ADVANCE SHEET HEADNOTE
April 27, 2020

2020 CO 28

No. 19SA272, *Coke v. People*—Fifth Amendment—Due Process —Right to Counsel—Voluntary Statements—Fourth Amendment—Self-Incrimination.

In this interlocutory appeal, the supreme court reviews the trial court's suppression of statements the defendant made to the police and evidence obtained from her cell phone. The supreme court concludes that because the defendant was not in custody at the time she made the statements at issue and because there is no evidence of government coercion, the statements were not taken in violation of the defendant's right to avoid self-incrimination and were voluntary. It also concludes that the search warrant permitting the search of the defendant's cell phone was constitutionally overbroad because it authorized a search of virtually the entire contents of the defendant's phone. Therefore, the search violated the particularity requirement of the Fourth Amendment. Accordingly, the supreme court reverses the portion of the trial court's order suppressing her statements, affirms the portion suppressing the evidence from Coke's cell phone, and remands the case for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2020 CO 28

Supreme Court Case No. 19SA272
Interlocutory Appeal from the District Court
Larimer County District Court Case No. 19CR964
Honorable Thomas R. French, Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Pamela Kay Coke.

Order Affirmed in Part and Reversed in Part
en banc
April 27, 2020

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JUSTICE HOOD delivered the Opinion of the Court.

¶1 The defendant, Pamela Kay Coke, has been charged with sexual assault on a child. The prosecution filed this interlocutory appeal of the trial court's order suppressing (1) evidence obtained from Coke's cell phone and (2) certain statements she made to the police before her formal arrest. We affirm the portion of the trial court's order suppressing the evidence from Coke's cell phone, reverse the portion suppressing her statements, and remand the case for further proceedings consistent with this opinion.

I. Facts and Procedural History

¶2 T.F. told police officers that Coke sexually assaulted him in November 2018, when he was fifteen years old. He gave the officers his cell phone, which contained December 2018 text messages from "Pam." In those messages, "Pam" apologized to T.F. (without specifying why) and asked him to take a walk with her so they could talk. The officers decided to contact Coke.

¶3 Two plainclothes officers arrived at Coke's office. They knocked on the door, and Coke invited them in. After identifying themselves as police officers, they explained that she was not under arrest and did not have to speak with them. She responded that she had retained a lawyer and didn't want to speak to them without her lawyer present. The officers asked for the lawyer's contact information so they could attempt to schedule an interview with both her and the lawyer. They also asked her what her phone number was, and she provided it.

¶4 Seeing a cell phone sitting on Coke's desk, one of the officers informed her that they were going to have to take it as possible evidence. They elaborated that they would hold it until they could obtain a search warrant to examine its contents. Upon confirming that the phone was passcode protected, the officers asked Coke to help them put the phone in airplane mode to preserve its contents. Coke asked how long the officers would need to keep her phone. They explained that they weren't sure, and that ultimately that decision would be up to the district attorney, but they assured her that the process would go faster if they had her passcode. She gave them the code.

¶5 The officers took the phone, obtained a warrant, and searched the phone's contents. That search revealed that Coke's phone was the source of the text messages in question.

¶6 Before trial, Coke moved to suppress her statements made after asserting her right to counsel and the evidence found on her phone. She asserted that (1) the statements were involuntary and taken in violation of her right to counsel, and (2) the search warrant permitted an unconstitutional exploratory search. After a hearing, the trial court concluded that (1) Coke's statements were taken in violation of her Fifth Amendment right against self-incrimination; (2) the statements were involuntary; and (3) the search warrant was overbroad. Accordingly, the court suppressed the statements and any evidence obtained from

the cell phone. The prosecution then brought this interlocutory appeal challenging the suppression order.

II. Analysis

¶7 After identifying the standard of review, we first address the trial court's Fifth Amendment ruling. Our analysis begins—and essentially ends—with a point about which the court and counsel all agree: Coke was not in custody when she made the statements at issue here. Therefore, she was not entitled to the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966). Because the facts here present no other conceivable basis by which the Fifth Amendment privilege against self-incrimination could have attached, Coke had no Fifth Amendment privilege (or corresponding *Miranda* protection) to assert.

¶8 We then examine whether Coke's statements were involuntary. On the record before us, we conclude that they were not. While her attempted invocation of her right to remain silent and right to counsel is relevant to voluntariness, it did not prohibit these officers from continuing to speak to her, and it did not automatically render her subsequent statements subject to exclusion. Based on the totality of the circumstances here, Coke's statements were voluntary.

¶9 Finally, we discuss the Fourth Amendment protections against unreasonable searches and seizures. Because the search warrant encompassed the

entire contents of Coke's cell phone, we conclude that it fell short of the particularity required by the Fourth Amendment.

A. Standard of Review

¶10 A trial court's suppression ruling presents a mixed question of law and fact; thus, "[w]e accept the trial court's findings of historic fact if those findings are supported by competent evidence, but we assess the legal significance of the facts de novo." *People v. Davis*, 2019 CO 24, ¶ 14, 438 P.3d 266, 268 (quoting *People v. Burnett*, 2019 CO 2, ¶ 13, 432 P.3d 617, 620); *People v. Glick*, 250 P.3d 578, 582 (Colo. 2011) ("We will not substitute our own judgment for that of the trial court unless the trial court's findings are clearly erroneous or not supported by the record.").

B. Self-Incrimination

¶11 The Fifth Amendment of the United States Constitution applies to the states through the Due Process Clause of the Fourteenth Amendment; it guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amends. V, XIV, § 1; *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

¶12 The language of the Fifth Amendment tells us much about the scope of the privilege it bestows: "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004). The privilege extends to "official questions put to [a defendant] in any . . . proceeding, civil or criminal, formal or

informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). Thus, in the ordinary course, the privilege does not apply outside the context of some legal proceeding in which an individual is being asked to testify against herself. And here, there was no such proceeding at the time Coke sought to assert the privilege.[1]

¶13 The privilege also extends to custodial interrogation. To make the privilege more meaningful, the Supreme Court, for decades, has required that law enforcement officers use certain "procedural safeguards" when they subject someone to custodial interrogation. *Miranda*, 384 U.S. at 444–45. Among those safeguards is notice of the right to silence. *Id*. Once that right is invoked, it must be scrupulously honored. *Michigan v. Mosley*, 423 U.S. 96, 101–04 (1975).

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[1] This case does not require us to address the rule from the so-called "penalty cases," in which, for example, the threat of discharge from employment may constitute impermissible compulsion under the Fifth Amendment. *See, e.g.*, *People v. Sapp*, 934 P.2d 1367, 1370–71 (Colo. 1997) (discussing *Murphy*, 465 U.S. at 429; *Lefkowitz*, 414 U.S. at 80–81; and *Garrity v. New Jersey*, 385 U.S. 493 (1967)); *see also People v. Roberson*, 2016 CO 36, ¶¶ 30–32, 377 P.3d 1039, 1044 (noting that testimony is compelled when the state threatens to inflict potent sanctions unless the constitutional privilege is surrendered or a state imposes substantial penalties on a witness because she has elected to exercise her Fifth Amendment rights).

¶14 But "this extraordinary safeguard 'does not apply outside the context of the inherently coercive custodial interrogations for which it was designed.'" *Murphy*, 465 U.S. at 430 (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)). This judicial hurdle is significant: "A person is [only] in custody for *Miranda* purposes if she has been formally arrested or if, under the totality of the circumstances, a reasonable person in the suspect's position would have felt that her freedom of action had been curtailed to a degree associated with formal arrest." *People v. Garcia*, 2017 CO 106, ¶ 20, 409 P.3d 312, 317.[2]

¶15 Yet Coke was not in custody when she made the statements at issue. Defense counsel conceded as much at the suppression hearing, and the trial court found as much when it ruled. And here, no custody means no privilege.

¶16 We conclude that the trial court erred by excluding Coke's statements based on the privilege against self-incrimination.

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[2] Although the trial court did not base its ruling on the right to counsel, Coke's attempted invocation of that right seemed to dominate the court's thinking. Under the Fifth Amendment, however, the right attaches only when a defendant is subjected to custodial interrogation. *People v. Vickery*, 229 P.3d 278, 280 (Colo. 2010). And under the Sixth Amendment, the right attaches only once criminal charges have been filed. *Id.*; *see People v. Luna-Solis*, 2013 CO 21, ¶ 15, 298 P.3d 927, 932 ("[T]he Sixth Amendment right is offense-specific, applying only to charged offenses as distinguished from the investigation of any offense whatsoever."). Thus, Coke's invocation of her right to counsel, outside of custodial interrogation and before the filing of charges, did not prohibit further inquiry.

C. Voluntariness

¶17 This conclusion, however, does not end our analysis. "The Fifth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment, prevents admission of involuntary statements into evidence, regardless of the defendant's custodial situation, and whether or not the defendant made an inculpatory statement." *People v. Medina*, 25 P.3d 1216, 1221 (Colo. 2001); *see also Sanchez v. People*, 2014 CO 56, ¶ 11, 329 P.3d 253, 257 (concluding that defendants have a separate due process right prohibiting the use of involuntary statements, even if those statements were not the product of custodial interrogation).

¶18 In analyzing whether an individual's statements were voluntary, courts must consider the totality of the circumstances "to determine whether the accused's will was actually overborne by coercive police conduct." *Sanchez*, ¶ 11, 329 P.3d at 257; *People v. Wood*, 135 P.3d 744, 748 (Colo. 2006) ("The ultimate test of involuntariness is whether a defendant's will has been overborne.").

¶19 This analysis requires a two-step inquiry. *See People v. Zadran*, 2013 CO 69M, ¶ 10, 314 P.3d 830, 833. First, the police conduct must have been coercive. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("We hold that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."). Second,

the coercive conduct must have played a significant role in inducing the statement. *Zadran*, ¶ 10, 314 P.3d at 833.

¶20 To determine whether the conduct was coercive, courts generally consider the following, non-exhaustive list of factors:

> (1) whether the defendant was in custody;
> (2) whether the defendant was free to leave;
> (3) whether the defendant was aware of the situation;
> (4) whether the police read *Miranda* rights to the defendant;
> (5) whether the defendant understood and waived *Miranda* rights;
> (6) whether the defendant had an opportunity to confer with counsel or anyone else prior to or during the interrogation;
> (7) whether the statement was made during the interrogation or volunteered later;
> (8) whether the police threatened [the] defendant or promised anything directly or impliedly;
> (9) the method of the interrogation;
> (10) the defendant's mental and physical condition just prior to the interrogation;
> (11) the length of the interrogation;
> (12) the location of the interrogation; and
> (13) the physical conditions of the location where the interrogation occurred.

Id. at ¶ 11, 314 P.3d at 833–34 (citing *Medina,* 25 P.3d at 1222–23). "Police coercion includes not only physical abuse or threats directed at a person but also subtle forms of psychological coercion." *People v. Miranda-Olivas*, 41 P.3d 658, 660–61 (Colo. 2001).

¶21 With this analytical backdrop in place, let's consider the circumstances here. The trial court made few factual findings, perhaps because the underlying facts

were largely, if not entirely, uncontested. Based on the audio recording of the exchange and the testimony from the suppression hearing, the facts are as follows.

¶22 The officers, wearing plain clothes, contacted Coke in her office at work. They told her she was not under arrest and did not have to speak with them. Although they did not give Coke a *Miranda* advisement, they weren't legally required to do so under these circumstances. They asked her if she knew why they were there, and she responded that she did. The entire discussion lasted less than ten minutes and was, at all times, polite and conversational.

¶23 Shortly after the officers entered her office, Coke expressed her desire to have her lawyer present. Following her assertion of her right to counsel, the officers did not ask her about the alleged offense. Instead, one of the officers asked Coke for her lawyer's number so they could try to schedule an interview with her and her lawyer. He also asked what her phone number was, and she gave it to him.

¶24 Right after that exchange, one of the officers saw Coke's phone on her desk and told her they were going to have to seize it. She expressed concern about how long they would have to keep it because she needed it for work and childcare. After checking her most recent text messages for her and putting the phone in airplane mode, the officers told Coke that their search would go faster if they had her passcode. They made no promises about when, or even if, she would get her

phone back. And they made no threats to keep it if she remained silent or otherwise failed to cooperate with their investigation. She then wrote down her passcode for them and told them that she "respect[s] and appreciate[s] the job that [they] have." Toward the end of the interview, she even affirmed that she did not feel that she had been treated unfairly or coerced and that the officers had treated her with respect.

¶25 In this interlocutory appeal, the prosecution highlights two of the statements Coke made during this exchange, though Coke seems to have only challenged the latter: (1) telling the officers her phone number and (2) providing the officers with the passcode to unlock her phone. Still, the trial court seems to have concluded that all of Coke's statements were involuntary. Although the court found that Coke was not in custody at any point during the conversation, it emphasized that Coke told the officers that she did not want to speak with them without her lawyer present, and yet they continued to speak with her. It also found that she was reluctant to give the officers her passcode or her phone and that their statements to her that it would all go faster with the code were "not accurate."

¶26 Based on our de novo review of the legal significance of these same undisputed facts, we conclude that all of Coke's statements were voluntary. We focus our attention on the statements that seem to be most in dispute.

¶27 As to the first statement—Coke's phone number—the phone had not yet been seized when she made this statement. The conversation had barely started, and the officers had not yet told her they would be taking her phone. They just casually asked for her number. There is no evidence of any coercive police conduct before this statement.

¶28 As to the second statement—Coke's passcode—the trial court made no findings that the officers' statements about the search going faster with the passcode constituted an implied promise or a coercive tactic. Despite the trial court's finding that these statements were "not accurate," there is nothing in the record to support this conclusion. Common experience suggests that the search of a phone's contents will indeed proceed more expeditiously if officers do not first have to figure out how to gain access to its digital content. And here, although the officers told Coke that having the passcode would expedite the search, they said nothing about it expediting the return of her phone. In fact, the record reveals that the officers repeatedly told Coke that they did not know when she would get her phone back. Therefore, the trial court's finding in this respect is not supported by competent evidence and is clearly erroneous.

¶29 Further, there is little to nothing in the record to support that Coke felt vulnerable or intimidated, or that she was reluctant to provide her passcode. Coke is a university professor; she was on familiar ground in her office; and she

exhibited no reluctance in asserting her right to counsel. Although she informed the officers that she wanted her lawyer present when speaking with them, this is only one variable among many that the court may consider in evaluating voluntariness. *See People v. Klinck*, 259 P.3d 489, 496–97 (Colo. 2011).

¶30 While the audio recording reveals her reluctance to relinquish the phone itself, there is no indication that Coke was reluctant to provide her passcode. She did not ask any questions or even pause before providing that information. On the contrary, when the officer asked Coke if she would give him the passcode, she immediately said yes. Coke's reluctance to give up her phone does not convert non-coercive conduct into coercive conduct. *See Connelly*, 479 U.S. at 165–66 (declining to "expand our previous line of 'voluntariness' cases into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision").

¶31 And, to the extent that the officers' statements could be considered coercive, there is still no evidence that the coercive conduct played a *significant* role in inducing Coke's statements. *See Klinck*, 259 P.3d at 496. Therefore, based on the

totality of the circumstances, we conclude that the trial court erred in finding that the statements were involuntary.[3]

¶32 Because Coke's statements were voluntary, we conclude that the trial court erred by suppressing them.

D. Fourth Amendment

¶33 The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV. It states, in part, that "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* This constitutional bulwark "safeguard[s] the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v.*

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[3] The court further concluded that because the statements were not voluntary, the subsequent search of the phone using the involuntary statements—the passcode—was not valid and any evidence was inadmissible fruit of the poisonous tree. *See People v. Tomaske*, 2019 CO 35, ¶ 10, 440 P.3d 444, 447 ("The exclusionary rule applies to evidence obtained as the result of an illegal search and seizure, as well as 'evidence later discovered and found to be derivative of an illegality,' otherwise known as the 'fruit of the poisonous tree.'" (quoting *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016))). However, because we have concluded that the statements are admissible under both the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, the subsequent search was not tainted.

United States, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967)).

¶34 A search conducted pursuant to a warrant is typically reasonable. *See Davis*, ¶ 16, 438 P.3d at 269. However, so-called "general warrants," which permit "a general, exploratory rummaging in a person's belongings," are prohibited. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). To prevent general, exploratory searches, the Fourth Amendment requires "a 'particular description' of the things to be seized." *Id.* (quoting *Coolidge*, 403 U.S. at 467); *see People v. Noble*, 635 P.2d 203, 209 (Colo. 1981) ("[T]he description [in the warrant] of the property to be seized should be such that 'the officer charged with the duty of executing the warrant will be advised with a reasonable degree of certainty of the property to be seized.'" (quoting *People v. Schmidt*, 473 P.2d 698, 700 (Colo. 1970))).

¶35 Here, the warrant allowed officers to search Coke's phone for the following:

- Data which tends to show possession, dominion and control over said equipment; including but not limited to system ownership information, phone number, pictures, or documents bearing the owners name or information;
- Any electronic data that would be illegal to possess (contraband), or fruits or proceeds of a crime, or data intended to be used in the commission of a crime;
- All telephone contact lists, phone books and telephone logs;
- Any text messages and Multimedia Messaging Service (MMS) stored, sent, received or deleted;

- Any photographs or images stored, sent, received or deleted;
- Any videos stored, sent, received or deleted[;]
- Any electronic data packets stored, sent, received or deleted.

¶36 The trial court found that the warrant was overbroad because phones "are a repository of almost everything that is private and personal and deserving of [heightened] protection" and the warrant gave the officers virtually unfettered access to it. We agree.

¶37 Given modern cell phones' immense storage capacities and ability to collect and store many distinct types of data in one place, this court has recognized that cell phones "hold for many Americans 'the privacies of life'" and are, therefore, entitled to special protections from searches. *Davis*, ¶¶ 17–22, 438 P.3d at 269–70 (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). Further, this court has held that a warrant authorizing the search of a cell phone simply for general indicia of ownership would violate the Fourth Amendment's particularity requirement. *See People v. Herrera*, 2015 CO 60, ¶¶ 4, 18, 357 P.3d 1227, 1228, 1230.

¶38 Despite these recent admonitions, the warrant at issue here contains no particularity as to the alleged victim or to the time period during which the assault allegedly occurred. Rather, it permitted the officers to search all texts, videos, pictures, contact lists, phone records, and any data that showed ownership or possession. We conclude that such broad authorization violates the particularity

demanded by the Fourth Amendment. Because it authorized a general search of Coke's phone, it was also unreasonable under the Fourth Amendment. *See Davis*, ¶ 15, 438 P.3d at 269 ("When analyzing the legality of a search, the 'ultimate touchstone' is reasonableness."). Therefore, the trial court did not err by excluding the evidence.[4] *See People v. Roccaforte*, 919 P.2d 799, 802 (Colo. 1996) ("The principal means of effectuating the [particularity] requirement is to suppress all evidence seized pursuant to an overbroad, general warrant.").

III. Conclusion

¶39 We affirm the portion of the trial court's order suppressing the contents of Coke's cell phone, reverse the portion of its order suppressing her statements, and remand the case for further proceedings consistent with this opinion.

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[4] The prosecution contends that even if the warrant is invalid, the officers acted in good faith in executing it, and the evidence should be admissible under the good faith exception to the exclusionary rule. Because this argument was not raised below or addressed by the trial court, it is not properly before us and we will not address it. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998); *see also* § 16-3-308(4)(a), C.R.S. (2019) ("[W]hen evidence is sought to be excluded from the trier of fact in a criminal proceeding because of the conduct of a peace officer leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question was taken in a reasonable, good faith belief that it was proper.").