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18-P-1021 Appeals Court

COMMONWEALTH vs. DONDRE SNOW.

No. 18-P-1021.

Suffolk. February 6, 2019. - December 10, 2019.

Present: Henry, Lemire, & Ditkoff, JJ.

Homicide. Firearms. Cellular Telephone. Practice, Criminal, Motion to suppress. Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Probable cause. Probable Cause.

Indictments found and returned in the Superior Court Department on February 26, 2016.

A pretrial motion to suppress evidence was heard by Maureen B. Hogan, J.

An application for leave to prosecute an interlocutory appeal was allowed by Ralph D. Gants, C.J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

Cailin M. Campbell, Assistant District Attorney (David D. McGowan, Assistant District Attorney, also present) for the Commonwealth.

David A.F. Lewis for the defendant.

LEMIRE, J. The Commonwealth appeals from an order that allowed the defendant's motion to suppress the results of a search of his cell phone. We reverse.

1. Background. a. Alleged crime. The following facts are taken from the affidavit accompanying the search warrant. On December 5, 2015, at approximately 8:30 P.M., Boston police officers and State police troopers responded to a report that a person had been shot. They went to the area of 425 Old Colony Avenue in the South Boston section of Boston where they found Maurice Scott with multiple gunshot wounds. He was transported to the Boston Medical Center, where he was pronounced dead a few hours later at 12:20 A.M. on December 6, 2015. Later on December 6, 2015, an autopsy determined that Scott died from multiple gunshot wounds in his torso and that his death was a homicide.

A witness saw a tall, heavy-set black male standing over Scott, who was on the ground, shoot him a number of times. Police later identified the shooter as Dwayne Diggs. The shooter got into a light-colored car with an out-of-state license plate, possibly from Rhode Island, starting with the numbers 386. Another person was driving the car. Police later identified the driver as the defendant. The car headed toward the Dorchester section of Boston. The witness immediately

called 911 and reported this information to the Boston Police Department, which broadcast it to its officers.

Shortly afterward, another witness, this one in Dorchester, saw a light gray sedan speeding. It went past Elm Street, quickly braked and reversed, entered Elm Street, and parked. The location was a little more than two miles from the shooting. This second witness saw people moving around inside the car, giving him the impression that they were changing clothes. A man got out of the car's front passenger seat, appeared to pull down his sweatshirt, and got back into the car. This witness, too, called the Boston Police Department, which broadcast this information to its officers. It had been a matter of minutes since the shooting in South Boston.

Boston police officers, aware that a light-colored car with a license plate whose numbers included 386 had been involved in a shooting, responded to Elm Street in Dorchester. There, they found a parked light gray Nissan Altima with the New Hampshire license plate 386-1026.

Three men were in the car. Police officers "removed" them from the car and handcuffed them. The defendant was in the driver's seat and had the car keys in his pocket. Diggs was in the front passenger seat. A third man, Daquan Peters, was in a rear seat. Diggs was about six feet, one inch tall, and weighed about 380 pounds, matching the witness's description of the

shooter. The other two men had thin builds. The defendant was talking on his cell phone as he "was removed" from the driver's seat. This cell phone is the subject of this decision.

Peters had a cell phone in his pocket. During a later search of the car, police found a third cell phone in the console between the front seats. Later still, police found a latent print on that cell phone, which was individualized to Diggs's right thumb. Thus, the police believed that Diggs owned or controlled this third cell phone.

Shortly after the shooting, the witness of the shooting in South Boston was brought by police to the corner of Elm Street to view Diggs. The witness said that he had not seen the shooter's face but that Diggs's body was definitely the same size as that of the shooter. The witness also insisted that the shooter had worn a dark top, which Diggs was not wearing at the time of the showup. During the later search of the car, police recovered a black T-shirt in size 6X and sweatshirt in size large from inside the Nissan.

On Elm Street, police officers also discovered a .40 caliber firearm on the ground, twenty-five to thirty feet from the car. The absence of debris and rust on it and its heat signature, as determined by a thermal imaging device, see Commonwealth v. Bannister, 94 Mass. App. Ct. 815, 824 (2019),

led police to believe that it had been discarded very recently. Police believed this to be the murder weapon.

The firearm, the police later determined, could hold eleven rounds, ten in the magazine and one in the chamber. Police collected nine cartridge casings at the scene of the shooting. They were consistent with having been fired by the firearm that police found on Elm Street. The firearm had two rounds in it, one in the magazine and one in the chamber. The police found a latent print on the firearm's magazine; the print was individualized to Diggs.

Police discovered that the defendant and Diggs were wearing global position system (GPS) monitoring devices on their ankles. Police checked with the probation department, and learned that the electronic monitoring (ELMO) system revealed that the two men had been on Old Colony Avenue in South Boston at the time of the shooting and then on Elm Street in Dorchester until police transported them to headquarters.

The police later determined that the defendant's girlfriend had rented the car. While the police were processing the defendant at headquarters, he asked, unsolicited, how his girlfriend could get her car back. He stated that he had borrowed the car and did not want to be stuck with the bill. He asked an officer to make sure that the police returned the car to his girlfriend after processing it.

On December 6, 2015, the day after the shooting, police interviewed the defendant's girlfriend, Lanika Clark. She said that she owned a car but had rented one to help her move to Fall River. Clark also stated that the defendant had called her on his cell phone and informed her that he was about to be arrested.

During the investigation, one witness reported that Diggs and the victim had had a dispute in the days before the shooting, much of it via social media and through text messages. She also reported that Diggs was called Butta Bear or Butta -- a name that the defendant used to refer to Diggs in police headquarters.

The police recovered the victim's cell phone from the shooting scene and learned that the victim had exchanged threatening and violent text messages with a person labeled in the phone's contacts as "Slime Buttah."

b. Search warrant and affidavit. The Boston Police Department applied for a warrant to search the defendant's cell phone. The application contended that there was probable cause to believe that the telephone "is intended for use or has been used as a means of committing a crime," "has been concealed to

prevent a crime from being discovered," and "is evidence of a crime or is evidence of criminal activity."[1]

The application sought the following information:

> "Cellular telephone number; electronic serial number, international mobile equipment identity, mobile equipment identifier or other similar identification number; address book; contact list; personal calendar, date book entries, and to-do lists; saved, opened, unopened, draft, sent, and deleted electronic mail; incoming, outgoing, draft, and deleted text messages and video messages; history of calls sent, received, and missed; any voicemail messages, including those that are opened, unopened, saved, or deleted; any photographs or videos, including those stored, saved, or deleted; any audio or video 'memos' stored, saved, or deleted; GPS information; mobile instant message chat logs, data and contact information; Internet browser history; and any and all of the fruits or instrumentalities of the crime of [m]urder."

The search warrant was approved as applied for, and the defendant's cell phone was searched.

c. Procedural history. The defendant was indicted for murder in the first degree; carrying a firearm without a license; possessing ammunition without a firearm identification card; and carrying a loaded firearm without a license.

On the morning of trial, the defendant moved to suppress evidence seized under the warrant to search his cell phone. The Superior Court judge conducted a nonevidentiary hearing and, after a recess, ruled from the bench and allowed the motion.

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[1] See G. L. c. 276, § 2A.

Subsequently, the Commonwealth moved to expand the hearing record to include the following evidence recovered from the search: text messages between the defendant and Diggs, Peters, a person called Sista, and a person called Staxx; call logs between the defendant and Diggs and between the defendant and Peters; and "Snapchat"[2] videos of the defendant.

The motion judge held a second hearing and declined to mark the text messages, call logs, and videos as exhibits. However, she did "state for the record what [evidence] was recovered from the phone" that the Commonwealth sought to introduce at trial. She listed the evidence that the Commonwealth had identified in its motion and added these following details: the text messages between the defendant and Sista referred to "Snapchatting with guns";[3] the text messages between the defendant and Staxx indicated that the defendant sought to buy a firearm other than the murder weapon (according to the Commonwealth's interpretation); in two of the three Snapchat videos of the defendant, he held a firearm that resembled the murder weapon;

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[2] "Snapchat is a social media website on which a member may share information with a network of 'friends.'" F.K. v. S.C., 481 Mass. 325, 327 (2019). "A SnapChat [sic] video includes both audio and visual components." United States vs. McMillan, U.S. Dist. Ct., No. 17-CR-0290, slip op. at 2 n.2 (D. Minn. May 25, 2018).

[3] It is unclear to us what this reference means.

and the third Snapchat video depicted him with two firearms, one of which resembled the murder weapon.

The Commonwealth timely filed a notice of appeal of the order allowing the motion to suppress. Later, it filed an application for interlocutory review and a request that its application be accepted as timely filed, both of which a single justice of the Supreme Judicial Court allowed.

2. Discussion. a. Nexus. We begin with the premise that probable cause to believe that a person with access to a cell phone participated in a crime plus "an officer's averment that, given the type of crime under investigation, the device likely would contain evidence," does not equal probable cause to seize and search that cell phone. Commonwealth v. White, 475 Mass. 583, 591 (2016). That is, those two factors alone do not establish the nexus between an alleged crime and a cell phone that is a prerequisite for a seizure or search. See id. at 589-591 (no nexus; police lacked information that anyone used cell phone in crime under investigation). See also Commonwealth v. Broom, 474 Mass. 486, 489 (2016) (no nexus; defendant's and murder victim's cell phone numbers did not appear in each other's cell phone records); Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750-751 (2017) (no nexus; affidavit established that defendant used his cell phone four hours before murder and

telephoned two relatives around time of murder, but no connection established between cell phone and crime).

Multiple cell phone calls and text messages between a defendant and a murder victim on the day of the killing, without more, also are not sufficient to establish probable cause to search the defendant's cell phone. See Commonwealth v. Fulgiam, 477 Mass. 20, 34, cert. denied, 138 S. Ct. 330 (2017). Likewise, the defendant's use of his telephone at unspecified times to communicate with someone implicated in the crime did not, without more, justify intrusion into the content of that communication. See Commonwealth v. Morin, 478 Mass. 415, 427-428 (2017). But see Commonwealth v. Mack, 482 Mass. 311, 314 (2019) (more specific information, such as cell phone records showing coventurers frequently calling and texting each other "prior to and on the day of the killing," can help establish nexus).

In contrast, the nexus between a crime and a defendant's cell phone was established when the defendant had received threats on his cell phone and, "immediately prior to the shooting," had argued with someone on it. Commonwealth v. Dorelas, 473 Mass. 496, 503 (2016). In Commonwealth v. Cruzado, 480 Mass. 275 (2018), probable cause existed to search a cell phone found next to a sleeping defendant who had been with the victim on the day of the murder and had recently been overheard

speaking on a cell phone confessing to murder. See id. at 282. When "police had detailed and specific knowledge," including from wiretaps, that the defendant was using a cell phone to arrange drug transactions, and he was talking on a cell phone when he arrived in a parking lot for such a transaction, probable cause was established to search nine cell phones found in his apartment. Commonwealth v. Perkins, 478 Mass. 97, 105-106 (2017).

Four factors established the nexus to search the cell phone of one of the defendants in Commonwealth v. Holley, 478 Mass. 508 (2017).[4] Two of the factors were general: (1) the averment that drug deals are commonly arranged by telephone, see id. at 522, and (2) "the type of crime, the nature of the items sought, and the normal inferences as to where such items might be kept by the suspect," id. at 523, quoting Commonwealth v. Matias, 440 Mass. 787, 794 (2004). See Mack, 482 Mass. at 321 (parenthetically describing Holley, supra at 522, as having established requisite nexus because, among other factors, "shooting was likely connected to drug deal").

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[4] The search warrant in Holley focused on communications and, unlike this case, did not include images. See Holley, 478 Mass. at 524-525. From the information found as a result of the search, the Commonwealth offered in evidence only text messages. See id. at 525.

The third and fourth factors were specific to the case: (3) surveillance video showed Holley entering the homicide victim's apartment building and using his cell phone to call the victim, a drug dealer, a few minutes prior to the shooting, and (4) while the victim usually had his cell phone with him, its absence from the homicide scene indicated that perpetrators had taken it "to hide any information such as recent contact information and caller history." Holley, 478 Mass. at 522-523 (quoting search warrant affidavit). But see Broom, 474 Mass. at 488 (no nexus, even though murder victim's cell phone was missing from her apartment).

These and additional factors established the nexus in Holley to search the cell phone of Holley's coventurer, Pritchett. The additional factors were that Pritchett entered the victim's apartment building while Holley talked on his cell phone with the victim and, after the coventurers fled the homicide scene to a Massachusetts Bay Transportation Authority station, surveillance footage showed Pritchett apparently sending text messages on a cell phone. See Holley, 478 Mass. at 526. Finally, "[t]he warrant affidavit also contained information that Holley and Pritchett had different home addresses but arrived at the victim's house together. Given that both Pritchett and Holley had used their cellular phones during the time span of the crime, it was reasonable to infer

that Pritchett's cellular communications contained evidence of his having arranged to meet with Holley before they entered the victim's building together." Id. "[N]one of these facts in isolation would be sufficient for probable cause." Id.

As in Holley, the fact that a crime required coordination helped establish a "sufficient nexus" in Commonwealth v. Arthur, 94 Mass. App. Ct. 161, 166 (2018). There, three coventurers drove in two cars, parked, and then "participated in a coordinated attack on a home" a block away, firing multiple bullets into it. Id. at 162. We found probable cause to search five cell phones. An officer found two cell phones in one car -- one cell phone on the driver's seat and a second one on the front passenger's seat. The officer also found three cell phones in the other car -- two cell phones on the driver's seat and a third one in the passenger's door handle. See id. at 163. The "coordinated attack" and the cell phones in the cars led to the reasonable inference that the coventurers had used the cell phones to communicate with each other "in the period leading up to, and immediately preceding, the attack" to "coordinate the crime." Id. at 165, 167.

Here, the shooting required planning and coordination. Three men drove to a shooting and drove away. To hinder identification, some or all of them changed into clothes that they had previously placed in the car. Whether the defendant's

girlfriend had rented the car for her move or for the shooting, the defendant borrowed the car for the shooting. Although the record does not reveal whether the three men lived at separate addresses, see Holley, 478 Mass. at 526, the record reveals that the shooting was not spontaneous but, rather, "planned and coordinated," Arthur, 94 Mass. App. Ct. at 165.

Additional factors establish the nexus between the crime and the cell phone. The defendant's cell phone was in a car that he allegedly used to arrive at and flee from the scene of the crime, as in Arthur. See id. at 162-163. The defendant talked on his cell phone while he was fleeing from the crime and while he or one of his companions disposed of the murder weapon. See Holley, 478 Mass. at 522 (immediately before crime); id. at 526 (texting on cell phone after crime); Perkins, 478 Mass. at 105 (defendant talking on cell phone while arriving at location of drug transaction).

We have no evidence that the purpose of the cell phone call between the defendant, when he was arrested, and his girlfriend was to cover up the crime, as the Commonwealth contends. However, we need no such evidence. "[T]he fact that police did not know to a certainty that [the coventurer] was using his cellular telephone to communicate regarding the crime under investigation is not dispositive as to the question of nexus." Holley, 478 Mass. at 526-527.

It is a reasonable inference that a telephone call made by a defendant while fleeing from a crime, especially one as horrendous as a shooting, is probably related to the crime. See Commonwealth v. Barbosa, 477 Mass. 658, 667 (2018) (defendant's flight from scene and telephone calls immediately prior to and after crime to coventurers allowed reasonable inference of participation and shared intent). It is conceivable that a nonchalant criminal would, minutes after a crime, communicate with another person about an unrelated and mundane topic, but it is not probable. "In dealing with probable cause . . . we deal with probabilities." Brinegar v. United States, 338 U.S. 160, 175 (1949).

A final factor in establishing nexus is that one of the defendant's coventurers, who was known as Butta Bear or Butta, was probably the same person as Slime Buttah, who exchanged threatening and violent text messages with the victim on their cell phones. See Holley, 478 Mass. at 526 (nexus between crime and coventurer's cell phone was partly established by text messages with Holley, and Holley talking on cell phone with victim). Thus, a sufficient nexus existed, and the affidavit established probable cause to search the defendant's cell phone. His motion to suppress the search should not have been allowed.

b. Scope of search. "The conclusion that the warrant affidavit established a sufficient nexus to search" a cell phone

"does not mean, however, that police had unlimited discretion to search every portion" of the device. Perkins, 478 Mass. at 106. Whether the application's request for GPS and communication data was unconstitutionally overbroad or whether the physical search of the cell phone extended beyond the scope of the warrant has not been briefed by both parties. As such, we must remand to allow for a determination on those issues relating to the particularity requirement and the scope of the search. The record before us is insufficient. It is unclear what exactly the Commonwealth searched for and located on the defendant's telephone, directly or through hired experts. It is also unclear how the Commonwealth searched the phone and what evidence may have been discovered inadvertently while searching for other evidence.

We have descriptions of evidence, but those descriptions omit significant information, such as the dates of the texts, call logs, and images in question. Even though the Commonwealth has briefed the issue of particularity to establish a nexus between the files of the defendant's cell phone that were searched and the murder, the defendant did not brief this issue at all. Moreover, the Commonwealth did not brief whether the search it conducted was overbroad under existing law. A remand is therefore necessary to allow the Commonwealth and the defendant to present arguments on whether there was sufficient

particularity to search the designated files of the cell phone. Argument is also necessary as to those files for which there is a sufficient nexus to determine whether the search that was conducted was within the scope allowed by the warrant.

3. Conclusion. The order allowing the motion to suppress is reversed, and the case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

HENRY, J. (concurring in part and dissenting in part). I would affirm the order of the Superior Court judge allowing the defendant's motion to suppress evidence seized from his cell phone because I agree with the motion judge's conclusion that "[t]he information contained in the affidavit [in support of the application for a search warrant] did not establish a sufficient nexus between the shooting and killing of the victim . . . and the cellular telephone seized from the defendant." The majority essentially holds that although the ubiquity of cell phones cannot justify a search, if a person actually uses rather than just carries that cell phone shortly after committing a crime, then the cell phone is probably connected to the crime and subject to search. On this issue, respectfully, I dissent.

I agree with the majority that further proceedings are necessary to determine whether the search warrant and the subsequent search were constitutionally overbroad. On this point, I write separately to highlight recent controlling case law.

1. Probable cause for search of cell phone. I agree with the majority's recitation of the law, but I disagree with its application of the law to the facts in this case. See Commonwealth v. Mack, 482 Mass. 311, 320 (2019), quoting Commonwealth v. Morin, 478 Mass. 415, 426 (2017) ("Whether probable cause exists to believe that a cell phone contains

evidence of a crime 'is a fact-intensive inquiry and must be resolved on the particular facts of each case'"). Thus, as the majority states, the question is whether the affidavit demonstrates a "nexus between an alleged crime and a cell phone that is a prerequisite for a seizure or search." Ante at . Certainly, this is a close case. However, the inculpatory factors here align with recent cases that have suppressed evidence seized from cell phones because the affidavits in support of the search warrants lacked a sufficient nexus to the crime.

For example, in Morin, the Supreme Judicial Court held that the affidavit in support of the search warrant

> "established a personal relationship between the individual who brought the [deceased] victim to the hospital and the defendant, and that [the individual and the defendant] had communicated by [cell phone] before and after the killing. Nothing in the affidavit indicated that the defendant's [cell phone] would contain particular evidence related to the crime under investigation."

Morin, 478 Mass. at 427-428. Therefore, the Supreme Judicial Court concluded that, without more, the affidavit statement that search of "the defendant's telephone would lead to evidence of 'the individuals involved' in the victim's death is merely conclusory and cannot support a determination of probable cause." Id. at 428.

Similarly, as the majority acknowledges, in Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 750 (2017), we held that the

required nexus between the crime and the cell phone was not shown even where the "affidavit established, at most, that the defendant was using his [cell phone] four hours before the murder and used it to telephone two family members around the time of the murder" (emphasis added). Accordingly, we affirmed the order suppressing the results of the search.

Here, the affidavit did establish probable cause that the defendant participated, with Diggs and Peters, in the shooting and killing of the victim. It also established that the police were in possession of the victim's cell phone and had analyzed it for the victim's communications. However, the affidavit offered no evidence whatsoever of any communication between the victim and the defendant, nor did it show that the defendant's cell phone was used in the commission of the crime.

Rather, the majority reverses based on three factors: (1) that the defendant, while in the car that was used to drive to and from the shooting, was talking on his cell phone shortly after the crime; (2) that the shooting required planning and coordination; and (3) that Diggs, the alleged shooter and a coventurer, likely exchanged threatening and violent text messages with the victim.[1] These factors, neither separately nor

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[1] Even though the keys to the car were in the defendant's pocket, and not in the ignition, I will assume that the defendant and his companions had not yet completed their flight.

in combination, establish the requisite nexus to support a search of the defendant's cell phone.

a. Factor one. The majority essentially holds that the requisite nexus is established where there is probable cause to believe a suspect participated in a crime, combined with the presence and use of the suspect's cell phone close to the time of that crime. This violates the directive of the Supreme Judicial Court in Morin that "police may not rely on the general ubiquitous presence of [cell phones] in daily life." Morin, 478 Mass. at 426. Indeed, the Supreme Judicial Court "ha[s] repeatedly recognized that cell phones have become 'an indispensable part of daily life and exist as almost permanent attachments to [their users'] bodies.'" Commonwealth v. Hobbs, 482 Mass. 538, 546 (2019), quoting Commonwealth v. Almonor, 482 Mass. 35, 45 (2019) (cell phones now "almost a feature of human anatomy"). Inherent in the attachment between people and their cell phones is the fact that people use those phones, including using them to make telephone calls. Given this ubiquity, if the majority's holding is correct, "it would be a rare case where probable cause to charge someone with a crime would not open the person's [cell phone] to seizure and subsequent search." Commonwealth v. White, 475 Mass. 583, 591 (2016).[2]

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[2] The affidavit in support of the search warrant contains information that, in the telephone call at issue, the defendant

The facts here are far less fulsome than cases where we have found the requisite nexus. In Commonwealth v. Holley, 478 Mass. 508, 523 (2017), for example, there was a sufficient nexus between Holley's cell phone and the crime, as there is here with Diggs. The question then became whether the police could search the cell phone of Holley's coventurer, Pritchett. Id. at 526. Pritchett was seen on video camera texting as he and Holley fled the scene. Id. The crime involved a drug deal; drug deals are "commonly arranged by a telephone call." Id. Significantly, the victim's phone was missing -- inferably because it contained inculpatory material. Id. Further, Pritchett and Holley lived separately and traveled separately but arrived at the victim's location together, indicating that they were coordinating their movements by phone. Id. See Commonwealth v. Perkins, 478 Mass. 97, 105-106 (2017) (probable cause to search nine cell phones found in defendant's apartment where police had "detailed and

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was talking to his girlfriend and telling her that he was about to be arrested. At the motion hearing, the Commonwealth took this to be true, and the motion judge made a finding that this was true. I agree with the motion judge that this information is not sufficient to establish a sufficient nexus between the defendant's cell phone and the shooting. The majority speculates that regardless of the identity of the person to whom the defendant was speaking, the probability is that the call was related to the crime. However, the Supreme Judicial Court has not condoned such speculation, even where the cell phone to be searched was used to call a coventurer. See Morin, 478 Mass. at 427-428. See also Commonwealth v. Kaupp, 453 Mass. 102, 110-111 (2009) (probable cause deals with probabilities, but inferences cannot be too attenuated and must be reasonable).

specific knowledge," including from wiretaps, that defendant used cell phone to arrange drug transactions, and defendant was talking on cell phone when he arrived to conduct such transaction).

b. Factor two. The majority justifies its far-reaching holding by concluding that the shooting "required planning and coordination." Ante at . The foundation for this conclusion is insufficient. The warrant application established the following: the defendant borrowed a car, which he drove to the scene of the crime with two passengers, one of those passengers -- Diggs -- brought an extra T-shirt, and the defendant or the other passenger brought an extra layer on a December day -- a sweatshirt.[3] This is not a case where all three people brought a change of clothing. Nor did the warrant application establish, as the majority acknowledges, that the defendant and his passengers lived separately. Compare Holley, 478 Mass. at 526 (noting that affidavit contained information that two coventurers had different home addresses yet arrived at crime scene together). These facts do not demonstrate that the defendant's cell phone was used as a tool of coordination.

[3] The T-shirt was a size 6X and the sweatshirt was a size large. I assume, given the discrepancy, that it was not Diggs who brought the sweatshirt.

Accordingly, the majority's reliance on Commonwealth v. Arthur, 94 Mass. App. Ct. 161 (2018), is misplaced.

In Arthur, three coventurers arrived at the scene of the crime in two separate cars at the same time and parked facing the same direction. See id. at 162. The coventurers then left their respective cars in sequence and carried out a coordinated attack, much of which police officers witnessed. See id. at 163, 165. Following the attack, a police officer observed two cell phones in the defendant's car and three cell phones in the other car. See id. at 163. We concluded that "'the factual and practical considerations of everyday life' tell us that the cell phones found on the car seats likely were used to coordinate the crime." Id. at 167, quoting Commonwealth v. Gentile, 437 Mass. 569, 573 (2002). Nothing in this case suggests such coordination.

c. Factor three. As the majority acknowledges, "[m]ultiple cell phone calls and text messages between a defendant and a murder victim on the day of the killing, without more, also are not sufficient to establish probable cause to search the defendant's cell phone." Ante at . See Commonwealth v. Fulgiam, 477 Mass. 20, 34-35, cert. denied, 138 S. Ct. 330 (2017). Here, the contact was between a coventurer and the victim; it does not form a nexus between the defendant and the crime, or even the victim. Thus, this factor may

support a search of Diggs's cell phone; it does not form a nexus between the defendant's cell phone and the shooting.

2. Permissible scope of search and overbreadth. The motion judge found, and I agree, that "[t]he search warrant at issue sought authorization to search virtually all files" on the defendant's cell phone. It also was unlimited as to time. These facts raise a significant concern that the warrant did not satisfy the particularity requirements of the Fourth Amendment to the United States Constitution. See J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 8-3[a] (2018) ("It is important to note that if the scope of the search, even a search with a warrant, exceeds that which is reasonable, then it is as if the search were conducted without a warrant").

a. Temporal limits. A search warrant without a temporal limit is unreasonable. In Holley, which involved review of the search warrant after trial, the Supreme Judicial Court observed that although the evidence established a nexus between the defendant's telephone call and the crime, and the warrant was limited to seventeen days, the warrant still "raise[d] significant concerns" whether the warrant was sufficiently limited in scope. Holley, 478 Mass. at 525. The court found no prejudice because the text messages actually admitted in

evidence at trial were all sent or received within two to four days of the shooting. Id. at 525, 528.

In a more recent case involving an overbroad date range request for cell site location information (CSLI), the Supreme Judicial Court explained, "[g]iven the uncertainty in the case law" in this area of overbroad requests and "the limited briefing before the court on the issue presented, we [need to] proceed cautiously." Hobbs, 482 Mass. at 550. The court recognized the significant constitutional issues raised by the collection of extended amounts of historical CSLI and concluded that, "where the requisite nexus for probable cause clearly exists for a reasonable period of time encompassing the commission of and flight from the crime, as well as the defendant's immediate apprehension, the CSLI for this period of time need not be suppressed so long as the CSLI for which there is not the requisite nexus to the crime is not relied on or otherwise exploited by the Commonwealth at trial" (footnote omitted). Id. The court then held that the motion judge did not err in denying the defendant's motion to suppress because even without the requisite nexus, the Commonwealth did not "attempt to exploit the overbroad portions of the CSLI evidence at trial." Id. at 552. See Commonwealth v. Vasquez, 482 Mass. 850, 867 (2019) (reversing denial of motion to suppress CSLI for thirty-two days when "nothing in the affidavit [for the search

warrant] . . . suggest[ed] that the location of the defendant's telephone, beyond the night of the shooting itself, would produce any evidence of the crime").

In both Holley and Hobbs, the Supreme Judicial Court upheld the denial of the motion to suppress after trial, with the hindsight knowledge that the Commonwealth had not actually exploited the search warrant's broad temporal scope at trial. Here, however, as in Vasquez, the scope of the search had been challenged before trial. The question is whether the Commonwealth can support the temporal scope of the search warrant it sought and the search it conducted. The officer stated in the affidavit in support of the application for the search warrant that the reason the police needed a temporally unlimited warrant was that they did not know "when the weapon used was acquired" or "when any related conspiracy may have been formed." This stands probable cause on its head. It essentially means that the less the police know, the broader the scope of the search, which is not the law. This is particularly striking here, where the police are searching for evidence on a cell phone that has nothing to do with the telephone call that is the basis for searching the cell phone.

b. Telephone records, text messages, and Snapchat. The Commonwealth alleged that the defendant's one telephone call formed the basis for a search warrant application that was not

only unlimited temporally, but also unlimited as to the cell phone feature or even applications (such as Facebook, Viber, and WhatsApp) that, when enabled, allow telephone calls.

The affidavit in support of the application certainly included cell phone call-related information, such as call history (sent, received, and missed), and voicemail messages from anyone else to the defendant (even ones he had not yet opened, as well as ones he had opened, saved, or deleted). It also included the following:

- equipment information (cellular telephone number, electronic serial number, international mobile equipment identity, and mobile equipment identifier or other similar identification number);
- all of the defendant's contacts (address book and contact list);
- the defendant's calendar (personal calendar and date book entries);
- the defendant's to do lists;
- e-mail between the defendant and anyone (saved, opened, unopened, draft, sent, and deleted electronic mail);
- text messages between the defendant and anyone (incoming, outgoing, draft, and deleted text messages and video messages);
- any photographs or videos (including those stored, saved, or deleted);
- any audio or video "memos" (whether stored, saved, or deleted);
- GPS information;
- mobile instant message chat logs, data, and contact information;
- Internet browser history; and
- any and all of the fruits or instrumentalities of the crime.

The breadth of the information contained in a cell phone cannot be overstated. In fact, most cell phones contain more information about the owner than the owner can recall. As the United States Supreme Court explained in Riley v. California, 573 U.S. 373, 393 (2014), "[t]he term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."

"The conclusion that the warrant affidavit established a sufficient nexus to search" a cell phone "does not mean, however, that police had unlimited discretion to search every portion" of the device. Perkins, 478 Mass. at 106. A search warrant violates the particularity requirement of the Fourth Amendment where it is not limited to cell phone data that the police have probable cause to believe relates to the crime. See United States v. Winn, 79 F. Supp. 3d 904, 919 (S.D. Ill. 2015) ("The major, overriding problem with the description of the object of the search -- 'any and all files [of a cell phone]' -- is that the police did not have probable cause to believe that everything on the phone was evidence of the crime"); Buckham v. State, 185 A.3d 1, 18 (Del. 2018) (warrant authorizing search of any and all stored data on defendant's cell phone "so far

outruns [a] probable cause finding -- and is so lacking in particularity relative to that probable cause finding --" that it violated the particularity requirement of the Fourth Amendment); State v. McKee, 3 Wash. App. 2d 11, 29 (2018), rev'd on other grounds, 193 Wash. 2d 271 (2019) ("The warrant in this case was not carefully tailored to the justification to search and was not limited to data for which there was probable cause"); State vs. Morasch, Wash. Ct. App., No. 50810-9-II, slip op. at 8 (Apr. 16, 2019) (warrant violated particularity requirement of Fourth Amendment to United States Constitution where warrant "made no attempt to narrow the actual description of the items wanted with precise language . . . to tailor the warrant to items particular to that crime"). Nothing here supported a warrant for "virtually all files" on the defendant's cell phone.

The question of telephone calls versus text messages is a more complicated question and may similarly depend on whether the challenge to the warrant is before or after trial. In Holley, the Supreme Judicial Court held that where the evidence established a nexus between the defendant's telephone call and the crime, which involved drug dealing, the warrant could reach

"contemporaneous communications," including "real-time text messages." Holley, 478 Mass. at 523.[4]

On the other hand, in a case issued two months before Holley involving review of a warrant before trial, the Supreme Judicial Court upheld a warrant restriction on the scope of a cell phone search. See Perkins, 478 Mass. at 106. As in Holley, Perkins involved a drug transaction that was arranged by telephone calls on a cell phone. The court noted approvingly that "[t]he police were not authorized to rummage through the entirety of the defendant's cellular telephones, and were confined to the plain terms of the warrant affidavit to call activity and contact lists." Id.

Here, the defendant raised the scope of the warrant before trial, and the crimes did not include drug dealing. Nothing in the record supported the full-scale rummaging that the warrant allowed, including the search of the defendant's text messages. Where a telephone was used to make a voice call, the only evidence to be found on the telephone would be a record of the

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[4] By Holley's logic -- that the defendant's use of one type of cell phone communication (a telephone call) allowed the search of a different type of communication (text messages) on the same cell phone because both are "contemporaneous communications" -- one cell phone call could permit a search of every other way to communicate with a cell phone. Such a search could reach every application that allows communications with third parties, including all social media and all e-mail. It is hard to see how to reconcile that with the Fourth Amendment's particularity requirement.

call history -- the fact that he called his girlfriend or vice versa -- and that information could be obtained from her telephone or the cellular carrier. The Commonwealth should demonstrate why the warrant should not have been limited to the telephone feature, and if that search had revealed that the defendant had not used the telephone feature to make the telephone call, then the police could have sought a warrant for any applications used for that purpose.

Assuming that Holley constrains us to hold that a telephone call opens all text communications to search, the Commonwealth could then, based on the content of those text messages referring to "Snapchatting with guns," seek to search further for Snapchat videos. On remand, the Commonwealth must justify the broad scope of this warrant.[5]

This is an evolving area of law, and we must heed the Supreme Judicial Court's warning to proceed cautiously, especially where the scope of the warrant was exponentially broader than CSLI. The Fourth Amendment to the United States Constitution requires particularity.

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[5] If the courts allow the Commonwealth boundless access to defendants' cell phones, one should ask how this will affect discovery of the cell phones of victims. Given the amount of personal data available on a person's cell phone, which is really a pocket-sized computer, the reluctance of victims to come forward could be greatly exacerbated. Those who do come forward could be subjected to unnecessary and painful intrusion on their privacy.