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SJC-13119

COMMONWEALTH vs. RICHARD COMENZO.

Norfolk. October 6, 2021. - February 11, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Electronic Surveillance. Privacy. Constitutional Law, Search and seizure, Privacy, Probable cause. Search and Seizure, Electronic surveillance, Expectation of privacy. Probable Cause. Obscenity, Child pornography. Practice, Criminal, Motion to suppress, Interlocutory appeal.

Indictments found and returned in the Superior Court Department on December 30, 2014, and May 1, 2017.

A pretrial motion to suppress evidence was heard by Robert C. Cosgrove, J., and a motion for reconsideration was considered by him.

An application for leave to prosecute an interlocutory appeal was allowed by Lowy, J., in the Supreme Judicial Court for the county of Suffolk.

Patrick J. Noonan (Scott M. Martin also present) for the defendant.

Tracey A. Cusick, Assistant District Attorney, for the Commonwealth.

Anna E. Lumelsky, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

Matthew Spurlock & David Rangaviz, Committee for Public Counsel Services, Jessie J. Rossman, & Matthew R. Segal, for American Civil Liberties Union of Massachusetts, Inc., & others, amici curiae, submitted a brief.

BUDD, C.J. The defendant, Richard Comenzo, who was indicted on child pornography charges, sought to suppress evidence obtained after surveillance was conducted at his apartment building via a hidden video camera placed on a nearby public utility pole (pole camera). In Commonwealth v. Mora, 485 Mass. 360, 376 (2020), we determined that, in certain circumstances, pole camera surveillance could constitute a search requiring a warrant under art. 14 of the Massachusetts Declaration of Rights. Because surveillance of this kind previously was conducted without the need for a warrant prior to our decision in Mora, we resolved that, where a defendant challenges warrantless pole camera surveillance and such surveillance indeed constituted a search pursuant to art. 14, the Commonwealth should be afforded an opportunity to demonstrate that the surveillance nevertheless was lawful. Mora, supra.

As Mora was decided after the surveillance at issue in this case took place but before the instant motion to suppress the pole camera footage was decided in the Superior Court, the parties submitted briefing in light of Mora to the judge hearing the motion. That judge denied the defendant's motion, and the

defendant sought leave to file an interlocutory appeal. A single justice of this court granted the application and allowed the appeal to proceed before the full court. We conclude that, although the pole camera surveillance constituted a warrantless search, it was nevertheless constitutional. We therefore affirm the order denying the motion to suppress the evidence obtained as a result of the pole camera surveillance.<sup>1</sup>

Background. 1. Procedural posture. In 2014, the defendant was indicted on one count of possession of child pornography and one count of dissemination of child pornography. He moved to suppress the evidence seized pursuant to a search warrant. A Superior Court judge allowed the motion as to items seized from the defendant's car but denied it as to items seized from the defendant's apartment.

Two and one-half years later, the defendant was indicted on an additional count of possession of child pornography. The defendant filed a motion to suppress the evidence, alleging that the search warrant affidavit improperly relied on information derived from pole camera surveillance undertaken without a warrant, and therefore was unconstitutional. A second Superior Court judge (motion judge) held an evidentiary hearing. While

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<sup>1</sup> We acknowledge the amicus briefs submitted by the Attorney General and by the American Civil Liberties Union of Massachusetts, Inc., the Committee for Public Counsel Services, and the Massachusetts Association of Criminal Defense Lawyers.

the motion was under advisement, this court released Mora, 485 Mass. 360, with guidance for analyzing warrantless pole camera<sup>0</sup> surveillance. The motion judge ultimately denied the motion after the parties submitted supplemental briefing applying the Mora analysis. The interlocutory appeal was transferred here to the full court by the single justice.

2. Facts. The facts as found by the judges who presided over the two motion hearings may be summarized as follows.<sup>2</sup> In 2013, a detective with the Norfolk County district attorney's detective unit received information from the National Center for Missing and Exploited Children that tips had come in concerning images posted by a user on Tumblr, a microblogging<sup>3</sup> and social networking website. Upon investigation, the detective concluded that two of the reported images constituted child pornography. The blog's Internet protocol (IP) address was traced to a Verizon Internet Services Inc. (Verizon) account. Through the use of an administrative subpoena, the detective determined that the account was registered to the defendant, and the address

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<sup>2</sup> In reviewing a ruling on a motion to suppress, we accept a judge's subsidiary findings of fact absent clear error. See Commonwealth v. Almonor, 482 Mass. 35, 40 (2019).

<sup>3</sup> Microblogging is defined as "blogging done with severe space or size constraints typically by posting frequent brief messages about personal activities." Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/microblogging> [<https://perma.cc/NX47-LPST>].

associated with the account was a three-level, multifamily dwelling.

Surveillance of the dwelling revealed a relationship between the defendant's arrivals or departures and the operation of lights in certain areas of the building. Based on these observations, investigators were able to determine that the defendant's apartment was either one of two units. Because investigators were unable to identify further the defendant's unit through "conventional" surveillance techniques,<sup>4</sup> on September 19, 2014, a pole camera was installed to facilitate additional surveillance of the building.<sup>5</sup>

The pole camera was placed across the street from the building and provided a view of the front entrance, the left side of the building, and the driveway.<sup>6</sup> It was equipped with video recording features that enabled police to monitor activity

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<sup>4</sup> For example, investigators requested information via an administrative subpoena from National Grid. The apartment number provided by National Grid differed from the apartment number provided by Verizon. Additionally, the investigators found that none of the mailboxes in the common area of the building was labeled with the defendant's name, and an inquiry to the United States Postal Service further revealed that the defendant did not receive mail at the residence.

<sup>5</sup> The camera was installed without a warrant as was customary at that time.

<sup>6</sup> The camera was placed approximately eighty-two feet from the front door of the building and approximately ninety-four feet from the left of the building.

in real time, or to review footage that was searchable by date and time. While an investigator watching live footage remotely could move the camera lens approximately forty-five degrees in each direction and zoom in or pan out, all recordings were limited to the view captured in real time and could have been viewed by a person physically present at the scene.

On a review of the pole camera footage, investigators were able to determine which unit belonged to the defendant, and subsequently sought a search warrant.<sup>7</sup> On October 6, 2014, a judge issued a search warrant. The following day, the defendant's unit was searched pursuant to the warrant, and the defendant's computer and hard drives were confiscated.

Discussion. Article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution protect individuals from unreasonable governmental searches and seizures without a warrant. As noted supra, law enforcement officers routinely employed pole camera surveillance without the need for a warrant; however, since our decision in Mora, we have required judges to consider the constitutionality

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<sup>7</sup> The search warrant affidavit did not mention the pole camera surveillance, but it did include the location of the defendant's unit, which was obtained as a result of reviewing the footage of the surveillance.

of such warrantless searches under art. 14.<sup>8</sup> See Mora, 485 Mass. at 376.

Whether the use of a pole camera without a warrant is unconstitutional depends on (1) whether it was a search under art. 14 and, if so, (2) whether there was probable cause to conduct the search at the time it began. Mora, 485 Mass. at 376-377. The defendant has the initial burden to establish that a search implicating art. 14 has taken place. Id. at 366. See Commonwealth v. Bly, 448 Mass. 473, 490 (2007) ("To succeed on appeal, [the defendant] must bear the threshold burden of showing that a warrantless search or seizure occurred"). See also Commonwealth v. D'Onofrio, 396 Mass. 711, 714 (1986). The Commonwealth then has the burden to show that the warrantless search was nevertheless lawful by demonstrating there was probable cause to conduct the pole camera surveillance search prior to its initiation. Mora, supra at 376-377.

1. Whether the surveillance constituted an art. 14 search.

"[A] search in the constitutional sense occurs when the government's conduct intrudes on a person's reasonable expectation of privacy." Commonwealth v. Augustine, 467 Mass. 230, 241-242 (2014), S.C., 470 Mass. 837 and 472 Mass. 448

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<sup>8</sup> Because the United States Supreme Court has yet to consider the constitutional implications of prolonged, targeted pole camera surveillance, we decide this issue solely based on our State Constitution. See Mora, 485 Mass. at 365.

(2015), citing Commonwealth v. Montanez, 410 Mass. 290, 301 (1991). A reasonable expectation of privacy has both subjective and objective components. See Augustine, supra at 242. "An individual has a reasonable expectation of privacy where (i) the individual has manifested a subjective expectation of privacy in the object of the search, and (ii) society is willing to recognize that expectation as reasonable" (citation omitted). Commonwealth v. McCarthy, 484 Mass. 493, 497 (2020).

Here, where the defendant filed an affidavit averring that he was unaware that a pole camera was monitoring the front of his residence and that he did not expect police to monitor his comings and goings by way of that camera, he has satisfied the subjective expectation requirement. See Mora, 485 Mass. at 367 ("While people subjectively may lack an expectation of privacy in some discrete actions they undertake in unshielded areas around their homes, they do not expect that every such action will be observed and perfectly preserved for the future").

Whether an expectation of privacy is one that society accepts as reasonable depends on the circumstances, including "whether the public had access to, or might be expected to be in, the area from which the surveillance was undertaken; the character of the area (or object) that was the subject of the surveillance; and whether the defendant has taken normal precautions to protect his or her privacy." Mora, 485 Mass. at



368, quoting Commonwealth v. Almonor, 482 Mass. 35, 42 n.10 (2019). We have been clear that pole cameras trained on a suspect's home are "of greater constitutional significance" than those directed at public spaces. Mora, supra at 369.

Here the pole camera, which was placed across the street from the defendant's residence, captured footage of the residence's exterior, including the front entrance, the left side of the building, and the driveway over the course of approximately fifteen days.<sup>9</sup> "[T]argeted long-term pole camera surveillance of the area surrounding a residence has the capacity to invade the security of the home," as it "captures . . . revealing interactions at the threshold of a person's private and public life." Mora, 485 Mass. at 371, 373. The camera allowed investigators either to monitor the defendant in real time as he arrived to and departed from the residence, or to search the footage by date and time. Thus, the investigators had the "ability to 'pick out and identify individual, sensitive

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<sup>9</sup> The defendant argues that the search lasted for seventeen days, which was the total length of time the pole camera had been in place. In contrast, the Commonwealth contends that because there were two days during which the camera malfunctioned and because the camera remained in place two days after the search warrant was executed, the surveillance instead lasted a total of thirteen days. In our view, the correct calculation is fifteen days (the number of days the camera was in place prior to execution of the search warrant). However, regardless of whether we consider the number of days to be thirteen, fifteen, or seventeen, our analysis remains the same.

moments that would otherwise be lost to the natural passage of time.'" Id. at 375, quoting Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 Emory L.J. 527, 603 (2017). We conclude that under these circumstances the defendant's expectation of privacy was reasonable; thus, the pole camera surveillance constituted a search under art. 14.

2. Whether there was probable cause to conduct the search.

As discussed supra, where a warrantless pole camera surveillance is determined to be a search under art. 14, there must have been probable cause to conduct the search before the surveillance began in order for the search to be constitutional. See Mora, 485 Mass. at 376-377. That is, the Commonwealth must demonstrate that there was probable cause to believe that a particular offense had been, was being, or was about to be committed, and that the pole camera surveillance undertaken would produce evidence of the offense or that it would aid in the apprehension of the suspect. See id. at 377, citing Augustine, 467 Mass. at 255-256.

We conclude, as did the motion judge, that the requisite probable cause existed to conduct the pole camera surveillance prior to the time the search began. First, there is no question that the Commonwealth had probable cause to believe that an individual at that location had been engaged in the distribution

of child pornography. As described supra, the investigation began when the police received a tip concerning images constituting child pornography posted online. Officers traced the IP address to a computer located at the defendant's street address, and from a Verizon account registered to the defendant. Thus, detectives had amassed enough evidence to establish probable cause that a crime had been committed by the defendant.

As for the second prong of the test, police had probable cause to believe that the pole camera surveillance would lead to additional evidence of the crime, including, but not limited to, determining the defendant's unit number so that they could apply for a search warrant. As the motion judge pointed out, the Commonwealth could not identify the defendant's apartment even after having conducted physical surveillance, which, the judge found, had to be curtailed to avoid risk of detection.

Conclusion. For the reasons discussed, the order denying the defendant's motion to suppress evidence obtained as a result of the surveillance via a pole camera is affirmed.

So ordered.