SJC-12749

ALBA GARCIA vs. COMMONWEALTH.

Suffolk. March 2, 2020. - December 3, 2020.

Present: Gants, C.J., Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Practice, Criminal, Execution of sentence, Stay of proceedings, New trial. Global Positioning System Device. Constitutional Law, Search and seizure. Search and Seizure, Bodily intrusion.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on April 17, 2019.

The case was heard by Lenk, J.

Luke Rosseel for the defendant.
Michelle R. King, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. Following her conviction of trafficking in narcotics, the defendant filed a motion for a new trial. She also sought to stay the execution of her sentence while her motion for a new trial was pending. The trial judge granted the stay and imposed conditions of release, including home

[1] Chief Justice Gants participated in the deliberation on this case prior to his death.

confinement with various exceptions, and monitoring with a global positioning system (GPS) device. The defendant filed a petition in the county court seeking relief from the conditions on the ground that GPS monitoring and home confinement were an unconstitutional search and seizure. After the single justice denied relief, the defendant appealed to the full court. We conclude that the condition of home confinement was not a seizure because it was imposed pursuant to a valid conviction and lawful sentence. And, although the imposition of GPS monitoring was a search, it was reasonable under the circumstances. Thus, we affirm.[2]

Background. In 2014, a grand jury indicted the defendant on charges of trafficking in between thirty-six and one hundred grams of heroin, in violation of G. L. c. 94C, § 32E (c), and possession of cocaine with intent to

[2] After oral argument in this case, the underlying case in the Superior Court was resolved. Thus, the stay of the execution of the defendant's sentence is no longer in effect, and this appeal is moot. Nonetheless, we exercise our discretion to reach the merits of the defendant's claims because "the issue [is] one of public importance, . . . it was fully argued on both sides, [and] the question [is] certain, or at least very likely, to arise again in similar factual circumstances." See Commonwealth v. Yameen, 401 Mass. 331, 333 (1987), cert. denied, 486 U.S. 1008 (1988), quoting Lockhart v. Attorney Gen., 390 Mass. 780, 783 (1984). Additionally, due to the limited duration of any stay of execution, and because many defendants may be reticent to challenge conditions imposed pursuant to stays they sought and successfully obtained, the issues addressed are "capable of repetition, yet evading review." See Department of Revenue Child Support Enforcement v. Grullon, 485 Mass. 129, 130 (2020), quoting Commonwealth v. McCulloch, 450 Mass. 483, 486 (2008).

distribute, in violation of G. L. c. 94C, § 32A (c). After arraignment, the defendant was released on personal recognizance. A Superior Court jury later convicted her of both charges. The judge sentenced her to a term of from five years to five years and one day in State prison on the trafficking conviction, and two years of probation for the conviction of possession, to be served concurrently.

After appealing from her convictions, the defendant was granted leave by the Appeals Court to file a motion for a new trial in the Superior Court. She sought to stay her sentence while her motion for a new trial was pending. Accompanying her motion to stay, the defendant submitted an affidavit stating that all of her close family members lived in Massachusetts, including multiple children and siblings in Worcester County, the county in which she was convicted and lives. She also averred that she had been released on bail or personal recognizance during multiple years of the pendency of this case, and that she had not missed any court appearances.

The trial judge granted the stay after concluding that "the defendant has presented a meritorious issue regarding sentence that could possibly lead to a new trial." The judge set bail at $2,500 and imposed conditions of release, including home confinement, GPS monitoring, and weekly reporting to the probation department. The defendant was permitted to leave her home only for medical and legal appointments.

In a subsequent motion for reconsideration, the defendant argued that the conditions of GPS monitoring and home confinement were an unreasonable search and seizure, respectively, under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. The judge denied the motion but granted the defendant's alternative request to modify the conditions in order to permit her to leave her home for employment in addition to medical and legal appointments. The defendant then filed a petition in the county court pursuant to G. L. c. 211, § 3, seeking to remove the conditions. The single justice denied relief, and the defendant appealed to the full court.

Discussion. "[T]he extraordinary remedy of general superintendence [under G. L. c. 211, § 3,] is meant for situations where a litigant has no adequate alternative remedy." Vaccari, petitioner, 460 Mass. 756, 758 (2011), quoting McMenimen v. Passatempo, 452 Mass. 178, 185 (2008). We "review interlocutory matters in criminal cases only when substantial claims of irremediable error are presented . . . and only in exceptional circumstances, . . . where it becomes necessary to protect substantive rights" (quotations and citations omitted). Commonwealth v. Snow, 456 Mass. 1019, 1019 (2010), quoting Commonwealth v. Cook, 380 Mass. 314, 320 (1980). "We will not disturb the single justice's denial of relief absent an abuse of discretion or other clear error of

law." Care & Protection of Isabelle, 459 Mass. 1006, 1006 (2011), citing Matthews v. Appeals Court, 444 Mass. 1007, 1008 (2005).

1. Home confinement. The defendant argues that the condition of home confinement is an unreasonable seizure under the Fourth Amendment and art. 14.[3] We conclude that the seizure doctrine is inapplicable here. Moreover, under the applicable law, i.e., the common law and existing rules of criminal procedure, the imposition of home confinement was not an abuse of discretion. See Mass. R. Crim. P. 31 (a), as appearing in 454 Mass. 1501 (2009).

a. Seizure. To prevail in her claim that home confinement as a condition of release during a stay of sentence pending resolution of a motion for a new trial is a seizure under the Fourth Amendment and art. 14, the defendant first must establish that the constitutional prohibitions against unreasonable seizures apply during a postconviction stay of sentence.

i. Pretrial seizures. Seizure jurisprudence historically has focused on arrests, investigatory stops, and other street-level interactions. See, e.g., Terry v. Ohio,

[3] Indeed, several United States Courts of Appeals have held that pretrial conditions of release restricting interstate travel are seizures under the Fourth Amendment. See, e.g., Evans v. Ball, 168 F.3d 856, 861 (5th Cir. 1999), abrogated on other grounds by Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003), and cases cited. But see Bielanski v. County of Kane, 550 F.3d 632, 642 (7th Cir. 2008).

392 U.S. 1, 21 (1968); Commonwealth v. Baldassini, 357 Mass. 670, 672-675 (1970). Nonetheless, the reach of the doctrine since has expanded. In Gerstein v. Pugh, 420 U.S. 103, 114, 125 (1975), for example, the United States Supreme Court held that, under the Fourth Amendment, the government cannot detain a suspect following a warrantless arrest without "promptly" obtaining a judicial determination of probable cause. See County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) ("judicial determinations of probable cause within [forty-eight] hours of arrest will, as a general matter, comply with the promptness requirement"). Such holdings made clear that a seizure can exist not only as a momentary occurrence, but also as a circumstance that persists from the moment of arrest at least until the determination of probable cause. See Bryant v. City of New York, 404 F.3d 128, 136 (2d Cir. 2005), citing McLaughlin, supra, and Gerstein, supra at 125 ("it is well established that the Fourth Amendment governs the procedures applied during some period following an arrest").

In Albright v. Oliver, 510 U.S. 266, 274 (1994) (plurality opinion), the United States Supreme Court signaled that the doctrine had an even greater temporal scope when it stated that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." The Court cemented this doctrine in Manuel v. Joliet, 137 S. Ct. 911, 918 (2017), where it proclaimed that "pretrial detention can violate the Fourth Amendment not only

when it precedes, but also when it follows, the start of legal process in a criminal case." Thus, the Fourth Amendment's prohibition against unreasonable seizures remains in effect throughout the pretrial period. See id.; Hernandez-Cuevas v. Taylor, 723 F.3d 91, 94 (1st Cir. 2013). The reach of art. 14 must extend at least as far. See Commonwealth v. Lyles, 453 Mass. 811, 812 n.1 (2009), citing Commonwealth v. Stoute, 422 Mass. 782, 786-789 (1996).

ii. Postconviction deprivations of liberty. Notwithstanding the extension of the definition of a seizure, the doctrine is not limitless. "[O]nce a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuing incarceration does so under the Due Process Clause of the Fourteenth Amendment." Manuel, 137 S. Ct. at 920 n.8. For the following reasons, we conclude that the seizure protections of art. 14 also come to an end at the point of conviction.

There are two conceptual avenues by which a seizure could take place after trial. First, a single seizure could begin during the pretrial period and continue past the moment of conviction. The word "seizure," however, typically describes an event that is momentary or brief. See Manuel, 137 S. Ct. at 926-927 (Alito, J., dissenting); California v. Hodari D., 499 U.S. 621, 627 (1991). The word plausibly can be expanded to encompass the entire pretrial period, which theoretically

is a short-lived prelude to the main event of trial. But no purported brevity exists after trial. To say that a seizure can last throughout the pretrial period and then continue throughout any postconviction deprivation of liberty would stretch the concept to the point of snapping.

The second possibility is that a sentence of incarceration or other postconviction deprivation of liberty could constitute a new seizure, independent of any pretrial seizures. But the "constitutional division of labor" inherent in the Massachusetts Declaration of Rights weighs against this possibility. See Manuel, 137 S. Ct. at 920 n.8. The seizure doctrine primarily protects against two types of government action: deprivations that are unreasonable because the government did not have justification to seize, see, e.g., Commonwealth v. Warren, 475 Mass. 530, 531 (2016), and circumstances in which some type of seizure was permissible, but the manner in which the deprivation of liberty was effected was excessive or otherwise unreasonable, see, e.g., Graham v. Connor, 490 U.S. 386, 395–396 (1989), citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985).

In the pretrial stage, the various procedural protections offered at trial have not been made available. Once trial commences, however, many protections spring to life. See, e.g., Commonwealth v. Wardsworth, 482 Mass. 454, 456 (2019) (vacating conviction due to errors at trial). See also Gerstein, 420 U.S. at 125 n.27 ("probable cause determination

is . . . the first stage of an elaborate system . . . designed to safeguard the rights of those accused of criminal conduct"). At that point, the two primary areas of concern under the seizure doctrine, discussed supra, are covered by other provisions. If a defendant believes that there is no justification for any deprivation of liberty, he or she can challenge the validity of the conviction or the underlying criminal statute. See, e.g., Commonwealth v. Squires, 476 Mass. 703, 710–711 (2017) (reversing convictions based on insufficient evidence); Commonwealth v. Williams, 395 Mass. 302, 303 (1985) (reversing conviction where criminal ordinance was unconstitutionally vague). If a defendant wishes to redress the manner in which a postconviction liberty deprivation is administered, the defendant has many potential claims, including that the sentence is illegal or that the punishment is cruel or unusual. See, e.g., Commonwealth v. McGhee, 472 Mass. 405, 428 (2015) (revising illegal sentence that exceeded length permitted by statute); Michaud v. Sheriff of Essex County, 390 Mass. 523, 533-534 (1983) (holding unsanitary jail conditions were cruel and unusual punishment under Federal and State Constitutions).

Simply put, if a postconviction deprivation of liberty does not violate one of the many applicable constitutional provisions, the deprivation cannot be unreasonable. Therefore, it is logical that the Massachusetts Declaration of Rights would cabin the seizure doctrine, as implied by the

natural meaning of the word, to the pretrial process. We thus conclude that art. 14's prohibition against unreasonable seizures does not apply to a deprivation of liberty based on a lawful conviction or sentence.[4]

Here, the defendant challenges conditions imposed while her sentence is stayed. As discussed infra, the Superior Court judge derived her authority to impose such conditions of release from the defendant's conviction and sentence, both of which remain lawful judgments at this point. Accordingly, the seizure doctrine does not apply.

b. Mass. R. Crim. P. 31 (a). Although the seizure doctrine is inapposite, our court rules and jurisprudence regarding stays of sentences do apply in the postconviction context.

Here, the defendant moved to stay the execution of her sentence pursuant to Mass. R. Crim. P. 31 (a), which provides, in relevant part:

> "If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or [a single justice of the Supreme Judicial Court or the Appeals Court] determines in [his or her] discretion that execution of said sentence shall be stayed pending the [final] determination of the appeal."

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[4] A deprivation of liberty that occurs postconviction, but that is not based on the conviction or sentence, presents a different question. See, e.g., Jones vs. District of Columbia, U.S. Dist. Ct., No. 16-CV-2405 (D.D.C. June 13, 2019) (postconviction seizure occurred where judge sentenced defendant to time served and ordered him released, but department of corrections held him at jail for several hours).

The two considerations relevant to a determination whether to grant a stay of execution of a sentence pending the disposition of a motion for a new trial "are the same as those relating to a stay of execution of sentence pending appeal."[5] See Commonwealth v. Charles, 466 Mass. 63, 77 (2013). The first is "whether the defendant's motion for a new trial presents an issue that 'offers some reasonable possibility of a successful decision.'" Id., quoting Commonwealth v. Allen, 378 Mass. 489, 498 (1979). Embodied within this inquiry is the primary motivation for granting stays: if the motion is successful, absent a stay, a fundamental injustice could have occurred. "The conviction may be reversible, but the time spent in prison is not." Commonwealth v. Hodge (No. 1), 380 Mass. 851, 856 (1980), quoting Commonwealth v. Levin, 7 Mass. App. Ct. 501, 513 (1979).

The second consideration is whether a defendant would pose a security risk if released. See Commonwealth v. Dame, 473 Mass. 524, 539, cert. denied, 137 S. Ct. 132 (2016), citing Commonwealth v. Cohen (No. 2), 456 Mass. 128, 132 (2010). This inquiry takes into account whether the defendant will return to court, whether the defendant poses a danger to any individual or the community, and the likelihood that the defendant will commit other crimes while a resolution of the

[5] Although the defendant requested that the execution of her sentence be stayed during the pendency of a decision on her motion for a new trial, her direct appeal also then was, and remains, pending.

motion for a new trial is pending. See Charles, 466 Mass. at 77, citing Polk v. Commonwealth, 461 Mass. 251, 253 (2012). In making this determination, a judge may weigh factors such as the defendant's "familial status, roots in the community, employment, prior criminal record, and general attitude and demeanor." Charles, supra, citing Hodge, 380 Mass. at 855, and Levin, 7 Mass. App. Ct. at 505.

If a judge grants a stay despite some perceived security risk, the judge may impose conditions of release to address that risk. See Charles, 466 Mass. at 78–79 ("judge evaluated the possible security risk posed by [defendant] and addressed any uncertainties by imposing conditions that effectively would confine [him] to his home"); Commonwealth v. Senior, 429 Mass. 1021, 1022 (1999) (conditions of release during stay "provide[d] some further assurance that the defendant [would] not endanger the community or commit additional criminal acts").

We review a denial of a stay of execution based on security concerns for an abuse of discretion because such a denial "involve[s] determinations of fact and the exercise of sound, practical judgment, and common sense" (citations omitted). See Hodge, 380 Mass. at 855. See also Christie v. Commonwealth, 484 Mass. 397, 400 (2020), citing Cohen, 456 Mass. at 132 ("[a] decision whether to grant a stay is within the sound discretion of the judge"). An abuse of discretion exists where a judge makes "a clear error of judgment in

weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). The imposition of conditions of release during a stay implicates the same determinations, and thus must be reviewed under the same standard. See Polk, 461 Mass. at 255 (applying abuse of discretion standard to single justice's decision to impose conditions of release during stay of execution of sentence).

In this case, the judge granted the requested stay after having concluded that the defendant had presented a potentially meritorious issue in her motion for a new trial. Implicit in that decision was a determination that the defendant did not pose a security risk sufficient to require incarceration. Those conclusions are not at issue before us. Although the judge determined that continued incarceration was not necessary, she did decide that bail, home confinement, and GPS monitoring were necessary to ensure public safety and the defendant's future appearance in court.

These implicit determinations were not an abuse of discretion. During her pretrial release in this case, a new criminal complaint was brought against the defendant alleging possession of cocaine with intent to distribute, to which she later pleaded guilty. Based on the defendant's history of repeat offenses, the judge could have concluded there was a significant risk that the defendant would continue to

participate in drug distribution if she were to be released without conditions. Additionally, the serious charges in this case, if the defendant again were to pursue such actions, would pose a danger to the public. See G. L. c. 276, § 58A (trafficking in more than thirty-six grams of heroin is among crimes that can lead to pretrial detention based on dangerousness). Lastly, the judge's explicit conclusion that the conditions were necessary to ensure the defendant's future appearances in court could have been based on the implicit conclusion that the defendant had three years of her prison sentence remaining to serve, potentially providing her with a significant incentive to flee. Cf. Vasquez v. Commonwealth, 481 Mass. 747, 755 (2019), quoting Querubin v. Commonwealth, 440 Mass. 108, 116 (2003) ("potential penalty . . . and the related 'possibility of a defendant's flight to avoid punishment' . . . are significant considerations" in bail context). The judge reduced the hardship imposed on the defendant by ultimately allowing exceptions to the condition of home confinement for work, legal appointments, and medical appointments. We conclude that the judge did not abuse her discretion by requiring partial home confinement during the pendency of a decision on the defendant's motion for a new trial.

2. GPS monitoring. The defendant also argues that the imposition of GPS monitoring as a condition of the stay of sentence was an unconstitutional search. We review this claim

as well under "the more stringent standards of art. 14, with the understanding that, if these standards are met, so too are those of the Fourth Amendment" (quotation omitted). See Commonwealth v. Tapia, 463 Mass. 721, 729 n.16 (2012). We agree that it was a search, but we conclude that the search was reasonable because the legitimate governmental interests advanced by the search outweighed the level of intrusion on the defendant.

a. Whether GPS monitoring of the defendant was a search. A governmental action can constitute a search in either of two ways. See Commonwealth v. Johnson, 481 Mass. 710, 715, cert. denied, 140 S. Ct. 247 (2019). The most frequently referenced test derives from Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 361 (1967). Under this test, the government performs a search when it intrudes on a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." Commonwealth v. Odgren, 483 Mass. 41, 58 (2019), citing Matter of a Grand Jury Subpoena, 454 Mass. 685, 688 (2009). See Commonwealth v. Augustine, 467 Mass. 230, 241 (2014).

Regardless of whether there is an intrusion on a reasonable expectation of privacy, a search also occurs when the government violates the "degree of privacy against government that existed when the Fourth Amendment was adopted." See United States v. Jones, 565 U.S. 400, 406 (2012), quoting Kyllo v. United States, 533 U.S. 27, 34

(2001). See also Johnson, 481 Mass. at 715. Thus, "[w]hen the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred" (quotations omitted). Florida v. Jardines, 569 U.S. 1, 5 (2013). Privacy rights under art. 14 are at least as extensive as those under the Fourth Amendment. See Lyles, 453 Mass. at 812 n.1.

In Grady v. North Carolina, 575 U.S. 306, 309 (2015) (per curiam), the United States Supreme Court examined a statute that required recidivist sex offenders to be tracked by a GPS device attached to their persons. The Court held that "in light of [Jones and Jardines], a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." Grady, supra at 307-309. We subsequently concluded that the imposition of GPS monitoring as a condition of probation is a search under art. 14.[6] See Johnson, 481 Mass. at 718, citing Commonwealth v. Feliz, 481 Mass. 689, 691 (2019). We held similarly that "GPS monitoring as a condition of pretrial

[6] Thus, unlike the seizure doctrine discussed supra, the search doctrine under art. 14 is applicable postconviction. The reasons for this distinction are readily apparent. While a search is forward-looking and potentially can generate evidence for a future criminal prosecution or probation revocation proceeding, see, e.g., Commonwealth v. Johnson, 481 Mass. 710, 720-721, cert. denied, 140 S. Ct. 247 (2019), incarceration and other postconviction seizure-like deprivations of liberty are primarily backward-looking and address criminal offense that previously have occurred.

release is a search under art. 14." See Commonwealth v. Norman, 484 Mass. 330, 335 (2020).

We have not yet examined whether GPS monitoring as a condition of release during a stay of sentence is also a search. Here, government authorities attached a GPS device to the defendant's body, without her consent, in order to track her movement.[7] Under the plain language of Grady, 575 U.S. at 309, the imposition of GPS monitoring was a search. Her status as a convicted criminal released during a stay of execution does not alter this obvious conclusion.

First, the fact that the defendant's liberty is conditional does not preclude GPS monitoring from constituting a search. Parolees and probationers, whose circumstances are in some ways similar to the defendant's, have diminished expectations of privacy. See Johnson, 481 Mass. at 722, citing United States v. Knights, 534 U.S. 112, 119 (2001); Commonwealth v. Moore, 473 Mass. 481, 485 (2016). See also Griffin v. Wisconsin, 483 U.S. 868, 874 (1987) (probationers and parolees "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special . . .

[7] There is no evidence of consent in this record. Even if the defendant had signed a form acknowledging and consenting to her conditions of release, a form not contained in this record, such a form would not constitute consent sufficient to exempt the GPS monitoring imposed from the reach of art. 14. See Commonwealth v. Feliz, 481 Mass. 689, 702 (2019), citing Commonwealth v. LaFrance, 402 Mass. 789, 791 n.3 (1988).

restrictions'"). This diminishment is justified by a variety of related reasons.

One such justification is based on the fact that "probationers [and] parolees are on the 'continuum of [S]tate-imposed punishments.'" See Moore, 473 Mass. at 485, quoting Samson v. California, 547 U.S. 843, 850 (2006). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." Knights, 534 U.S. at 119. Here, the government lawfully could punish the defendant, but it has decided in the interests of justice temporarily to forgo that option. Because the defendant is not currently serving a sentence, the government cannot justify a search on the ground of punishment. See Commonwealth v. Morasse, 446 Mass. 113, 121 (2006) (defendant does not receive credit towards sentence of incarceration for time spent in home confinement).

The reduction in privacy interests also is justified by the "assumption . . . that the probationer 'is more likely than the ordinary citizen to violate the law.'" See Knights, 534 U.S. at 120, quoting Griffin, 483 U.S. at 880. This consideration applies to defendants released during a stay of sentence; their convictions and sentences remain valid judgments. See Charles, 466 Mass. at 77. Cf. G. L. c. 276, §§ 57, 58 (criminal record is relevant factor in bail

decisions). We therefore conclude that the defendant's privacy interests, like those of a probationer or parolee, are diminished as compared with other individuals. See United States v. Kills Enemy, 3 F.3d 1201, 1203 (8th Cir. 1993), cert. denied, 510 U.S. 1138 (1994) ("As with the parole and probation cases, there is a heightened need for close supervision" if defendant has been released while awaiting sentencing); State v. Lucas, 56 Wash. App. 236, 240–241 (1989) ("convicted criminal defendant . . . released pending appeal but subject to conditions of probation . . . should expect close scrutiny").

Nonetheless, "[t]he fact of 'diminished privacy interests does not mean that [art. 14] falls out of the picture entirely.'" Feliz, 481 Mass. at 701, quoting Carpenter v. United States, 138 S. Ct. 2206, 2219 (2018). Art. 14 still provides substantial protections to parolees and probationers. See Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("liberty of a parolee enables him [or her] to do a wide range of things open to persons who have never been convicted of any crime"). See, e.g., Moore, 473 Mass. at 487–488 (reasonable suspicion required for search of parolee's home); Commonwealth v. LaFrance, 402 Mass. 789, 792-793 (1988) (warrant requirement and reasonable suspicion standard apply to probation searches).

At a minimum, these diminished interests must safeguard the most basic aspects of freedom and privacy in our society.

The protection against physical intrusions of persons, houses, papers, and effects, is an "irreducible constitutional minimum." See Jones, 565 U.S. at 414 (Sotomayor, J., concurring). Therefore, the fact that the defendant's release is conditioned on compliance with certain rules does not bring the imposition of GPS monitoring outside the ambit of art. 14. See Johnson, 481 Mass. at 718.

The existence of the defendant's incomplete prison sentence also does not change our analysis. We have held that a governmental action within a prison does not constitute a search when two conditions are present: the prison policy at issue furthers legitimate penological security interests, and prisoners are warned of the policy. See Commonwealth v. Gomes, 459 Mass. 194, 206–207 (2011), citing Matter of a Grand Jury Subpoena, 454 Mass. at 687-689 & n.6. See also Hudson v. Palmer, 468 U.S. 517, 526 (1984) (no Fourth Amendment privacy rights in prison cell). Neither of these factors apply here.

First, the defendant lives at home, so the security interests of correctional facilities are irrelevant. Second, that the defendant was aware of the imposition of the GPS device is not relevant. In some circumstances, the government 0may be able to reduce individuals' reasonable expectations of privacy by warning them of the forthcoming surveillance. See Johnson, 481 Mass. at 722, citing Knights, 534 U.S. at 119. But see Matter of a Grand Jury Subpoena, 454 Mass. at 698–699 (Marshall, C.J., dissenting), quoting 5 W.R. LaFave, Search

and Seizure § 10.9(d), at 427–428 (4th ed. 2004) ("Katz surely does not mean that Fourth Amendment protections evaporate upon advance notice of any intended surveillance"). Our analysis here, however, is centered on the physical intrusion test, not reasonable expectations of privacy.[8] Thus, our jurisprudence regarding searches within correctional facilities is inapposite.

We conclude that the imposition of GPS monitoring as a condition of release during a stay of the execution of a sentence is a search under art. 14. Thus, if the search of the defendant by the imposition of GPS monitoring was unreasonable, the condition violated art. 14. See Commonwealth v. Barillas, 484 Mass. 250, 259 (2020).

b. Reasonableness of the search. Warrantless searches, such as the one here, "are presumptively unreasonable." See Commonwealth v. Ramos, 470 Mass. 740, 745 (2015), quoting Kentucky v. King, 563 U.S. 452, 459 (2011). "Because the

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[8] Our discussion of reasonable expectation of privacy in Johnson, 481 Mass. at 718, occurred as part of a distinct inquiry. We first determined in that case, without consideration of reasonable expectations of privacy, that the imposition of GPS monitoring as a condition of probation for that defendant was a search. See id. We then concluded that the search did not violate art. 14 because it was reasonable. See id. at 719-720. Next, we examined whether access by the police to the GPS location data, after the probationary period had ended, was an additional search. See id. at 720. This access involved no physical trespass beyond the initial imposition of the GPS device, which we already had deemed permissible. Accordingly, the proper inquiry was whether the police access violated a reasonable expectation of privacy. See id. at 721-722.

'ultimate touchstone' of art. 14 is reasonableness, however, 'the warrant requirement is subject to certain carefully delineated exceptions.'" Commonwealth v. Almonor, 482 Mass. 35, 49 (2019), quoting Commonwealth v. Entwistle, 463 Mass. 205, 213 (2012), cert. denied, 568 U.S. 1129 (2013). "[T]he burden is on the Commonwealth to show that the search 'falls within a narrow class of permissible exceptions' to the warrant requirement." Commonwealth v. Perkins, 465 Mass. 600, 603 (2013), quoting Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974). A search as a condition of release falls within that narrow class of exceptions only when the legitimate governmental interests advanced by the search outweigh the level of intrusion inflicted upon the individual. See Norman, 484 Mass. at 339, citing Moore, 473 Mass. at 484. See also Knights, 534 U.S. at 118–119, citing Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

i. Intrusion. We repeatedly have observed that GPS monitoring intrudes significantly on the lives of the monitored individual. See Feliz, 481 Mass. at 698, quoting Commonwealth v. Selavka, 469 Mass. 502, 505 n.5 (2014) (GPS monitoring is "singularly punitive"); Commonwealth v. Goodwin, 458 Mass. 11, 22 (2010), quoting Commonwealth v. Cory, 454 Mass. 559, 570 (2009) (GPS monitoring is "'dramatically more intrusive and burdensome' than being required to register as a convicted sex offender").

We have described two primary ways in which a GPS device burdens its wearer. First, the device burdens the individual's liberty interest by the physical attachment of it to the individual's body. See Cory, 454 Mass. at 570. Thereafter, the device can function as a "modern day 'scarlet letter,'" alerting others of the individual's involvement in the criminal justice system. See Norman, 484 Mass. at 339, quoting Commonwealth v. Hanson H., 464 Mass. 807, 815-816 (2013). Additionally, the device frequently may lose satellite connectivity or the battery may become depleted, requiring the individual to contact a probation employee immediately or risk arrest. See Feliz, 481 Mass. at 695. Resolving the issue may require the individual to leave any setting, e.g., his or her place of employment, a house of worship, the individual's home, or a doctor's office, in order to seek a new satellite connection. See id. at 704.

The second form of intrusion perpetrated by GPS monitoring is informational. As discussed, a GPS device provides the government with a "detailed, encyclopedic, and effortlessly compiled" log of the individual's movements. See Carpenter, 138 S. Ct. at 2216; Cory, 454 Mass. at 570. This relentless, twenty-four hour per day observation "chills associational and expressive freedoms[,]" potentially "alter[ing] the relationship between citizen and government in a way that is inimical to democratic society." Augustine, 467 Mass. at 248 n.33, quoting Jones, 565 U.S. at 416 (Sotomayor,

J., concurring). These concerns are lessened here, however, because the permissible condition of home confinement had limited the defendant's travels to predetermined locations and times. Thus, her associational and expressive freedoms already had been curtailed significantly.[9] Additionally, her status as a convicted felon with an incomplete sentence to serve reduced her privacy interests, partially offsetting the intrusion. See Johnson, 481 Mass. at 722, citing Knights, 534 U.S. at 119.

Having examined the level of intrusion on the defendant, we next consider the scope of the governmental interests advanced by the search.

ii. Legitimate governmental interests. In this case, the judge noted that she imposed conditions of release in order to ensure public safety and the defendant's return to court. We understand the term "public safety," as used by the judge, to correspond both to the risk that the defendant will pose a danger to others, as well as the possibility that the defendant will commit other crimes while released. These are legitimate governmental interests in the context of a stay of execution of a sentence. See Charles, 466 Mass. at 77, citing Polk, 461 Mass. at 253. As explained supra, these concerns

[9] We do not suggest that an underlying condition of home confinement automatically justifies the imposition of GPS monitoring. In some situations, even where the underlying condition is permissible, the governmental interests served by enforcement of that condition may not justify the additional burden imposed by attachment of a GPS device.

justified the imposition of home confinement. In turn, the judge decided that compliance with home confinement was so important that GPS monitoring was needed.

The risk of recidivism was not fanciful. This case began in 2013, when the defendant was arrested, arraigned, and released on bail; her bail later was reduced to personal recognizance. Thereafter, she was arrested for and pleaded guilty to another charge of possession with intent to distribute for an incident that occurred while trial in the instant case was pending. She subsequently was convicted in this case of trafficking in between thirty-six and one hundred grams of heroin, as well as possession of cocaine with intent to distribute. Drug distribution at this scale poses a danger, albeit indirectly, to others in the community. See G. L. c. 276, § 58A (charge of which defendant was convicted can be basis for pretrial detention based on dangerousness). Due to the repetitive, relatively recent, and dangerous nature of the defendant's criminal conduct, the government had a significant interest in deterring her from recidivating. See Johnson, 481 Mass. at 719 (previous probation violations supported government's interest in GPS monitoring of probationer).

Additionally, the judge commented that the conditions of release were necessary to ensure the defendant's return to court. The defendant's looming prison sentence indeed contributed to a risk that she might not appear. See Vasquez,

481 Mass. at 755. But this factor is tied more closely to bail decisions than to GPS monitoring. In Norman, 484 Mass. at 338, we noted that "[a]lthough the general specter of government tracking could provide an additional incentive to appear in court on specified dates, the causal link [was] too attenuated and speculative" to justify GPS monitoring based solely on the governmental interest in ensuring a defendant's return to court. Here, the same is true. Nothing in the record indicates specifically that GPS monitoring would ensure the defendant's appearance in court. Moreover, for multiple years prior to trial, with the potential of the entirety of a minimum five-year sentence looming, the defendant had appeared at every court proceeding. Therefore, this factor weighs in favor of the constitutionality of the search minimally, if at all.

iii. Balancing. Because "GPS monitoring is not a minimally invasive search," its imposition must be supported by reasons that are particularized to the defendant. See Feliz, 481 Mass. at 691. If the legitimate, particularized governmental interests advanced by GPS monitoring do not outweigh the level of intrusion, the search violates art. 14. See Moore, 473 Mass. at 484, citing Commonwealth v. Rodriguez, 472 Mass. 767, 776 (2015).

The defendant contends that the reasons supporting imposition of the conditions would be applicable to anyone seeking a stay of execution of a sentence, and therefore were

not particularized to the defendant. The reasons justifying a search, however, need not be entirely unique to an individual defendant. Rather, the reasons must be based on the defendant's specific situation, which well may bear similarity to those of other defendants. The defendant's convictions in this case, her history of recidivism while released, and the length of time remaining on her prison sentence all are particularized reasons. These reasons, especially the seriousness of the crime and the repeated nature of her offenses, provided the government with weighty, legitimate interests in monitoring her location. Thus, because her privacy interests were diminished by her conviction and pending sentence, we conclude that the legitimate governmental interests advanced by monitoring outweighed the significant level of intrusion. See Kills Enemy, 3 F.3d at 1203 ("search condition . . . g[ave] society the extra measure of protection necessary when releasing a convicted drug merchant pending sentencing").

Judgment affirmed.