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19-P-846
19-P-889

Appeals Court

COMMONWEALTH vs. MILANO R. ANDRE-FIELDS (and nineteen companion cases¹).

Nos. 19-P-846 & 19-P-889.

Worcester. February 3, 2020. - September 23, 2020.

Present: Vuono, Henry, & Hand, JJ.

Controlled Substances. Firearms. Search and Seizure,
Affidavit, Probable cause, Warrant. Constitutional Law,
Search and seizure, Probable cause. Probable Cause.
Practice, Criminal, Motion to suppress, Affidavit.

Indictments found and returned in the Superior Court Department on March 15, 2018.

A motion to suppress evidence was heard by Paul D. Wilson, J., and a motion for reconsideration was considered by him.

An application for leave to prosecute an interlocutory appeal was allowed by Kimberly S. Budd, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by her to the Appeals Court.

Ellyn H. Lazar, Assistant District Attorney, for the Commonwealth.

Daniel P. Griffin for Milano R. Andre-Fields.

¹ Nine against Milano R. Andre-Fields and ten against Mindy Doherty.

Sean M. Smith for Mindy Doherty.

VUONO, J. A grand jury returned indictments charging the defendants, Milano R. Andre-Fields and Mindy Doherty, with numerous drug and firearm offenses.² The charges are based on evidence seized during the execution of two search warrants at an apartment located at 1223 West Boylston Street in Worcester. The first warrant authorized the police to search for records and other evidence of a drug distribution scheme operated by Andre-Fields. The second warrant was obtained after the police had entered the premises and observed a large amount of drugs and a number of firearms. That warrant expanded the search to include illegal drugs. Both warrants were executed on November 21, 2017. Prior to trial, Andre-Fields filed a motion to suppress the evidence, which Doherty joined. Following a hearing, a judge of the Superior Court concluded that the affidavits submitted in support of the search warrants failed to

² The defendants were charged with trafficking in methamphetamine in excess of 200 grams, G. L. c. 94C, § 32E (b) (4); possession of methamphetamine with intent to distribute, G. L. c. 94C, § 32A (a); two counts of possession of a large capacity firearm, G. L. c. 269, § 10 (m); possession of a firearm without a firearm identification (FID) card, G. L. c. 269, § 10 (h); possession of ammunition without an FID card, G. L. c. 269, § 10 (h); possession of a firearm with a defaced serial number, G. L. c. 269, § 11C; and three counts of improper storage of a large capacity firearm, G. L. c. 140, § 131L.

establish the requisite nexus between the objects sought and the premises to be searched. Consequently, he allowed the motion to suppress.³ A single justice of the Supreme Judicial Court granted the Commonwealth's application for leave to prosecute an interlocutory appeal, and the case was transferred to this court. For the reasons that follow, we reverse the order allowing the motion to suppress.

Background. We summarize the information contained in the affidavit submitted in support of the search warrant application. The affiant, Felipe Martinez, is a State trooper with extensive experience in controlled substance investigations.⁴ At the time he prepared the affidavit, Trooper Martinez was assigned to the State police detective unit narcotics squad in Worcester County. Within one month of submitting the search warrant, Trooper Martinez was contacted by a confidential informant (CI) who told him that a black man called "Sike" was selling crystal methamphetamine and "crack" cocaine in the Worcester area.⁵ The CI said that he had

³ The Commonwealth filed a motion for reconsideration, which was denied.

⁴ Trooper Martinez has specialized training in drug investigations and has participated in approximately one thousand drug investigations.

purchased cocaine from Sike many times by calling him on one of two cellular telephone numbers and placing an order. Sike then delivered the drugs to a predetermined location.

The CI knew where Sike lived and described the cars that Sike drove. He told Trooper Martinez that Sike previously lived on School Street in Boylston, Massachusetts, and that the CI had observed large amounts of drugs in Sike's home there. Through additional investigation, Trooper Martinez learned that Andre-Fields and his wife lived at 199A School Street and that one of the vehicles he owned, a grey BMW, was registered to him at that address.⁶ According to the CI, at some point, Sike had moved to 1223 West Boylston Street in Worcester, Massachusetts. Trooper Martinez learned that Doherty lived in an apartment located on the second floor of a multifamily home at that address and that the home was owned by Doherty's mother.⁷ He also learned that Doherty and Andre-Fields were dating. By reviewing records maintained by the registry of motor vehicles (RMV) Trooper Martinez further learned that Andre-Fields had listed his

⁵ Our use of the masculine pronouns should not be considered any indication of the CI's gender, about which we have no information.

⁶ We infer that the two are married based on the CI's statement that Sike lived with his wife.

⁷ The affidavit does not indicate that the CI saw drugs at the West Boylston address or that the CI had entered that residence.

address as 1223 West Boylston Street. In addition, the CI reported that Sike owned a small, black Ford pickup truck. Trooper Martinez confirmed that Andre-Fields owned such a vehicle and that it was registered to him at the West Boylston Street address. Officers observed that the truck was parked overnight at 199A School Street and at 1223 West Boylston Street.

Trooper Martinez obtained a photograph of Andre-Fields from the RMV and showed it to the CI, who identified the photograph as being that of Sike. The CI also showed Trooper Martinez a Facebook social media account profile under the name "Scrooge Macduck (sikesosock)," and Trooper Martinez recognized the photographs on the profile as images of Andre-Fields. The page also listed Andre-Fields's nickname as "sike."

Trooper Martinez investigated the telephone numbers provided by the CI to contact Andre-Fields and learned that one of them was registered to an "Andre Milano" with an address of 199A School Street in Boylston. The other telephone number was registered to an "A Agnes" in East Millbury, Massachusetts (second phone). Based on his training and experience, Trooper Martinez was aware that drug dealers, in addition to using their personal cellular telephones, commonly own a "burner phone[]" registered in the name of another individual to facilitate drug transactions.

The CI also stated that Andre-Fields (Sike) had recently been arrested in Rhode Island with a large amount of crystal methamphetamine. Trooper Martinez confirmed that Andre-Fields was arrested in North Smithfield, Rhode Island in October 2017. Trooper Martinez contacted the North Smithfield Police Department and learned that when the police arrested Andre-Fields they found forty-two grams of what appeared to be crystal methamphetamine, approximately twenty grams of what appeared to be crack cocaine, and some marijuana. Trooper Martinez reviewed Andre-Fields's criminal history, which included prior charges for possession of a controlled substance in California between 2007 and 2008, and one conviction. Less than one year earlier, in December 2016, Andre-Fields was charged in Clinton District Court with one count of distribution of a class D substance (marijuana) that was continued without a finding of guilt.

During the course of the investigation, Trooper Martinez and other law enforcement agents conducted intermittent surveillance of both addresses associated with Andre-Fields, 199A School Street and 1223 West Boylston Street. They observed Andre-Fields's black Ford pickup truck parked overnight at both locations. The affidavit does not state whether Andre-Fields was observed by officers at the School Street address, but both he and Doherty were observed at 1223 West Boylston Street. The West Boylston residence had two outdoor staircases, one on the

left side of the house and one on the right side, both of which led to the second floor. Andre-Fields and Doherty were seen using the staircases to enter and exit the second-floor apartment.

Trooper Martinez also received information about Doherty's involvement with the distribution of drugs. He spoke with a detective assigned to the Worcester police vice squad who told him that Doherty was known to distribute illegal drugs and that he had conducted a controlled purchase of methamphetamine from Doherty in the past. The detective also said that he had seen Doherty at 1223 West Boylston Street and that Doherty was dating Andre-Fields.

As part of his investigation, Trooper Martinez arranged for the CI to conduct three controlled purchases of cocaine from Andre-Fields. The first controlled buy occurred approximately three weeks before the execution of the search warrant. Under the supervision of Trooper Martinez, the CI contacted Andre-Fields by calling the telephone number for the second phone (the suspected burner phone) and arranged to purchase crack cocaine. Prior to the buy, the CI and his car were searched for money and drugs. Trooper Martinez then provided the CI with money and instructed him to use it to purchase crack cocaine from Andre-Fields. The CI traveled to the location set for the transaction. Meanwhile, Trooper Martinez observed Andre-Fields

leave 1223 West Boylston Street (the affidavit does not state which floor) and travel directly to the set location.⁸ The CI met with Andre-Fields briefly, and the officers conducting surveillance observed them have a hand-to-hand exchange. When the two separated, Andre-Fields returned to 1223 West Boylston Street and entered the second-floor unit. The CI, who had been under constant surveillance, then met with the officers and gave them a substance that field-tested positive for the presence of cocaine. The amount of the suspected cocaine was not stated but it was consistent with the price the CI paid for it. The CI reported that he had purchased the drugs from Andre-Fields.

The second controlled buy occurred about two weeks before the execution of the search warrant. The CI followed the same procedure in contacting Andre-Fields, i.e., he called the same telephone number and placed an order for crack cocaine. He submitted to a search of his body and car and then met Andre-Fields at a predetermined location. On this occasion, Andre-Fields was not under police surveillance while he travelled to and from the meeting with the CI. Andre-Fields drove the grey BMW, which was seen parked at 1223 West Boylston Street at an unspecified later time.⁹ As with the first controlled buy, the

⁸ The affidavit does not specify the manner of travel.

⁹ The affidavit notes that throughout the course of the investigation, the BMW often was parked at 1223 West Boylston

substance that the CI obtained from Andre-Fields field-tested positive for the presence of cocaine, and the amount of the suspected cocaine, though unstated, was consistent with the price the CI paid for it.

The third controlled buy occurred within seventy-two hours of the issuance of the search warrant. This buy was arranged and conducted in the same manner as the prior two buys. After the CI called Andre-Fields's second phone and arranged to meet him at a set location, officers observed Andre-Fields leave 1223 West Boylston Street (the affidavit does not state which floor) and travel to the location where he met with the CI.¹⁰ Officers then followed Andre-Fields as he travelled directly back to 1223 West Boylston Street, where he entered the second-floor unit. Once again, the substance the CI purchased from Andre-Fields field-tested positive for the presence of cocaine, and the amount of the suspected cocaine, though unspecified, was consistent with the price the CI paid for it.

Based on this information and his training and experience, Trooper Martinez alleged in his affidavit that there was probable cause to believe that evidence, including "[b]ooks,

Street and officers observed Andre-Fields driving the BMW in a manner consistent with an effort to avoid police surveillance.

¹⁰ The affidavit does not state how Andre-Fields travelled to the location of the controlled buy.

papers, documents, ledgers, records, accounts, [and] electronic devices" related to the purchase and distribution of cocaine would be found in the second-floor apartment located at 1223 West Boylston Street. Trooper Martinez also stated there was probable cause to believe that, among other items, drug paraphernalia, currency used to purchase or sell cocaine or that was traceable to the purchase or sale of cocaine, and documents showing ownership and control over the second phone would be found at the apartment.

The search warrant issued on November 20, 2017, and was executed on November 21, 2017. During the ensuing search, the police found two "AR-15" style rifles, an automatic .380 caliber handgun, ammunition, packaging material, United States currency, multiple digital scales, and a black safe in which a significant amount of crystal methamphetamine was discovered. When the police found a second safe, they suspended the search and obtained a second search warrant authorizing the seizure of illegal drugs in addition to the items related to the records and proceeds of a drug operation specified in the first warrant.¹¹ The second warrant issued, the search resumed, and

¹¹ The affidavit submitted in support of the second warrant application included the information gleaned during the execution of the first warrant. Otherwise, the affidavits were the same.

"crystal substance[s] consistent with the appearance of crystal methamphetamine" were seized.

Discussion. As previously noted, the judge concluded that the warrants were not supported by probable cause and allowed the defendants' motion to suppress the evidence seized from the apartment.¹² Although the Commonwealth argues that the first search warrant application established probable cause to search for drugs in addition to evidence of a drug operation, we need not address that question. Rather, we address the issue whether the affidavit established probable cause to believe the items (records, proceeds, and so forth) specified in the first search

¹² Given his conclusion, the judge did not address the question whether the affidavit established the CI's veracity and basis of knowledge. See Commonwealth v. Upton, 394 Mass. 363, 374 (1985), citing Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964). We conclude, however, that because the CI, who has provided the police information (later corroborated) in regards to narcotics activity and whose personal information was known to Trooper Martinez and other officers, told Trooper Martinez that his information was based on personal knowledge, admitted to buying cocaine in the past from Andre-Fields, and participated in three controlled purchases of cocaine, his veracity and basis of knowledge under the Aguilar-Spinelli test are established. See Commonwealth v. Lima, 80 Mass. App. Ct. 114, 119 n.5 (2011). See also, Commonwealth v. Clagon, 465 Mass. 1004, 1005 n.3 (2013). Furthermore, as Trooper Martinez noted in his affidavit, the information provided by the CI was corroborated through his investigation. Thus, if any deficiencies existed, they were cured. See Commonwealth v. Blake, 413 Mass. 823, 828 (1992).

warrant application would be found in the apartment.¹³ More specifically, we must determine whether "[t]he information in the affidavit [is] adequate to establish a timely nexus between the defendant and the location to be searched and to permit the determination that the particular items of criminal activity sought reasonably could be expected to be found there."

Commonwealth v. Gallagher, 68 Mass. App. Ct. 56, 59 (2007), quoting Commonwealth v. Eller, 66 Mass. App. Ct. 564, 565 (2006).

Our review of the sufficiency of the search warrant application "begins and ends with the 'four corners of the affidavit'" (citation omitted). Commonwealth v. O'Day, 440 Mass. 296, 297 (2003). "[T]he affidavit should be read as a whole, not parsed, severed, and subjected to hypercritical analysis." Commonwealth v. Blake, 413 Mass. 823, 827 (1992). Rather, we interpret the affidavit in a commonsense fashion. See Commonwealth v. Santiago, 66 Mass. App. Ct. 515, 521 (2006). Viewed in this light, the clerk magistrate properly concluded that Trooper Martinez's affidavit was sufficient to establish a timely nexus between Andre-Fields's drug activity and the

¹³ There is no dispute that if the first search warrant was supported by probable cause, the second warrant, which included the fact that the officers saw drugs and firearms in the apartment, passed muster as well.

apartment such that probable cause existed to believe evidence of his drug operation would be found there.

First, the affidavit established that Andre-Fields was a drug dealer and that he was running an ongoing drug distribution operation. The CI described Andre-Fields as a drug dealer, and that description was corroborated by independent police investigation, which revealed that Andre-Fields was arrested in Rhode Island with a significant amount of drugs, including crack cocaine, and that he sold crack cocaine to the CI three times within approximately the three weeks preceding the execution of the search warrant. This information provided a sufficient basis from which the magistrate could reasonably infer that Andre-Fields currently was engaged in the illegal distribution of drugs and that he had ready access to a supply of drugs for sale.¹⁴ See Commonwealth v. Escalera, 462 Mass. 636, 646 (2012).

Second, the affidavit contained information from which it may be inferred that Andre-Fields was staying at the apartment and using it as a base of operations for his drug business. The

¹⁴ The defendants claim that it is not reasonable to conclude Andre-Fields had access to his own supply of drugs because the affidavit did not specify the amount of drugs sold to the CI or the amount of time that passed between the CI's placing an order of cocaine and the subsequent sale. The fact that Andre-Fields had a large amount of various types of drugs on his person when he was arrested in Rhode Island and then had access to additional drugs such that he was able to sell drugs to the CI in the following weeks supports the inference that Andre-Fields had a ready supply of drugs for sale.

CI stated that Andre-Fields had moved from School Street to West Boylston Street and there was evidence that Andre-Fields was dating Doherty. One or both of his vehicles were seen parked outside the residence overnight and one of those vehicles, the black Ford pickup truck, was registered to Andre-Fields at that address. In addition, Andre-Fields listed 1223 West Boylston Street as his address with the RMV. Furthermore, as we discuss in more detail below, twice while under police surveillance Andre-Fields left the apartment and traveled directly to meet the CI, sold crack cocaine to the CI, and then returned directly to the apartment.¹⁵

¹⁵ We acknowledge that the affidavit states that Andre-Fields was observed leaving 1223 West Boylston Street without specifically referring to the second-floor apartment. However, we view the affidavit, taken as a whole, as reasonably suggesting that Andre-Fields departed from the second-floor apartment. See Commonwealth v. Luthy, 69 Mass. App. Ct. 102, 106-107 (2007). The magistrate could infer from the fact that the defendant had previously been observed entering and exiting the second-floor unit on "multiple occasions" that this was his usual practice and that he did so when departing for and returning from selling cocaine to the CI. See, e.g., Commonwealth v. Colon, 80 Mass. App. Ct. 162, 167-168 (2011) ("There were no direct observations that the defendant . . . left from or returned to the first floor of the target location, . . . [but] the defendant had been seen entering and exiting the rear door several times. These facts reasonably indicate that the defendant's residence, on the first floor, was the base of his operations and would contain evidence of those operations"). Cf. Commonwealth v. Warren, 418 Mass. 86, 90 (1994) ("It is not fatal to the warrant application that police did not observe which of the three apartments the informant entered. Based on the information provided by the informant and their own observations, the police could infer that the defendant was dealing drugs from his second-floor apartment").

It is true that the affidavit did not affirmatively establish that the apartment at 1223 West Boylston Street was Andre-Fields's primary residence. Clearly, Andre-Fields also had a connection to 199A School Street, and it can be inferred that he stayed at both places. However, we reject the argument that, because Andre-Fields may have been living in two locations, evidence of his drug activity would not be found in the apartment at 1223 West Boylston Street. "A warrant application 'need not establish to a certainty that the items to be seized will be found in the specified location, nor exclude any and all possibility that the items might be found elsewhere. The test is probable cause not certainty.'" Commonwealth v. Clagon, 465 Mass. 1004, 1006 (2013), quoting Escalera, 462 Mass. at 646. As the court observed in Clagon, supra at 1007, "[w]hether the suspect owns the premises, lives there, or merely conducts business there, the question is whether evidence is likely to be found there." Thus, that evidence of Andre-Fields's drug sales might also have been found at the residence on School Street does not detract from the conclusion that there was probable cause to search the apartment at 1223 West Boylston Street.

We now turn to the final inquiry, namely whether the affidavit provided a reasonable basis to infer that the items sought, i.e., records and related evidence of Andre-Fields's

drug operation, would be found in the apartment 1223 West Boylston Street. Based on the information that established that Andre-Fields was a regular supplier of drugs with a substantial connection to the apartment from which he departed on at least two occasions to sell drugs to the CI, it was reasonable to infer that evidence related to the distribution of drugs would be found in the apartment.

"No bright-line rule can establish whether there is a nexus between suspected drug dealing and a defendant's home" because "each case presents its own facts and must be considered in light of a unique set of circumstances." Escalera, 462 Mass. at 643. In Escalera, the Supreme Judicial Court noted that "[o]bservations by police of a suspect on multiple occasions leaving his residence and proceeding directly to a prearranged location to sell drugs can support a reasonable inference that the suspect is a drug dealer who stores drugs or packages drugs for resale in his residence." Id. In Clagon, the court determined that the affidavit submitted in support of a search warrant established the required nexus between the alleged criminal activity and the target premises based on information that the defendant was a drug dealer who sold heroin to a confidential informant on three occasions in the thirty days before the warrant was issued. 465 Mass. at 1005-1006. On two of those occasions, the defendant left the target premises and

travelled directly to the prearranged location of the controlled purchase, and on a third occasion, the defendant returned to the premises after having sold heroin to the confidential informant. Id. at 1006. The defendant's connection to the residence was bolstered by the fact his father, also a known drug dealer, was able to come and go from the premises using a key. Id. at 1005-1006. The court concluded that, although the case was close, it was reasonable to infer that "evidence, such as paraphernalia, money, and records connected with [the drug] trade, would likely be found there." Id. at 1006.

Here too, the type of crime involved, and the apparent scope of the operation, permitted the inference that Andre-Fields would maintain records of his drug business and that those records would be found in the apartment at 1223 West Boylston Street. "Drug dealers do not provide receipts for product purchases; nor are informants privy to the private business records of any money generating drug enterprise." Santiago, 66 Mass. App. Ct. at 522. "What records are kept, and surely they are, given the nature of the business, are typically beyond the reach of police surveillance." Id. "Once it was established that [Andre-Fields] was operating a drug business that included [1223 West Boylston Street], little, if anything more, needed to be added in the affidavit to justify searching for records, ledgers, or proceeds" (quotation and footnote

omitted). Id. Furthermore, it was likely that Andre-Fields, who remained under surveillance after the final controlled buy, brought the proceeds of that transaction into the apartment. It is similarly likely that the cellular telephone used to arrange the sales with the CI would be found in the apartment. See Commonwealth v. Perkins, 478 Mass. 97, 104-108 (2017) (affidavit established sufficient nexus between defendant's participation in drug transaction and his residence to permit a search for cellular telephone used to arrange sale and sweatshirt defendant wore to conduct transaction); Santiago, supra at 521-522. See also Commonwealth v. Luthy, 69 Mass. App. Ct. 102, 108 (2007) (magistrate could have inferred that defendant brought illicit proceeds into his house after returning from controlled sale).

The defendants rely heavily on the fact that the CI did not see drugs or drug related records inside the apartment at 1223 West Boylston Street for support of their position that it was not likely that evidence of drug activity would be found there. However, "[t]he connection between the items to be seized and the place to be searched does not have to be based on direct observations; it may be found by looking at the type of crime, nature of the items, the suspect's opportunity to conceal items, and inferences as to where the items are likely to be hidden." Gallagher, 68 Mass. App. Ct. at 59, quoting Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 600 (1991). In this case, for

the reasons discussed, the information in the affidavit established that drug related evidence was "likely" hidden in the apartment. We therefore disagree with the defendants' claim that the absence of direct observations of contraband by the CI in the apartment is a fundamental flaw that negates probable cause. See Commonwealth v. Hardy, 63 Mass. App. Ct. 210 (2005) (although CI had not visited defendant's apartment, affidavit established sufficient nexus between defendant's drug activity and apartment based on two controlled purchases during which police observed defendant travel directly to and from apartment to meet CI at designated location and conduct drug transaction).¹⁶

In reaching our conclusion that the search warrant application was sufficient to establish probable cause, we acknowledge that certain details were not included that would

¹⁶ In Commonwealth v. Pina, 453 Mass. 438, 442 (2009), the Supreme Judicial Court found there was no substantial nexus between the defendant's drug activity and his apartment where "[t]he only particularized information contained in the affidavit connecting the defendant's observed drug activity with the apartment in which he lived was a single observation of the defendant driving from the apartment to a location where he sold an unspecified quantity of cocaine to the informant." Here there was much more. The affidavit included information that Andre-Fields had sold drugs to the CI numerous times in the past, that the method of operation was the same on all occasions, that the police observed Andre-Fields leave and return to the apartment in connection with two of the three controlled buys, and that the police established Andre-Fields's close connection to the apartment.

have made the affidavit stronger, such as the time it took Andre-Fields to meet the CI after he received the CI's telephone call ordering crack cocaine, the quantity of cocaine sold and the price paid by the CI at each controlled buy, and, as a further example, whether the CI was given prerecorded buy money. The affidavit does not state whether Andre-Fields walked or drove to and from the sales. But the absence of this information is not fatal to a determination of probable cause. See Escalera, 462 Mass. at 643. "We give considerable deference to the magistrate's determination, and even 'the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants'" (citations omitted). Commonwealth v. Harmon, 63 Mass. App. Ct. 456, 460 (2005). See Commonwealth v. Perez, 90 Mass. App. Ct. 548, 555 (2016). Based on all the evidence and circumstances that the affidavit did describe, we conclude that the search warrant application established a timely nexus between Andre-Fields's criminal activity and the second-floor apartment located at 1223 West Boylston Street.

Order allowing motion to
suppress reversed.

HENRY, J. (concurring). I agree that based on the facts of this case, and the status of the law as it now stands, we are required to reverse the order granting the motion to suppress. I write separately to highlight the tenuously low showing to establish the requisite nexus to search a residence in a drug delivery service case, such as this one, where the confidential information (CI) made no statement connecting the target premises to the drug activity. By "drug delivery service case," our cases have meant the defendant operated in a manner to keep the drug transactions away from their home or target residence, typically where the transactions are arranged in advance with the buyer. See, e.g., Commonwealth v. Pina, 453 Mass. 438, 440 (2009). Given the sanctity of a person's home, I urge the Supreme Judicial Court to revisit this issue. At minimum, we should lower the showing no further, at least without far greater explanation than has been offered to date.

Eight years ago the Supreme Judicial Court stated that "[n]o bright-line rule can establish whether there is a nexus between suspected drug dealing and a defendant's home" because "each case presents its own facts and must be considered in light of a unique set of circumstances." Commonwealth v. Escalera, 462 Mass. 636, 643 (2012).¹ Certainly, the nexus

¹ In Escalera, the Supreme Judicial Court did indeed mean the defendant's home. Our cases, however, sometimes use the

determination is complicated by the multivariable factual circumstances that courts consider in determining whether an affidavit in support of an application for a search warrant for a residence establishes the requisite nexus between the residence and the drug activity. These variables may include: the presence or absence of statements by one or more confidential informants (CI) tying drug activity to the target premises; the number of controlled buys and, for each, whether the seller departs from or returns to the target premises; surveillance revealing other apparent drug transactions; the seller's ties to the target premises; the scale of the operation; whether the proposed search is for drugs, records and proceeds, or both; and sometimes all of these variables for a second residence.

Nonetheless, analysis reveals that some rules and trends have emerged in the case law involving drug delivery services and it is a worthwhile endeavor to highlight what has or has not

word "home" loosely to mean some person's residence to which the defendant has ready access. In many of our cases, a defendant is staying with a romantic interest or living in multiple apartments. We should take care that language from a case where the defendant has only one home is not grafted onto cases where the defendant has access to more than one home and vice versa. For further clarity, I use "target residence" when the place to be searched is the defendant's residence, and the "target premises" when the place to be searched is not the defendant's residence, or it is unknown if it is the defendant's residence, but the application in support of the search warrant contains evidence that the defendant has ready access to that residence.

been found to be a sufficient nexus and how we arrived here. See the Appendix to this concurrence (collecting cases based on whether there was a CI statement tying drug activity to the target premises, the number of controlled buys, and police observation of other apparent drug sales and other factors). This analysis reveals that the Supreme Judicial Court and this court have relied on cases involving drug activity at a residence to lower the showing to establish a nexus in cases involving only drug activity away from the target premises without acknowledging the conflation.

Our cases involving drug delivery services and this nexus can be divided into: (1) cases where a CI provides information directly linking the defendant's drug activity to the residence to be searched, and (2) cases where the CI has not provided such a link. This case falls into the second category of drug delivery service cases, because here the CI offered no statements linking the defendant's drug activity to the target premises and had never even been inside the target premises. To understand our cases, it is instructive to look at both lines of cases.

1. A single controlled buy in a drug delivery case without more, such as a CI statement, does not establish the required nexus. "[P]robable cause to expect that drugs will be present in a home is not established by the fact that the defendant

[drug dealer] lives there" or that on one occasion he was observed driving from his apartment to a controlled buy. Pina, 453 Mass. at 441-442. See Commonwealth v. Medina, 453 Mass. 1011, 1011 (2009) ("the fact that a defendant drives from his home to the location of a drug transaction, and returns to his home on the transaction's conclusion, with no other facts connecting the residence to drug sales, does not provide probable cause to search the residence" [citation omitted]).

On the other hand, the Supreme Judicial Court has noted that "[a] single observation of a suspect leaving his home for a drug deal may also support an inference that drugs will be found in the home where it is coupled with other information, such as statements from credible informants." Escalera, 462 Mass. at 644, citing Commonwealth v. Young, 77 Mass. App. Ct. 381, 383-384, 388 (2010) ("single controlled purchase coupled with informant's statements that defendant 'always' selected sale locations within walking distance of his apartment sufficient to establish nexus"). There are very few cases that truly fall in this category. More typically, our cases rely on two or more controlled buys combined with the CI's statements connecting the target premises to the drug activity. See Appendix.

2. Drug delivery cases lacking a CI statement tying drug activity to the target premises have concluded that three controlled buys, at least two of which originate from the target

premises and a third that terminates there, combined with a suspect's ties to the target premises, can establish the required nexus. A small number of cases address the nexus required between the target premises and the defendant's drug delivery service when it is based on police observation of controlled buys and surveillance in the absence of a CI statement that ties the target premises to drug activity. The nexus showing in Commonwealth v. Clagon, 465 Mass. 1004, 1007 (2013), characterized by the court as a "close case," is the smallest showing the Supreme Judicial Court has recognized in a drug delivery service case to establish the nexus between drug activity and the target residence. In Clagon, the court held that there was sufficient nexus between the defendant's drug delivery service and the target residence based on three controlled buys, at least two of which originated from the target premises and at least one of which terminated at the target premises, and investigation revealing the defendant's family's ties to the residence and his father's extensive criminal record involving drug offenses. Id. at 1005-1006.

Notably, the nexus in Clagon was markedly lower than what was established in the Supreme Judicial Court's decision in Escalera the year before. In Escalera, the court relied on "multiple" sales, which in that case was six sales in total, all of which terminated at the target residence. 462 Mass. at 643,

646. These included four controlled buys, one of which originated from the residence, and two noncontrolled drug sales for which the defendant "departed from his apartment and drove directly to the location where an apparent drug deal took place." Id. at 646. The affidavit in support of the search warrant also "provided information that the defendant could deliver drugs in variable quantities on short notice, further supporting the inference that the defendant kept a supply of drugs in his home." Id.

Indeed, Escalera itself relied on cases with far more than three controlled buys or the authorities it cited involved drug activity at the target residence or both. Escalera, 462 Mass. 643-644, citing "Commonwealth v. Cruz, 430 Mass. 838, 841 (2000) (defendant engaged in six controlled sales, all occurring in parking lot of his apartment building); Commonwealth v. O'Day, [440 Mass. 296, 298-300 (2003)] (defendant left from his residence on two occasions; police also observed numerous quick visits by individuals to defendant's residence, and informant stated that he had purchased drugs inside residence); Commonwealth v. Hardy, 63 Mass. App. Ct. 210, 211-212 (2005) (defendant left from his apartment for two controlled sales; informant stated that defendant stored drugs in defendant's apartment [the target residence])." I note that in Hardy, the nexus calculation was actually stronger than stated because it

included police observations of the defendant "[o]n numerous other occasions" driving from his apartment to locations in two towns for presumed drug transactions. Id. at 212.

Although we also have held that a search warrant application established a sufficient nexus to the defendant's residence based on three controlled buys, with at least two originating from the target premises and two or all ending at the target premises, earlier than the Supreme Judicial Court, in Commonwealth v. Gallagher, 68 Mass. App. Ct. 56 (2007), and then in Commonwealth v. Colon, 80 Mass. App. Ct. 162 (2011), we were relying on cases involving statements by informants linking the target premises or residence to the alleged drug activity. See Colon, supra at 168 (citing Hardy, 63 Mass. App. Ct. 210); Gallagher, supra at 60 (citing Commonwealth v. Santiago, 66 Mass. App. Ct. 515, 522 n.15 [2006]; Hardy, supra at 212-213).

In sum, we and the Supreme Judicial Court lowered the showing for finding a nexus between drug activity and the target residence considerably in drug delivery cases relying on cases where there was drug activity at the target premises. We made this significant change without acknowledgement or analysis of the difference.

3. Conflicting case law involving drug delivery cases lacking a CI statement tying drug activity to the target premises with three or fewer controlled buys. Our decisions in

Commonwealth v. Smith, 57 Mass. App. Ct. 907 (2003), and Commonwealth v. Luthy, 69 Mass. App. Ct. 102 (2007), are hard to reconcile and there is good reason to call Luthy into question.²

We held in Smith that the search warrant did not meet the threshold to establish a nexus between the suspected drug activity and the target residence. 57 Mass. App. Ct. at 908. In Smith, there were three controlled buys, one of which originated from the target residence, one of which ended at the target residence, and the third of which was not described. Id. at 907-908. We found the absence of information from the CI about a defendant's residence dispositive, stating that the "fundamental flaw" in the affidavit in support of the search warrant was that "it does not explain why there was probable cause to believe that drugs or related evidence would be found at [the target residence] other than it being the residence of the defendant." Id. at 908. "[T]he observations by the police of the defendant driving, either to or from his home, without

² I in no way intend to criticize the authors or courts in any of the cases in this section. This is a confusing area of law with an interplay of facts that has challenged many an able judge and attorney. I merely want to humbly acknowledge that our cases are not as clear as they could be and invite us to redouble efforts to forge a cohesive doctrine. See Commonwealth v. Lougee, 485 Mass. 70, 85 (2020) (Lenk, J., concurring) ("acknowledg[ing] with some humility that our orders were not as clear as they might have been"). Given the special protections that a home enjoys, I urge that we lower the standard no lower than Clagon.

more, established no connection between his home and the controlled buys." Id.

By contrast, in Luthy we upheld a search warrant on fewer controlled buys than in Smith. Luthy, 69 Mass. App. Ct. at 106-109. In Luthy, a CI stated that he regularly purchased cocaine from the defendant and that the defendant sold cocaine on "a steady basis" to others. Id. at 103. The CI did not make any statements tying the defendant's drug activity to the target residence. The police observed just two controlled buys, one with no connection to the target residence and one that originated from and ended at the target residence. Id. at 104-105. We upheld the search warrant. Id. at 106-109. We stated that the defendants read Smith too broadly by arguing that it stood for the proposition that only one controlled buy in a drug delivery case did not, by itself, establish probable cause to search the defendant's residence. Luthy, supra at 108-109. Of course, two years later, Pina held just that. 453 Mass. at 441-442. In Luthy, we emphasized the CI statements, which were not present in Smith. But those CI statements were that the defendant was a steady drug dealer who could provide large quantities of cocaine. Luthy, supra at 103-104. Such statements do not contain "specific information" explaining why there was probable cause to believe that drugs would be found at the defendant's home. Indeed, Luthy also relied on Hardy

without acknowledging that in Hardy the CI's statement that the defendant kept drugs in his apartment was what provided "additional color" to the two controlled buys and other drug activity "as is needed to elevate the information acquired by police observation above the floor required for probable cause" (citation omitted). Hardy, 63 Mass. App. Ct. at 214.

The confusion over Smith and Luthy continued in subsequent Supreme Judicial Court cases. Notwithstanding Pina's agreement with Smith in 2009, the Supreme Judicial Court in 2012 characterized the Appeals Court as having "confined" Smith "to its facts." Commonwealth v. Tapia, 463 Mass. 721, 727 n.11 (2012), citing Luthy, 69 Mass. App. Ct. at 108-109. Given that Pina held exactly what Luthy characterized as too broad a reading of Smith, this is confusing at best. Pina has not been overruled and Smith is good law and distinguishable from Luthy by the existence of some CI statements and a large quantity of drugs. Indeed, we used the scale of the operation to distinguish Luthy from Pina and Smith in Commonwealth v. Lima, 80 Mass. App. Ct. 114, 119-120 (2011).

At this point, the continued validity of Luthy is in serious question. In addition to the above analysis, in 2012, in Escalera, the Supreme Judicial Court questioned at least some of the reasoning in Luthy, stating, "[W]e are not persuaded that information regarding records and proceeds alone will provide a

sufficient nexus to search a residence for drugs." Escalera, 462 Mass. at 644 n.7. Moreover, given that the Supreme Judicial Court thought Clagon was a close case, it is difficult to conclude that the showing in Luthy would be sufficient.

4. Conclusion. This case is controlled by Clagon. I urge that, in drug delivery cases without a CI statement tying drug activity to the residence, we set the threshold showing to establish the requisite nexus between the target premises and the drug activity to require at least the following: three controlled buys, with at least two originating from the target premises and a third terminating there, and factors indicating the suspect has ready access to the target premises.

Appendix

The following lists include only published Massachusetts decisions addressing whether the search warrant in support of an affidavit established a nexus between suspected drug dealing and the target residence. These lists are not exhaustive.

1. Drug delivery cases where a confidential informant (CI) ties the target residence to the drug activity.

a. Four or more controlled buys.

Commonwealth v. Santiago, 66 Mass. App. Ct. 515, 522 (2006)
(nexus found for search of records and proceeds based on four controlled buys, at least one originating at target premises, and CI's statements that "on at least one [other] occasion the defendant exited the front door at [the target residence] and directly went to the informant to sell drugs," and that defendant was running drug operation involving several residences, cars, and subordinates).

Commonwealth v. Monteiro, 80 Mass. App. Ct. 171 (2011)
(nexus found based on five controlled buys, two originating from and terminating at target residence and three where defendant's car parked at target residence shortly before and after driving to sale, and CI's statement that defendant was selling drugs from home).

b. Three controlled buys.¹

Commonwealth v. Tapia, 463 Mass. 721, 730 (2012) (nexus found based on three controlled buys, one originating from and two terminating at target residence, and CI's statement that "defendant had described her need to go home to procure drugs for sale").

Commonwealth v. Turner, 71 Mass. App. Ct. 665 (2008) (nexus for proceeds found based on three controlled buys, all terminating at target residence, plus CI's statement that CI purchased drugs in defendant's home).

c. Two controlled buys.

Commonwealth v. Hardy, 63 Mass. App. Ct. 210 (2005) (nexus found based on two controlled buys, both originating from and one terminating at target residence; police observation of several additional drug sales from target residence during one month surveillance; and CI's statement that defendant had drugs in his apartment).

Commonwealth v. Rodriguez, 75 Mass. App. Ct. 290 (2009) (nexus found based on two controlled buys, one originating from target residence and one terminating at target residence, plus

¹ I have not included Commonwealth v. O'Day, 440 Mass. 296, 302-304 (2003), because the nexus analysis in O'Day included not only three controlled buys, two originating from the target residence, and a CI's statement that he purchased drugs from the defendant at his work, but also police observations of additional presumed drug sales inside the target residence.

CI's statement that defendant had additional drugs on his person after each controlled buy).

d. One controlled buy.²

(1) Nexus found.

Commonwealth v. Blake, 413 Mass. 823, 829 (1992) (nexus found based on one controlled buy originating from target residence and CI's statement that defendant was selling drugs out of his apartment, plus another named informant's statement that he went to defendant's residence and defendant said he had twenty-five ounces of cocaine "on hand" and arranged delivery of nine ounces following day).

Commonwealth v. Young, 77 Mass. App. Ct. 381 (2010) (nexus found based on one controlled buy, originating from and terminating at target residence [where defendant walked to and from sale], plus CI's statement that defendant always chose locations within walking distance of home to complete drug sale).

² This list does not include Commonwealth v. Padilla, 42 Mass. App. Ct. 67, 69-71 (1997), as the nexus was found based on one controlled buy terminating at the target residence plus the CI's statements and an attempted controlled buy inside the defendant's residence that took place less than one hour before the controlled buy. Following the attempted buy, the CI indicated that drugs were or would soon be distributed from the defendant's residence; forty-five minutes later, the CI called a number provided by the defendant and arranged to purchase drugs. Id. at 69-70, 71. The police then observed the seller return to the target residence from the controlled buy. Id. at 70.

Commonwealth v. Perez, 90 Mass. App. Ct. 548 (2016) (nexus found based on one controlled buy terminating at target residence; named CI's statement that defendant was selling drugs out of his apartment; and CI's correct prediction of two additional drug deliveries both originating from target residence, where after second drug delivery police stopped buyer, who possessed heroin and said he just purchased it in transaction police observed, and police stopped defendant's car, finding multiple cell phones and large sums of money).

(2) Nexus not found.

Commonwealth v. Stegemann, 68 Mass. App. Ct. 292 (2007) (no nexus based on one controlled buy plus named CI's statement that defendant's drug-selling partner said he had to go to his apartment, which was not defendant's apartment, before making delivery).

Commonwealth v. Dillon, 79 Mass. App. Ct. 290 (2011) (no nexus for second residence based on one controlled buy at first residence and named CI' statement that defendant was selling drugs from second residence, where CI also said defendant stored drugs under hood of vehicle and police sought monies and proceeds, records, and drug distribution and sale paraphernalia, not drugs).³

³ Dillon involved three informants. The first CI stated that the defendant sold drugs from first residence at which that

2. Drug delivery cases lacking a statement by a CI tying the target residence to the drug activity.

a. Four or more controlled buys.

Commonwealth v. Escalera, 462 Mass. 636 (2012) (nexus found based on four controlled buys, one of which originated from target residence; two short transactions near target residence that were suspected drug sales; and defendant returned to target residence after all six suspected drug sales).

b. Three controlled buys.

(1) Nexus found.

Commonwealth v. Clagon, 465 Mass. 1004 (2013) (nexus found based on three controlled buys, two originating from target premises and third terminating at target premises, and significant family ties of suspect to target premises).

Commonwealth v. Gallagher, 68 Mass. App. Ct. 56 (2007) (nexus found based on three controlled buys, two originating from target residence plus inference that third buy also

CI engaged in a controlled buy. Dillon, 79 Mass. App. Ct. at 291. The second CI stated that the defendant had drugs under the hood of his vehicle. Id. A third (named) informant stated that the defendant sold drugs from the second residence in the morning and made deliveries at night, and corroborated that the defendant stored drugs under the hood of his vehicle. Id. at 292.

originated from target residence,⁴ and two terminating at target residence).

Commonwealth v. Luthy, 69 Mass. App. Ct. 102, 104 (2007) (nexus found based on two controlled buys, one originating from and terminating at target residence and one unknown; CI's statements about pattern of operation with independent police corroboration; and CI's explanation that defendant able to provide "large quantities" of cocaine even in absence of CI statement linking target residence to drug activity).⁵

Commonwealth v. Colon, 80 Mass. App. Ct. 162 (2011) (nexus found based on three controlled buys, two originating from target residence and three terminating at target residence).

(2) Nexus not found.

Commonwealth v. Smith, 57 Mass. App. Ct. 907 (2003) (nexus not found based on three controlled buys, one originating from target residence, one terminating at target residence, and one unknown).

c. Two controlled buys.

⁴ We noted this inference, but did not include it in the discussion: "While the police did not see from where [the defendant] departed for the first controlled buy . . . , it is a fair inference, especially when taken in conjunction with subsequent surveillance, that she came from her home, mere minutes away from the buy location." Gallagher, 68 Mass. App. Ct. at 59 n.4.

⁵ As indicated previously, there is good reason to question whether Luthy remains good law.

Commonwealth v. Lima, 80 Mass. App. Ct. 114 (2011) (nexus found for proceeds and records, but not drugs, based on two controlled buys at stash house, one originating from and terminating at target residence and one unknown, plus two additional suspected drug sales, one originating from and one terminating at target residence).

d. One controlled buy.

Commonwealth v. Pina, 453 Mass. 438 (2009) (no nexus based on one controlled buy originating from target residence).

Commonwealth v. Medina, 453 Mass. 1011 (2009) (no nexus based on one controlled buy originating from and terminating at target residence).

Commonwealth v. Bookman, 77 Mass. App. Ct. 546 (2010) (no nexus based on one controlled buy plus three other suspected drug sales).