there is no causal link between the pat down and Defendant's consent to search the vehicle. The pat down as described by Miller was brief and minimally restrictive. N.T. 1/7/20, at 36-37. Additionally, there is a separation of time of less thirty minutes from the brief pat down until the search of the vehicle. *Id.* at 53. Defendant was unrestrained and drove himself when he showed the officers to the garage where his truck was located. *Id.* at 19. Then at the garage, a different from the original illegal seizure, officers obtained consent to search the vehicle. *Id.* The testimony shows that the brief illegal detention of Defendant for the pat down was too far attenuated from the search of the vehicle to warrant the exclusion of evidence.

This finding does not end the Court's analysis, as the Commonwealth must still demonstrate based on the totality of the circumstances that the consent was voluntary. Defendant relies on many of the same arguments this Court disagreed with above in finding Defendant was not subject to a custodial interrogation. A few of Defendant's arguments misconstrue the evidence. For example, Defendant contends his "residence was already infiltrated by seven uniformed and armed police officers." This is incorrect only two of the officers were in uniform. *Id.* at 28. Additionally as stated above, there was no show of force by the armed officers and, as demonstrated by the record, Defendant's interactions predominately only dealt with Miller. Defendant also re-raises his contention that his invocation of counsel was ignored, which as stated above never attached and therefore does not weigh into the voluntariness of Defendant's consent. It is clear from record that Defendant was asked if he would return to his residence, was told by multiple officers on multiple occasions he was free to leave at any time, and not only was Defendant's consent orally obtained to retrieve the items from the vehicle, he also signed the Waiver outlining his rights to refuse. Based on the above, Defendant was not coerced and made a free and unconstrained choice to voluntarily allow officers to search his vehicle. Therefore, the physical evidence obtained as a result of the search of Defendant's vehicle will not be suppressed.

Conclusion

Defendant's rights to remain silent and to counsel did not yet attach as Defendant was not subject to a custodial interrogation. Likewise, as Defendant was not subject to a custodial interrogation he was also not entitled to *Miranda* warnings. Therefore, Defendant's statements will not be suppressed. Defendant's cell phone was obtained prior to Miller's improper pat down, and was brought into plain view of Miller by Defendant's own actions, therefore making

it subject to seizure. Additionally, Miller's improper pat down was too far attenuated from Defendant's consent to the vehicle to taint the voluntariness of his consent. The Commonwealth demonstrated by a totality of the circumstances that Defendant freely gave uncoerced voluntary consent to search his vehicle. Therefore, any physical evidence obtained from Defendant's cell phone or his vehicle shall not be suppressed.

ORDER

AND NOW, this 25th day of March, 2020, based upon the foregoing Opinion, Defendant's Motion to Suppress Statements and Motion to Suppress Physical Evidence in his Omnibus Pretrial Motion are hereby **DENIED**.

By the Court,

Nancy L. Butts, President Judge

cc: DA (MW)
Edward J. Rymysza, Esquire

NLB/kp