20-P-162 Appeals Court

COMMONWEALTH vs. DJOY DEFRANCESCO.

No. 20-P-162.

Plymouth. November 6, 2020. - February 12, 2021.

Present: Massing, Kinder, & Grant, JJ.

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

Indictments found and returned in the Superior Court Department on January 26, 2018.

A pretrial motion to suppress evidence was heard by Angel Kelley, J.

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

Jessica L. Kenny, Assistant District Attorney, for the Commonwealth.
Luke Rosseel for the defendant.

GRANT, J. Over the course of about a month, the defendant drove three different cars rented in someone else's name to

locations where he sold cocaine. Pursuant to a search warrant for the third car, a Nissan Rogue, police seized illegal drugs and firearms.[1] A Superior Court judge allowed the defendant's motion to suppress that evidence, ruling that the search warrant affidavit failed to establish the requisite nexus between the items sought and the Rogue. 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. We conclude that the affidavit did demonstrate that nexus, and we reverse the order allowing the motion to suppress.

Background. The affidavit supporting the search warrant application, sworn to by Brockton police Detective Timothy R. Donahue, provided the following information. Donahue has extensive experience in controlled substance investigations.[2]

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[1] The defendant was charged with trafficking in ten grams or more of fentanyl, G. L. c. 94C, § 32E (c 1/2); possession of cocaine with intent to distribute, G. L. c. 94C, § 32A (c); possession of a Class E substance, G. L. c. 94C, § 34; and four counts of possession of a large capacity firearm or feeding device, G. L. c. 269, § 10 (m).

[2] At the time he prepared the affidavit, Donahue was assigned to the Brockton police criminal investigations unit, charged with investigating crimes including narcotics violations. He had been a police officer for over sixteen years, had received specialized training in narcotics investigations, and had been involved in numerous investigations of narcotics crimes, including making undercover buys, executing search warrants, and seizing evidence.

During August 2017, he spoke to a confidential informant (CI), who said that a light-skinned Hispanic or Cape Verdean man called "J" was selling "crack" cocaine and using a newer model dark gray Ford Fusion to deliver it. The CI described "J" and told Donahue that the CI arranged purchases by calling "J" on a certain telephone number.

On or about August 8, 2017, the CI made a controlled buy of cocaine from "J." When the CI telephoned "J" and arranged to buy cocaine, "J" directed the CI to meet at a location. Before the buy, Donahue determined that the CI possessed no narcotics or money, and Donahue provided the CI with money. With Donahue and other officers maintaining surveillance, the CI went to the meeting location. A dark gray 2017 Ford Fusion arrived, and police saw the CI meet with an occupant of the Fusion for a short period of time. Afterward, the CI met with Donahue and gave him cocaine that the CI said had been purchased from "J" with the money provided by the police. From the registry of motor vehicles, police learned that the Fusion was registered to a rental car company, EAN Holdings LLC (EAN Holdings); investigation revealed that it had been rented to Joseph Dmitruk.

Two days later, the Fusion was subject to a traffic stop by another officer. As that officer approached, the driver and passenger swapped positions, so that the driver was in the front

passenger seat. The incident report identified the initial operator as the defendant, Djoy Defrancesco. Brockton police department records revealed that the defendant lived at 9 Falmouth Avenue, apartment 1, Brockton. That address had been listed for the defendant in connection with his arrest by the State Police more than two years before for possession of a class A substance with intent to distribute. Police later showed two photographs of the defendant to the CI, who identified them both as depicting "J."

On August 14, 2017, Donahue learned that the Fusion had been returned to EAN Holdings, and that Dmitruk had rented a gray 2017 Nissan Altima. Two days later, Donahue saw the Altima parked across the street from 9 Falmouth Avenue, and Donahue then saw the defendant come out of that house and get into the driver's seat.

On August 22, 2017, Donahue saw the defendant leave 9 Falmouth Avenue, get behind the wheel of the Altima, back it into the driveway, and go back into the house. About twenty-five minutes later, the Altima left the driveway (the affidavit does not describe the driver) and drove to a playground less than a mile away. At the playground, another officer saw an unidentified man get into the Altima's front passenger seat for a moment and then leave in his own vehicle. The Altima drove away at a high rate of speed. Donahue formed the opinion that

the occupant of the Altima "had engaged in a quick narcotics transaction" with the unidentified man.

On September 7, 2017, Donahue saw the third rental car, a white 2017 Nissan Rogue, parked across the street from 9 Falmouth Avenue. It too was registered to EAN Holdings and rented to Dmitruk.

The day after the Rogue appeared, the CI made a second controlled buy of cocaine from the defendant, using the same procedure. After the CI negotiated the transaction by telephone, police saw the defendant come out of 9 Falmouth Avenue, get into the Rogue, which was parked across the street, and then drive to the meeting location. There, the CI had a brief encounter with the defendant. Afterward, the CI gave Donahue the cocaine that the CI had bought from the defendant using the money police had provided. Meanwhile, police saw the Rogue return to 9 Falmouth Avenue, where the defendant got out and entered the house.

Two days later, the CI made a third controlled buy of cocaine from the defendant, using the same procedure. After the CI had negotiated the purchase by telephone, police saw the defendant come out of 9 Falmouth Avenue and drive the Rogue to the meeting location. Police saw the CI and the defendant meet briefly. Afterward, the CI gave Donahue a quantity of cocaine purchased from the defendant with the cash provided by police.

Based on the facts included in the affidavit, Donahue opined that the defendant was "storing" illegal narcotics such as cocaine in his apartment at 9 Falmouth Avenue, "and or within" the Rogue. On September 12, 2017, two days after the last controlled buy, a magistrate issued a warrant authorizing police to search the Rogue for items including controlled substances, records relating to their distribution, and money generated from the sale of controlled substances.[3] Executing the search warrant on September 14, 2107, police seized from the Rogue plastic bags containing fentanyl and cocaine, a Glock gun case containing four empty ammunition magazines and a loader, and documents bearing the defendant's name.

Discussion. On the defendant's motion to suppress, the judge concluded that the search warrant for the Rogue was not supported by probable cause and should not have issued because its supporting affidavit did not establish a nexus between the Rogue and the cocaine and related evidence. We review the search warrant application de novo. See Commonwealth v. Gosselin, 486 Mass. 256, 265 (2020). That review "begins and ends with the four corners of the affidavit" (quotation and citation omitted). Commonwealth v. O'Day, 440 Mass. 296, 297

[3] Based on the same affidavit, police also obtained search warrants for the defendant's apartment and cell phone. The defendant did not move to suppress the evidence seized during their execution, so they are not before us.

(2003). See Commonwealth v. Murphy, 95 Mass. App. Ct. 504, 509 (2019). The affidavit should be interpreted "in a commonsense fashion" and "read as a whole," rather than "parsed, severed, and subjected to hypercritical analysis" (quotation and citation omitted). Commonwealth v. Andre-Fields, 98 Mass. App. Ct. 475, 481 (2020). In this light, the magistrate properly concluded that Donahue's affidavit set forth a timely nexus between the defendant's drug activity and the Rogue, such that probable cause existed to believe that evidence of his cocaine dealing would be found there.

First, the search warrant affidavit demonstrated that the defendant was engaged in the ongoing business of selling narcotics illegally. The CI told Donahue that the defendant was selling cocaine, which the CI had bought from him in the past.[4] The CI then engaged in three controlled buys in which the CI bought cocaine from the defendant, the last two of which

[4] Given her conclusion, the judge did not address whether the affidavit demonstrated the CI's basis of knowledge and veracity. See Commonwealth v. Upton, 394 Mass. 363, 374-375 (1985), citing Spinelli v. United States, 393 U.S. 410, 415 (1969), and Aguilar v. Texas, 378 U.S. 108, 114 (1964). We conclude that the affidavit satisfied both prongs of the Aguilar-Spinelli test. The CI's identity was known to multiple police officers, the CI had bought cocaine from the defendant in the past, and the CI engaged in three controlled buys of cocaine. Police investigation of the three vehicles, and surveillance of them and of the defendant's home, further corroborated the CI's information. See Andre-Fields, 98 Mass. App. Ct. at 480 n.12.

occurred within a week before the execution of the search warrant. That information established probable cause that the defendant was selling cocaine and had access to a supply for sale.[5] See Commonwealth v. Escalera, 462 Mass. 636, 646 (2012).

Second, the affidavit established that the defendant was using the Rogue in connection with his drug business. During the second and third controlled buys, police saw him drive the Rogue to a location where he met the CI. The judge considered the affidavit lacking because it did not explicitly state that either of those controlled buys "occurred inside the Rogue." But the affidavit averred that, on each of those occasions, police saw the CI "meet for a brief moment" with the "operator" of the Rogue. From the word "operator" and the brevity of the interactions, the magistrate could infer that the controlled buys took place inside the Rogue. That inference was bolstered by the averments in the affidavit that, during the first controlled buy, the CI met with the defendant, an "occupant" who

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[5] Contrary to the Commonwealth's argument, information in the affidavit that the defendant had been "arrested" two years earlier for possession of heroin while living at the same apartment did not show that he would have a motive to store drugs outside the apartment. Absent information about whether that arrest resulted in a conviction, or even whether the heroin was found in the apartment, that information added little to probable cause. See Commonwealth v. Ponte, 97 Mass. App. Ct. 78, 82 (2020) ("As to the defendant's relevant criminal history, the affidavit detailed arraignments for drug possession and distribution, but nothing more"). See also Commonwealth v. Reyes, 423 Mass. 568, 572-573 (1996).

was "operating" the Fusion, and that during the August 22 interaction, an unidentified male got into "the front passenger seat" of the Altima "for a brief moment." Interpreted in a commonsense fashion, the affidavit provided the magistrate with probable cause to conclude that drug sales occurred inside each of the rental cars the defendant drove. Even if the affidavit left open the possibility that the defendant did not conduct transactions inside those cars, there was still probable cause to conclude that he used those cars, including the Rogue, to transport cocaine to the location of each sale to the CI. See Commonwealth v. Santiago, 66 Mass. App. Ct. 515, 523-524 & n.17 (2006). See also E.B. Cypher, Criminal Practice and Procedure § 6:2, at 613 n.7 (4th ed. 2014).

Finally, the search warrant affidavit established probable cause to believe that controlled substances and related evidence would be found in the Rogue and not, as the judge concluded, exclusively in the defendant's home. Probable cause does not require proof that it is more likely than not that evidence would be found in the Rogue; rather, it requires a quantum of proof from which the magistrate can conclude, applying common sense and reasonable inferences, that evidence is "reasonably likely" to be found in the Rogue. Commonwealth v. Diaz-Arias, 98 Mass. App. Ct. 504, 508 (2020). See Texas v. Brown, 460 U.S. 730, 742 (1983) (probable cause does not require showing that

belief that contraband is at location is "more likely true than false"). Thus a search warrant affidavit may establish probable cause that evidence could be found in more than one location. See, e.g., Escalera, 462 Mass. at 641 n.6 (apartment and two vehicles); O'Day, 440 Mass. at 303-304 (apartment and bar); Santiago, 66 Mass. App. Ct. at 516 n.2 (home, another apartment, and vehicle). That is particularly true where the evidence sought is easily dispersed, like drugs. See Commonwealth v. Signorine, 404 Mass. 400, 405 (1989) (cocaine sought in search warrant was "moveable contraband that could be secreted in innumerable places, including the defendant's automobile").

The judge relied on Commonwealth v. Wade, 64 Mass. App. Ct. 648 (2005), in which this court held that a search warrant affidavit did not set forth probable cause that the defendant's vehicle would contain cocaine. That affidavit described only two controlled buys to which the defendant drove the vehicle, one about five weeks before the search warrant issued, and the second the day before it issued. Id. at 650. Police then waited four days before executing the warrant; thus, by the time of the search, five days had passed since police last saw the defendant sell cocaine from the vehicle to the informant. Id. at 650-651. Here, in contrast, the police investigation detailed in the affidavit was more thorough and more recent. It included three controlled buys to which the defendant drove the

rental cars, two of which took place within a week before execution of the search warrant and involved his driving the Rogue. It also included Donahue's opinion, based in part on his extensive training and experience in narcotics investigations, see note 2, supra, that the defendant "is storing illegal narcotics . . . within" the Rogue. The affiant in Wade offered no such opinion. See Wade, supra at 652 n.4.

The judge reasoned that probable cause to search the Rogue was lacking because "if [the defendant] were storing his supply of drugs in his vehicle, he would park it in the privacy of his driveway rather than across the street where anyone could view and possibly access it." The facts recited in the affidavit provide no basis for this conclusion. Whatever general inference there may be that most people would not keep valuables in a vehicle parked on a street was negated by the affidavit's description of the efforts that the defendant took to conceal his connections to the vehicles he used in his drug trade. In just over a month, he used three different cars, all rented in another person's name. Police surveillance showed that only the defendant drove them, and that they were parked outside his home. When stopped by police on August 11, 2017, while driving the first of these, the Fusion, the defendant switched seats with his passenger, and within days afterward the Fusion was exchanged for another rental car. The defendant's conduct

strongly suggested that he was attempting to conceal from police his connection to the three rental cars he drove -- giving rise to an inference that he was using those cars, including the Rogue, to store as well as to transport drugs. See Commonwealth v. Dion, 31 Mass. App. Ct. 168, 174 (1991) (defendant's attempt to secrete car key added to probable cause that drugs were stored in car). Cf. Commonwealth v. Snow, 486 Mass. 582, 587 (2021) (girlfriend's "improbable explanation" about why she rented getaway car added to probable cause to search defendant's cell phone on which he called her after shooting); Commonwealth v. Anthony, 451 Mass. 59, 71 (2008) (defendant's rental of storage facility using false name and address added to probable cause that he used it to store child pornography).

Many cases discussing whether a search warrant affidavit demonstrated a nexus between a defendant's drug dealing and his home analyze whether the affidavit included details about the defendant's having left the home just before a drug sale or returned to the home just afterward. See Commonwealth v. Colondres, 471 Mass. 192, 201-202, cert. denied, 577 U.S. 934 (2015); Andre-Fields, 98 Mass. App. Ct. at 493 (Henry, J., concurring) (collecting cases in Appendix). See also J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 8-2[e][5] (2020). To support an inference that drugs would be found in the home, several of those cases

include dicta assuming that a drug dealer would not keep drugs in a vehicle. See O'Day, 440 Mass. at 303 (based on information that he transported drugs by truck to sale location, "it was unlikely that the defendant would keep so large a supply of drugs in the truck while at home"); Commonwealth v. Rabb, 70 Mass. App. Ct. 194, 207 (2007) (information that defendant stayed at motel and drove vehicle rented to someone else supported "inference that the defendant stored his supply of drugs in the motel room rather than the vehicle"); Commonwealth v. Luthy, 69 Mass. App. Ct. 102, 107 (2007) (given scale of drug business, "[i]t was a reasonable inference that the drugs were stored someplace other than the automobile"). But from the assumption that a drug dealer would bring drugs and related evidence from a vehicle into a home, it does not follow that a drug dealer would never store drugs and related evidence in a vehicle. "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." Andre-Fields, 98 Mass. App. Ct. at 483, quoting Commonwealth v. Clagon, 465 Mass. 1004, 1006 (2013).

Based on all the information in the affidavit, the search warrant application set forth probable cause that controlled substances and related evidence would be found in the rented

Nissan Rogue driven by the defendant. The defendant's motion to suppress should have been denied.

Order allowing motion to suppress reversed.