COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX COUNTY 2014 SITTING

No. 2014-P-0081

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COMMONWEALTH OF MASSACHUSETTS,

APPELLEE,

v.

JOHN DOE,

APPELLANT.

_____

ON APPEAL FROM JUDGMENTS
OF THE SUPERIOR COURT

_____

BRIEF FOR THE APPELLANT

_____

ISSUES PRESENTED

1. Did the trial court improperly deny the defendant's motion to dismiss the indictments, where the Commonwealth's sole witness before the grand jury offered false testimony that probably influenced the grand jury's decision to indict the defendant?
2. Did the trial court improperly deny the defendant's motion to suppress evidence, where the search warrant application failed to

establish probable cause that contraband would be discovered in the defendant's home?

3. Did the trial court commit reversible error in allowing, over the defendant's timely objection, the Commonwealth's expert witness to offer an opinion about the ultimate issue being litigated in the case?

STATEMENT OF THE CASE

This is an appeal from a conviction out of Middlesex County Superior Court.

In July of 2012, the Middlesex County Grand Jury returned a two-count indictment against the defendant charging him with: (1) possession with intent to distribute heroin, in violation of c. 94C, § 32(a); and (2) committing a school zone violation, in violation of c. 94C, § 32J.[1] (T1. 122-124; R. 1, 4). The first indictment also alleged that the defendant: had been previously convicted of distributing a Class

[1] References will be cited as follows: To the record appendix as "(R.)", to the motion to dismiss hearing transcript as "(MTD.)", to the motion to suppress hearing transcript as "(MTS.)", to volume 1 of the trial transcript (proceedings occurring on May 29, 2013) as "(T1.)", to volume 2 of the trial transcript (proceedings occurring on May 30, 2013) as "(T2.)", to volume 3 of the trial transcript (proceedings occurring on May 31, 2013) as "(T3.)", and to volume 4 of the trial transcript (proceedings occurring on September 3, 2013) as "(T4.)".

A substance, making him a repeat drug dealer in violation of c. 94C, § 32(b); and had been previously convicted at least twice of crimes for which he had received sentences of at least three years in state prison, making him a habitual criminal in violation of c. 279, § 25. (T4. 19-20; R. 2-3).

The defendant filed a motion to dismiss the indictments, arguing that the Commonwealth's only witness to appear before the grand jury offered false testimony that probably influenced the grand jury's decision to indict. (R. 5-39, 134). The Honorable Peter Lauriat presided over a non-evidentiary hearing on January 23, 2013, and denied the motion to dismiss on January 31, 2013. (R. 72-77, 133-134).

The defendant next filed a motion to suppress evidence seized pursuant to a search warrant, arguing that the application for the warrant failed to establish probable cause that contraband would be found at his home. (R. 78-98). The Honorable Douglas Wilkins presided over a non-evidentiary hearing on April 8, 2013, and denied the motion to suppress on April 11, 2013. (R. 110-116, 133-134).

The defendant elected to have a jury trial, which began on May 29, 2013. (R. 133). Following a

three-day trial presided over by the Honorable Douglas Wilkins, the jury convicted the defendant of: possession with intent to distribute heroin (indictment number 1); and a school zone violation (indictment number 2). (T3. 4-5; R. 119-122, 135).

The defendant elected to have a jury-waived trial to determine whether he had previously been convicted of a drug dealing offense and whether he was a habitual criminal. (T4. 10-19; R. 123-124, 136). On September 3, 2013, the Honorable Douglas Wilkins presided over the jury-waived trial and found the defendant guilty of having been previously convicted of a drug dealing offense and guilty of being a habitual criminal. (T4. 57-58; R. 125-126, 136).

The judge sentenced the defendant to serve not more than 10 years, and not less than 10 years, in state prison on the habitual criminal portion of indictment number 1.[2] (T4. 60; R. 136). The judge sentenced the defendant to serve two years in the House of Correction, from and after the sentence

[2] The portion of indictment number 1 that alleged the defendant was a second or subsequent drug dealer was dismissed by the judge. (T4. 58).

imposed on indictment number 1, for the school zone conviction. (T4. 60; R. 136).[3]

The defendant filed a timely notice of appeal. (T4. 61; R. 127, 136).

STATEMENT OF FACTS

The Commonwealth presented its case-in-chief through the testimony of three Lowell police officers, a representative from the Lowell public school system, a Massachusetts state police chemist, and an Everett police officer.

Detective David Lavoie has been employed by the Lowell Police Department since 2005. (T2. 6). For the past five years, he has worked in the vice narcotics unit and has received extensive training on issues related to street-level drug trade. (T2. 6-7).

On July 5, 2012, Detective Lavoie and other members of the vice narcotics unit executed a search

[3] On November 21, 2013, the judge vacated the conviction and sentence for the school zone violation in light of Commonwealth v. Bradley, 466 Mass. 551 (2013), which held that the reduced distances under the recently-amended school zone statute would be applied to any defendant whose case was tried after August 2, 2012. (R. 128-129). The defendant's drug dealing offense occurred 720 feet from a school. (T2. 23). Accordingly, this appeal will not address any evidence related to the school zone charge.

warrant at 657 Merrimack Street, unit 714, in Lowell. (T2. 7-10). The targets of the search warrant were the defendant and his wife, Wanda Bracetty. (T2. 8). The officers approached unit 714, knocked on the door, and announced "Lowell police." (T2. 9). Detective Lavoie heard people inside the apartment and used a key provided by the apartment complex's manager to open the door. (T2. 9-10, 31). Immediately upon entering, Detective Lavoie saw the defendant and Ms. Bracetty, who appeared surprised by the officers' appearance. (T2. 10). The defendant shouted "whoa" several times and raised his arms as if trying to shut the door. (T2. 10). Ms. Bracetty ran toward the bathroom and Detective Lavoie followed her. (T2. 11). Once in the bathroom, Detective Lavoie saw Ms. Bracetty throw a glassine sandwich baggie containing a tan powdery substance into the toilet. (T2. 12-13). Detective Lavoie was able to retrieve the baggie and its contents. (T2. 13).

Detective Lavoie then went to the kitchen and observed scissors, razor blades, a box of sandwich bags, numerous "knotted" sandwich baggies, and 12 baggies containing what appeared to be heroin. (T2. 15). It appeared to Detective Lavoie that the

defendant and Ms. Bracetty were "bagging up" the heroin. (T2. 49-53). Also seized in the apartment were identifications of the defendant and Ms. Bracetty. (T2. 32).

Detective Lavoie searched the entire apartment. (T2. 33). Numerous items that may be significant in a street-level drug investigation were not discovered in the apartment, including a digital scale, a drug ledger sheet, a safe, weapons, cutting agents, and a reinforced front door. (T2. 33-37). Detective Lavoie acknowledged during his trial testimony that when he appeared before the grand jury, he testified that the seized heroin weighed 9.3 grams. (T2. 39). However, the actual weight of the heroin was 3.54 grams, which is commonly known as an "eight ball." (T2. 39, 51). Detective Lavoie testified that a severe drug addict might use multiple grams of heroin per day. (T2. 45).

Detective William Callahan has been a Lowell police officer for 24 years. (T2. 54). He has worked for the vice narcotics unit for just under three years and has received training related to his duties in that unit. (T2. 55). Detective Callahan was part of the team that executed the search warrant

at 657 Merrimack Street, unit 714, on July 5, 2012. (T2. 55-56). As the officers opened the apartment's door, Detective Lavoie followed Ms. Bracetty to the bathroom and Detective Callahan approached the defendant and engaged him in conversation. (T2. 57-58). Detective Callahan made his way to the kitchen, where he saw glassine baggies containing heroin and a box of sandwich bags on the kitchen counter. (T2. 59). Detective Callahan asked the defendant to stand still, and the officers searched the apartment. (T2. 60). The defendant and Ms. Bracetty were then arrested. (T2. 60-61).

Detective Richard Desilets has been a Lowell police officer for the past 19 years. (T2. 64). He became a member of the vice narcotics unit five years ago and received training related to street-level narcotics. (T2. 64-65). Detective Desilets participated in the search of 657 Merrimack Street, unit 714, on July 5, 2012. (T2. 65). After the defendant and Ms. Bracetty were secured, Detective Desilets searched the bedroom and the kitchen. (T2. 68). In the kitchen, Detective Desilets found heroin, packaged heroin, razorblades, scissors, and sandwich bags. (T2. 69). In the bedroom, Detective

Desilets discovered Ms. Bracetty's purse which contained a photo identification, documents, and $775 in cash. (T2. 69).

Once the search was complete, Detective Desilets took the heroin found in the apartment to the police station and weighed it, along with its packaging, with a digital scale. (T2. 70-72). The bags containing heroin weighed 9.3 grams, but the heroin itself weighed only 3.54 grams. (T2. 74).

Jane Mosher-Conty works as an administrator in the Lowell public school system. (T2. 79). She offered testimony related to the school zone charge that was ultimately dismissed, so her testimony is irrelevant to the issues raised on appeal.

Timothy Woods has worked for the Massachusetts state police forensic services group for approximately three years. (T2. 82-83). He is primarily responsible for analyzing substances for the presence of narcotics. (T2. 83). He has a bachelor's degree and a master's degree in chemistry, and he has received specialized training in the detection of narcotics. (T2. 83-84).

Mr. Woods was assigned to analyze the substances seized from 657 Merrimack Street, unit 714, on July

5, 2012. (T2. 85). He removed the powder from the packaging and weighed it in three separate groups. (T2. 87-89). The respective weights of the three groups of powder were 1.86 grams, 0.10 grams, and 1.58 grams. (T2. 89). Further testing revealed that all three groups of powder contained heroin. (T2. 90).

Detective Robert Hall has worked for the Everett police department for 19 years. (T2. 96-97). Since 2002, he has been assigned to the narcotics unit. (T2. 97). He has been trained extensively on issues related to street-level narcotics dealing and has years of experience working in the field. (T2. 97-99). Detective Hall offered testimony regarding the types of street-level drugs ordinarily found in Middlesex County, the manner in which they are packaged, and they system used by street-level dealers to "cut" the drugs to increase supply. (T2. 99-101). He further testified about the prices of various quantities of heroin and the manner in which heroin is ingested. (T2. 102-103).

Detective Hall discussed the types of evidence that would be meaningful in determining whether someone possessing heroin is a user or a dealer.

(T2. 103-105). He testified that the evidence in this case is consistent with someone possessing with intent to distribute heroin. (T2. 105-108). However, he also opined that the amount of heroin recovered is a "small amount for a dealer..." and it is possible that someone might buy an eight ball for personal use. (T2. 111-112). Further, meaningful evidence of a drug distribution scheme includes digital scales, cuff sheets, safes, the presence of guns, the reinforcement of front doors, multiple pagers or cell phones, and cutting agents – none of which was discovered during the search of 657 Merrimack Street, unit 714. (T2. 113-121).

The defendant did not testify or offer evidence. The jury convicted him of possession with intent to distribute heroin and a school zone violation. (T3. 4-5).

At the subsequent bench trial, the Commonwealth called four witnesses and introduced various documents to establish that the defendant had been previously convicted of certain crimes and received certain sentences to qualify him as a repeat drug dealer and habitual criminal. (T4. 20-45). The defendant does not raise any appellate issues related

to the bench trial and accordingly will not recite its details.

SUMMARY OF ARGUMENT

I. Detective Lavoie was the Commonwealth's sole witness to testify before the grand jury. He erroneously testified that the heroin seized in the defendant's apartment weighed 9.3 grams. The correct weight of the heroin was 3.54 grams. Detective Lavoie's grand jury testimony was false, it was offered with a reckless disregard for the truth, and it probably influenced the grand jury's decision to indict the defendant. Therefore, the motion judge should have allowed the defendant's pretrial motion to dismiss the indictments. (Pages 14-25).

II. Heroin was seized from the defendant's apartment pursuant to the execution of a search warrant. The search warrant application relied primarily on information provided by confidential informants. One of the informants conducted three controlled buys in conjunction with the police. The first two controlled buys occurred at the defendant's wife's apartment, and had nothing whatsoever to do with the

defendant or his apartment. The third controlled buy involved the defendant selling heroin outside of his large apartment complex. The search warrant application failed to establish a nexus between the defendant's apartment and his drug dealing activities. Therefore, the motion judge should have allowed the defendant's pretrial motion to suppress the evidence recovered from the defendant's apartment. (Pages 25-35).

III. Detective Hall testified as an expert witness. He was permitted, over the defendant's timely objection, to offer an opinion that the facts of a hypothetical posed by the prosecutor (which were identical to the facts in the case) were "indicative of someone packaging, getting heroin ready to sell." Detective Hall's testimony was conclusory rather than explanatory, and it should have been excluded by the trial judge. The error in Detective Hall's testimony was compounded by the prosecutor, who said during her closing argument, "Detective Hall, a thirteen-year narcotics veteran of the Everett Police Department, didn't find, or

didn't believe that these drugs were consistent with personal use. He found that these drugs were consistent with intent to distribute." The introduction of Detective Hall's opinion was prejudicial to the defendant. Therefore, this Court should reverse his conviction and remand his case to the superior court for a new trial. (Pages 35-44).

ARGUMENT

I. THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENTS SHOULD HAVE BEEN ALLOWED WHERE THE COMMONWEALTH'S SOLE GRAND JURY WITNESS RECKLESSLY OFFERED FALSE TESTIMONY THAT PROBABLY INFLUENCED THE GRAND JURY'S DECISION TO INDICT.

Detective Lavoie appeared before the grand jury on July 25, 2012. (R. 12-37). He testified that he has been a member of the Lowell Police Special Investigations Section, which is primarily responsible for enforcing the narcotics statutes, for approximately four years. (R. 16-17). He has completed a two-week, 80-hour course on street-level narcotics and numerous follow-up classes. (R. 16-17). Detective Lavoie then described the execution of the search warrant that led to the defendant's

arrest, and his grand jury testimony was consistent with his trial testimony. (R. 17-23).

Detective Lavoie's grand jury testimony became problematic when he began discussing the weight of the seized heroin and the weight's significance. He testified that three bags of heroin were recovered, and they weighed 5.1 grams, 3.1 grams, and 1.1 grams, respectively, for a total of 9.3 grams. (R. 23-24). Detective Lavoie formed the opinion that the defendant and Ms. Bracetty were bagging the heroin for distribution. (R. 25). The following exchange then occurred between Detective Lavoie, the prosecutor, and the grand jurors:

JUROR:	Did you observe a scale or weighing device?
DETECTIVE LAVOIE:	I did not observe any scales on that – on the counter with anything, nor was any located in the apartment itself.
PROSECUTOR:	Anything else?
JUROR:	Is 9 grams much?
DETECTIVE LAVOIE:	It's commonly known for street level narcotics. It's also known as a finger – a finger of heroin because it's compressed like that. It's very common to find amounts like that in order to break it up for sale.

	For low to mid level dealers, that's often what they would do. So a finger of heroin is actually – for the average user, that's a lot of heroin. It's multiple bags if you sell them in gram bags. Most of the time it's sold in quarter gram bags, so there's a lot of money to be made if you stepped on that.
JUROR:	What would the value of something like that be?
DETECTIVE LAVOIE:	You could buy a finger of heroin from anywhere between – It depends on where you are in the region. But in Lowell, if you buy it on a regular basis, a finger for $600 is on the low end. Your average finger, you could buy it for around seven to eight hundred dollars. And if you break it up, it's well over that. That's how you make more money or that's how dealers often make more money with it.

(R. 25-26).

The state laboratory subsequently weighed the substance, which tested positive for heroin, and determined that it weighed only 3.54 grams (three baggies containing, respectively, 1.86 grams, 0.10 grams, and 1.58 grams of heroin). (R. 38-39). The defendant filed a motion to dismiss pursuant to

Commonwealth v. O'Dell, 392 Mass. 445 (1984), arguing that Detective Lavoie's false testimony impaired the integrity of the grand jury. (R. 5-39). The judge denied the defendant's motion in a written decision. (R. 72-77). The judge's decision recited Detective Lavoie's testimony regarding the execution of the search warrant and found that Detective Lavoie relied on Detective Desliets's representation that the baggies containing heroin weighed 5.1 grams, 3.1 grams, and 1.1 grams, for a total weight of 9.3 grams. (R. 73-74). The motion judge continued,

> [i]n response to a grand juror's question about the weight, he stated that nine grams is a common street level measure, and that it equates to a "finger" of heroin, a common measure for low to mid-level dealers. Detective Lavoie also stated that heroin is often sold in gram and quarter-gram bags. Responding to another question, Detective Lavoie stated that the street price for a finger of heroin, i.e. nine grams, is somewhere above $600.

(R. 74). Finally, the judge found that the state laboratory identified the powder contained in the baggies as heroin and confirmed the weight to be 3.54 grams. (R. 74). "The drug certificate was issued on July 20, 2012, five days before Detective Lavoie testified before the grand jury." (R. 74).

While concluding that Detective Lavoie's testimony regarding the heroin's weight "may have been inaccurate," the motion judge ruled that the testimony was made in good faith. (R. 75). The motion judge further ruled,

> [w]hile it may have been more prudent for Detective Lavoie to check for the drug lab results before testifying, this oversight does not mean that he did not testify in good faith. See Commonwealth v. Reddington, 395 Mass. 315, 319-320 (1985) (upholding denial of motion to dismiss where grand jury testimony as to amounts of drugs seized was factually inaccurate but made in good faith).

(R. 76). The motion judge reasoned that even if the weight provided to the grand jurors was incorrect, they could have found the defendant intended to distribute the seized heroin because they were presented with photographs depicting 12 individually-wrapped bags. (R. 77).

In reviewing a decision of a motion judge after a hearing on a motion to dismiss pursuant to Commonwealth v. O'Dell, supra, an appellate court "'accept[s] the judge's subsidiary findings of fact absent clear error 'but conduct[s] an independent review of his ultimate findings and conclusions of law.'" Commonwealth v. Hunt, 84 Mass. App. Ct. 643, 651 (2013), quoting Commonwealth v. Scott, 440 Mass.

642, 646 (2004), quoting Commonwealth v. Jimenez, 438 Mass. 213, 218 (2002).

To obtain an indictment, the Commonwealth must present sufficient evidence to the grand jury to establish the identity of the accused and probable cause to arrest him. Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). If the accused's identity and probable cause to arrest him are established, an indictment will be dismissed only if the integrity of the grand jury proceeding was impaired by an unfair and misleading presentation by the Commonwealth. Commonwealth v. O'Dell, supra, at 446-447. When the Commonwealth, through its witnesses, presents false information to the grand jury, a defendant is entitled to dismissal of the indictment only if he shows that "'(1) the evidence was given to the grand jury knowingly or with reckless disregard for the truth and for the purpose of obtaining an indictment, and (2) that the evidence probably influenced the grand jury's determination to indict the defendant.'" Commonwealth v. Collado, 426 Mass. 675, 680 (1998), quoting Commonwealth v. Kelcourse, 404 Mass. 466, 468 (1989), citing Commonwealth v. Mayfield, 398 Mass. 615, 621 (1986).

A. DETECTIVE LAVOIE'S GRAND JURY TESTIMONY THAT THE SEIZED HEROIN WEIGHED 9.3 GRAMS WAS FALSE.

There can be no real dispute that Detective Lavoie's grand jury testimony that the heroin weighed 9.3 grams was false, and the motion judge's inconclusive finding that Detective Lavoie's testimony "may" have been inaccurate constitutes clear error. The falsity was established by the state laboratory's determination that the heroin actually weighed 3.54 grams. Instead of cautioning the grand jury that the packaging might have increased the overall weight, Detective Lavoie testified that the case involved a "finger" of heroin that was worth between $600 and $800. (R. 26). At the trial, Detective Lavoie conceded that he told the grand jury that the defendant's case involved 9.3 grams of heroin but the actual weight was 3.54 grams. (T2. 42-43). He further testified at trial that while he told the grand jury the heroin would be worth between $600 and $800, its actual value would be between $200 and $300. (T2. 43).

At the motion to dismiss hearing, the prosecutor argued that Detective Lavoie's testimony was not false, because he simply testified about the weight

of the seized items, which included the packaging. (MTD. 11-12). However, in testifying that this case involved a finger of heroin, Detective Lavoie was asserting that the heroin itself weighed more than nine grams (at trial, he testified that a finger of heroin is usually defined as 10 grams). (T2. 41). Detective Lavoie's testimony regarding the weight of the heroin and its street value was unquestionably false.

B. DETECTIVE LAVOIE'S FALSE GRAND JURY TESTIMONY WAS MADE WITH A RECKLESS DISREGARD FOR THE TRUTH.

The motion judge relied on Commonwealth v. Reddington, 395 Mass. 315 (1985), to conclude that Detective Lavoie's testimony, while possibly inaccurate, was made in good faith and therefore did not require dismissal of the indictments. In Reddington, police officers searched the defendant's home and found a lump of yellow powder and more than 100 grams of a white powder. Plymouth Police Officer William Curtis testified before the grand jury that according to another officer, the yellow powder was opium and the more than 100 grams of white powder was cocaine. However, subsequent laboratory tests established that the yellow powder was a non-

narcotic, and only 7.62 grams of the white powder was cocaine. The Court held,

> [t]he defendant has failed to establish that the Commonwealth or Officer Curtis knew or should have known that the testimony in question was false or inaccurate. The judge found that Officer Curtis "was merely repeating what some other experienced officer had told him the result of his field test was, and in good faith." Furthermore, it is undisputed that the laboratory analysis of the substance seized in the defendant's house was not completed at the time that Officer Curtis testified before the grand jury.

Id. at 319-320.

There are two important distinctions in this case. First, Detective Lavoie was not merely reporting another officer's observations about the drugs. He was testifying about his personal involvement in the discovery and seizure of the heroin. He physically handled the heroin seized from the toilet and he observed the heroin in the kitchen. Given his lengthy history of working as a narcotics detective and the intensive training he has received, Detective Lavoie should have known the difference in appearance between 3.54 grams of heroin and 9.3 grams of heroin. His grand jury testimony that the heroin weighed in excess of nine grams was, therefore, reckless. Further, it was reckless for Detective

Lavoie to not advise the grand jurors that the packaging of narcotics can greatly increase the overall weight of the items. He was given a perfect opportunity to make such a disclosure when a grand juror asked, "is 9 grams much?" but instead mischaracterized the heroin as "a finger" and overvalued the heroin by hundreds of dollars.

Finally, and perhaps most importantly, it is undisputed that Detective Lavoie's grand jury testimony occurred five days after the state laboratory issued the drug certification that contained the correct weight of the heroin. A simple phone call would have revealed that the state laboratory determined the heroin weighed 3.54 grams.

C. DETECTIVE LAVOIE'S RECKLESSLY FALSE TESTIMONY PROBABLY INFLUENCED THE GRAND JURY'S DECISION TO INDICT THE DEFENDANT.

The defendant bears the burden of proving not only that the Commonwealth recklessly presented false testimony to the grand jury, but that the false testimony "probably made a difference" in the grand jury's decision to return an indictment. Commonwealth v. Mayfield, 398 Mass. 615, 621-622 (1986). The grand jurors' response to Detective

Lavoie's false testimony makes it absolutely clear that the falsities influenced their decision to indict.

The grand jurors asked Detective Lavoie three questions. (R. 25-26). Two of those questions related to the weight of the heroin. One grand juror asked, simply, "[i]s 9 grams much?" (R. 26). The question led to Detective Lavoie testifying that it's an amount associated with street-level narcotics, that it's known as a "finger," and that it can be broken down into smaller bags that will sell for a lot of money. (R. 26). A grand juror followed up by asking how much the heroin would be worth, and Detective Lavoie testified that a finger of heroin in Lowell would sell for between $600 and $800 (and it would sell for more than that if it was divided into smaller amounts). (R. 26). Had a grand juror asked "is 3.54 grams much?" Detective Lavoie would undoubtedly have given a different answer. Given the grand jurors' interest in the significance of the amount of the heroin and its value, it is reasonable to conclude that Detective Lavoie's recklessly false testimony made a difference in the grand jury's decision to indict the defendant.

This Court should reverse the motion judge's erroneous denial of the defendant's motion to dismiss the indictments, vacate the defendant's conviction, and order the case dismissed.

II. THE DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN ALLOWED WHERE THE SEARCH WARRANT APPLICATION AND ACCOMPANYING AFFIDAVIT FAILED TO ESTABLISH PROBABLE CAUSE THAT NARCOTICS OR OTHER CONTRABAND WOULD BE DISCOVERED INSIDE APARTMENT 714 AT 657 MERRIMACK STREET.

Detective Lavoie applied for a warrant on July 5, 2012, to search the defendant's residence located at 657 Merrimack Street, Apartment 714, in Lowell. (R. 91). The warrant was executed later that day, leading to the discovery of heroin and related evidence. (R. 90). The defendant filed a motion to suppress the evidence, arguing that the issuance of the warrant violated the Fourth Amendment to the United States Constitution and Article XIV of the Massachusetts Declaration of Rights. (R. 78-98). Following a non-evidentiary hearing, the judge denied the motion in a written decision. (R. 110-116).

The motion judge accurately recited the contents of Detective Lavoie's affidavit in support of the warrant application. (R. 111-112). Detective Lavoie reported that he had received information during the

previous several weeks from a reliable informant that Wanda Bracetty (later identified as the defendant's wife) was selling heroin from her apartment at 696 Merrimack Street, Second Floor Rear, in Lowell. (R. 111). The informant told Detective Lavoie that the defendant lived in the Archambeault Towers, located at 657 Merrimack Street in Lowell. (R. 111). The informant agreed to participate in a series of controlled buys from Ms. Bracetty. (R. 111).

The first two controlled buys occurred in June of 2012 at Ms. Bracetty's home, and there was no evidence that either the defendant or his residence were involved. (R. 111). The third controlled buy occurred in July of 2012, within 72 hours of the search warrant application. (R. 111). When the informant called Ms. Bracetty's cell phone, the defendant answered and instructed the informant to meet him outside a large, multi-unit apartment complex, located at 657 Merrimack Street. (R. 111). The informant traveled to that location and met the defendant, who was seen by the Lowell police surveillance team exiting a rear door of the apartment building. (R. 111). The defendant and the informant met briefly and conducted a hand to hand

transaction. (R. 111). The informant met the police at a prearranged location and provided heroin allegedly obtained from the defendant. (R. 111). There is no evidence concerning where the defendant went after the hand to hand transaction.

A second reliable confidential informant told the police that the defendant and his wife were selling heroin from 657 Merrimack Street and that he or she had purchased heroin from the defendant at that location. (R. 112). The police further learned that the defendant was living in apartment number 714 at 657 Merrimack Street. (R. 112). Detective Lavoie wrote that his informant told him that Ms. Bracetty and the defendant "never allow drug buyers to go directly into 657 Merrimack St. but that they rather meet with drug buyers outside their residence as to hide their actions from law enforcement as well as housing authority personnel." (R. 112).

In reviewing a decision of a motion judge after a hearing on a motion to suppress, an appellate court generally accepts the motion judge's subsidiary findings of fact absent clear error but conducts an independent review of his ultimate findings and conclusions of law. Commonwealth v. Morales, 461

Mass. 765, 766-767 (2012). A court reviewing the sufficiency of a search warrant application "always begins and ends with the 'four corners of the affidavit.'" Commonwealth v. O'Day, 440 Mass. 296, 297 (2003), quoting Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995). "The standard for probable cause is 'whether [the magistrate] has a substantial basis for concluding that any of the articles described in the warrant are probably in the place to be searched.... Strong reason to suspect is not adequate.'" Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 600 (1991), quoting Commonwealth v. Upton, 394 Mass. 363, 370 (1985).

While Detective Lavoie's affidavit establishes probable cause to believe the defendant had distributed drugs, "[t]he establishment of probable cause to believe that 'a person is guilty of a crime does not necessarily constitute probable cause to search the person's residence.'" Commonwealth v. Olivares, supra, at 600, quoting Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983). The Supreme Judicial Court has said,

> [t]o establish probable cause, "[a]n affidavit must contain enough information for an issuing magistrate to determine that the items sought

> are related to the criminal activity under investigation, *and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues*."

Commonwealth v. Matias, 440 Mass. 787, 792 (2004) (emphasis added), quoting Commonwealth v. Cruz, 430 Mass. 838, 840 (2000), quoting Cinelli, supra, 389 Mass. at 213. In the case at bar, the affidavit fails to establish a nexus between the defendant's drug dealing activities and 657 Merrimack Street, apartment 714. The outcome of this case is controlled by three recent Appeals Court decisions.

In Commonwealth v. Smith, 57 Mass. App. Ct. 907 (2003), the police obtained a search warrant for the defendant's home after witnessing three controlled buys in which the defendant sold marijuana to an informant. On the first buy, the police observed the defendant drive to his home immediately after he sold the marijuana. On the third buy, the police witnessed the defendant drive from his home directly to the parking lot where he sold the marijuana. Notwithstanding the police officers' observations, the Appeals Court held, "the observations by the police of the defendant driving, either to or from his home, without more, established no connection

between his home and the controlled buys..." Id. at 908. Compare Commonwealth v. Blake, 413 Mass. 823 (1992), (search of the defendant's home was appropriate where the defendant was selling large amounts of cocaine from his apartment, told an informant that he had 25 ounces of cocaine "on-hand" there, and was observed driving directly from his apartment to the location where he was to sell nine ounces of cocaine to the informant).

In Commonwealth v. Bookman, 77 Mass. App. Ct. 546 (2010), a confidential informant told the police that the defendant was connected to a Ford Explorer that was selling cocaine at various public places in Somerville. Police officers witnessed drug users enter and exit the Explorer and thereafter be in possession of cocaine. On one occasion, after watching the defendant leave his residence in the Explorer and participate in two separate drug deals, the police stopped and arrested the defendant and used his keys to enter and search his residence. The Appeals Court ruled that the search of the residence was unconstitutional.

> The information that a defendant's actions may be consistent with a known type of drug delivery service without more does not create a

> sufficient probability that this defendant kept drugs at his home.... In the present case, there was only one occasion, April 14, 2006, that the defendant was seen leaving his residence and engaging in two or possibly three drug transactions.... Notably absent is any specific information from any quarter placing illegal drugs or drug transactions in the apartment.

Id. at 550-551.

Finally, in Commonwealth v. Dillon, 79 Mass. App. Ct. 290 (2011), the Lowell Police Department conducted an investigation into the defendant's oxycodone distribution scheme, which involved a controlled buy from a residence (not the defendant's) in Lowell. An informant named Wizard told the police that the defendant operated his drug dealing business from his home at Lantern Lane in Billerica, where customers would visit him in the morning and he would make deliveries in the afternoons. The police confirmed the defendant's Billerica address through the Registry of Motor Vehicles. The police obtained a search warrant for the defendant's Billerica home and seized evidence during the warrant's execution. The Appeals Court ruled that the motion judge should have suppressed the evidence seized in the defendant's Billerica home.

> The only particularized information connecting the Lantern Lane residence to the defendant's drug-selling operation was Wizard's statement that customers came to the Lantern Lane address to purchase oxycodone and that the defendant delivered oxycodone from the residence. Wizard also gave more specific information that the defendant "keeps" these drugs "in a container underneath the hood of his vehicle," not inside the house. Wizard provided no information about records or proceeds of drug-selling activity nor any information about the defendant storing narcotics inside the Lantern Lane residence. The information supplied by Wizard therefore only corroborated the already established nexus between the defendant's drug-selling activity and his vehicles.

Id. at 295.

As in Smith, Bookman, and Dillon, there is probable cause in this case to believe that the defendant was a drug dealer. And as in Smith, Bookman, and Dillon, there was an insufficient nexus between the defendant's drug dealing activities and his residence to establish probable cause that contraband would be discovered in his apartment.

In denying the motion to suppress, the motion judge relied heavily on Commonwealth v. Escalera, 462 Mass. 636 (2012). (R. 114-116). The evidence that the defendant in Escalera was storing drugs in his home was compelling. An informant conducted four separate controlled buys and police surveillance teams watched the defendant return directly to his

apartment building each time. Id. at 639. The police also observed two other transactions conducted by the defendant that were similar to the controlled buys. Id. at 640. The evidence that the defendant in the present case was storing drugs in his apartment was considerably weaker than the evidence in Escalara.

The Escalara Court did say that a single observation of a suspect leaving his home to conduct a drug deal may support an inference that drugs will be found in his home, but only when the single transaction is coupled with other information. Id. at 644. There is no additional information in this case that supports an inference that the defendant would have drugs in his apartment.

Only the third controlled buy involved the defendant's residence at 657 Merrimack Street, and even that controlled buy occurred outside of the building. The first two controlled buys did not involve the defendant or his residence at all. Compare Commonwealth v. Cruz, 430 Mass. 838 (2000) (defendant engaged in six controlled sales, all occurring in parking lot of his apartment building). While an informant told the police that the defendant

and his wife were both selling heroin from the "Towers" located at 657 Merrimack Street and the informant had bought heroin from the defendant at that location, there is no information concerning when the alleged purchases occurred, how many transactions took place, or how much heroin changed hands. There is also no evidence that any informant ever went inside the building and into the defendant's apartment. To the contrary, Detective Lavoie's informant said the defendant never allowed buyers to go into the building and instead sold drugs outside. Compare Commonwealth v. O'Day, 440 Mass. 296 (2003) (informant stated he purchased drugs inside defendant's residence). No informant ever told the police that the defendant here kept drugs in his apartment. Compare Commonwealth v. Hardy, 63 Mass. App. Ct. 210 (2005) (informant stated defendant stored drugs in his apartment).

Detective Lavoie's affidavit confirms that the defendant sold an undisclosed amount of heroin one time outside of his large apartment complex. An informant alleged that the defendant was selling heroin from the "Towers" but did not specify the amounts, the number of transactions, or the time

period of the alleged transactions. There is no evidence that either drug buyers or law enforcement personnel ever saw the interior of the defendant's apartment during the police investigation, and an informant asserted that the defendant never sold drugs in his apartment. Given the complete lack of evidence about the size, scope, and origin of the defendant's drug dealing operation and the frequency of the sales, the magistrate should not have found probable cause to authorize the search of the defendant's residence.

This Court should reverse the motion judge's erroneous denial of the defendant's motion to suppress, vacate the defendant's conviction, and remand the case to the superior court.

III. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY ALLOWING THE COMMONWEALTH'S EXPERT WITNESS TO OFFER AN OPINION, OVER THE DEFENDANT'S TIMELY OBJECTION, ABOUT THE ULTIMATE ISSUE OF WHETHER THE DEFENDANT INTENDED TO DISTRIBUTE THE HEROIN FOUND IN HIS APARTMENT.

During the Commonwealth's case-in-chief, Everett Police Detective Robert Hall testified as an expert witness (he was otherwise not involved in the case). After offering general testimony regarding street-

level drug transactions, the following exchange occurred in front of the jury.

PROSECUTOR: And, Detective, if I were to pose to you the following hypothetical, that during the execution of a search warrant, the police find twelve small and tied baggies containing heroin, one larger baggie, glassine baggie, containing heroin, and another small baggie containing, that's not tied, containing heroin, a plastic bag only containing the knotted ends, a box of glassine baggies, seven hundred seventy-five dollars cash in a purse, scissors as well as a razorblade all straight up in a counter. Can you form an opinion as to what those narcotics would be intended for?

DEFENSE COUNSEL: Objection.

COURT: That's a yes-or-no question. You can answer yes or no.

WITNESS: Yes.

PROSECUTOR: And what would your opinion be?

DEFENSE COUNSEL: Objection.

(T2. 105-106). The judge called the attorneys to the sidebar, where the following discussion ensued.

DEFENSE COUNSEL: The prosecutor is asking this witness to make a determination as to factors to be determined by the jury and in this form it would be improper for the Court to allow this witness to answer it.

PROSECUTOR: I didn't hear what he said.

COURT: His argument is that you need a little bit more –

DEFENSE COUNSEL: Even with the "consistent with" language, I want to make sure this is on the record for appellate purposes, the Appeals Court and the SJC have been very clear that even with the "consistent with" language, that doesn't automatically protect prosecutors in this type of case where the prosecutor just puts a hypothetical with identical facts as were testified by the arresting police officer [and] is now asking this witness to form an opinion and say it's consistent with, you know, a particular type of activity. In my view that is a back-door way of trying to get this witness to testify about what the ultimate fact is to be determined by the fact-finders.

COURT: All right. Well, a couple things. I think she asked a question consistent with the facts of this case, otherwise it's not admissible. Second, the fact that it's the ultimate decision for the jury is not a disqualifying factor, it's expert testimony, so if she rephrases it to make it clear that she's not actually asking him to read someone's mind, then I think she may have it. You may reserve your objection and make any additional objection depending on what the question turns out to be.

(T2. 106-107). The Commonwealth's examination of Detective Hall continued in front of the jury.

PROSECUTOR: Detective, based on the hypothetical that I just previously read to you, you stated that you could form an opinion as to what that hypothetical would be consistent with, is that correct?

WITNESS: Yes.

PROSECUTOR: And what is your opinion as to what the narcotics would be consistent with?

DEFENSE COUNSEL: Same objection.

COURT: Overruled.

WITNESS: Consistent with someone possessing with intent to distribute them.

PROSECUTOR: And that's as opposed to personal use, is that correct?

WITNESS: Yes.

PROSECUTOR: And what sort of factors go into you making that determination?

WITNESS: The heroin itself being packaged in multiple little bags. The fact that there was one bag that appeared to be, have more heroin, we would call that a "feeder bag," when you take off of that bag and put it into the other little bags for sale. And then you have the plastic bags where all the corners are cut off, are indicative of sales. The money. Even though it's not a lot of money, it's a cash-and-carry

> business. The drug business is a multi-million dollar business. Some of them are just small street-level deals. The razor blade used to break up the heroin, cut it out. The scissors to cut off the bag. All the things that are present there would be indicative of someone packaging, getting heroin ready to sell.

(T2. 107-108).

Massachusetts appellate courts have repeatedly ruled that witnesses may not give opinions about the ultimate issue in a case.

> The traditional opinion rule precludes a witness from giving an opinion on the ultimate issue in a case. The purpose of the rule is to preclude a witness from giving an opinion as to the legal significance of facts in issue in such a fashion as to invade the province of the jury.

Commonwealth v. Lugo, 63 Mass. App. Ct. 204, 207-208 (2005). The Court in Lugo said an expert witness' testimony that "touches on the ultimate issues before the jury is generally admissible as long as the expert does not offer an opinion as to the defendant's guilt or innocence." Id. at 208. However, the Supreme Judicial Court has warned that "where an opinion comes close to an opinion on the ultimate issue of guilt or innocence, the probative value of the opinion must be weighed against the

danger of unfair prejudice." Commonwealth v. Canty, 466 Mass. 535, 543-544 (2013).

> The danger posed by a witness, especially a police officer witness, offering an opinion regarding a defendant's guilt is "that the jury might forego independent analysis of the facts and bow too readily to the opinion of an expert or otherwise influential witness."

Id. at 542-543, quoting Commonwealth v. LaCorte, 373 Mass. 700, 705 (1977), quoting McCormick on Evidence § 12, at 27.

The prosecutor in this case used the familiar "consistent with" language to elicit an opinion from the expert, but the Appeals Court has said that "'the mere use of the 'consistent with' formulation should not amount to a sure safe harbor for prosecutors.'" Commonwealth v. Delgado, 51 Mass. App. Ct. 661, 664 (2001), quoting Commonwealth v. Tanner, 45 Mass. App. Ct. 576, 581 (1998).

> Despite the continued emphasis in the case law on whether a police witness testifies simply that observed conduct was a drug transaction or (by virtue of better coaching) states instead that a defendant's actions were "consistent" with a drug transaction, such semantical differences almost certainly make no difference to jurors.... we think that the mere use of the "consistent with" formulation should not amount to a sure safe harbor for prosecutors.

Tanner, supra, 45 Mass. App. Ct. at 581.

The question, according to Tanner, is whether the expert's testimony is explanatory, which is permissible, or conclusory, which is prohibited. Expert witnesses in drug cases should "confine opinion testimony to the explanation of specific unusual or cryptic conduct, without stating, *in any form*, whether such conduct amounts to a criminal offense." Id. (emphasis added). While Detective Hall did offer some testimony that was explanatory, he ultimately offered his conclusion (albeit couched in the "consistent with" language) that the evidence supported the Commonwealth's theory that the heroin was intended for distribution rather than for the defendant's personal use. This was, of course, the ultimate issue in the case to be decided by the jury.

Detective Hall's testimony did not stop with his conclusion that the evidence was consistent with the Commonwealth's theory of the case and inconsistent with the defendant's position. The prosecutor then asked Detective Hall "what sort of factors go into you making that determination?" His answer, reproduced on pages 38 and 39 of this brief, sounded more like a closing argument than witness testimony. He methodically recapped the Commonwealth's evidence

and ended with the conclusory statement that, "[a]ll the things that are present there would be indicative of someone packaging, getting heroin ready to sell." There can be no question that Detective Hall offered his opinion about the defendant's guilt, thereby invading the province of the jury.

A. THE PROSECUTOR'S CLOSING ARGUMENT COMPOUNDED THE ERROR IN ALLOWING DETECTIVE HALL TO OFFER AN OPINION ABOUT THE DEFENDANT'S GUILT.

If there was any doubt that the Commonwealth was relying on Detective Hall's opinion about the defendant's guilt to sway the jury, it was eliminated by the prosecutor's closing argument. The prosecutor reminded the jury that, "Detective Hall, a thirteen-year narcotics veteran of the Everett Police Department, didn't find, or didn't believe that these drugs were consistent with personal use. He found that these drugs were consistent with intent to distribute." (T2. 145). The Commonwealth was not relying on Detective Hall to provide an explanation of the evidence to the jury – it was relying on him to make a "finding" that would vouch for the

credibility of the Commonwealth's evidence, and Detective Hall delivered.[4]

B. INTRODUCTION OF DETECTIVE HALL'S CONCLUSORY OPINION WAS PREJUDICIAL TO THE DEFENDANT.

The defendant objected repeatedly at trial to Detective Hall offering his opinion about the ultimate issue to be determined by the jury. The Supreme Judicial Court has held that the standard of review for objected-to trial errors is whether the error was prejudicial to the defendant.

> An error is non-prejudicial only "'[i]f... the conviction is sure that the error did not influence the jury, or had but very slight effect.... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the

[4] In Commonwealth v. Grissett, 66 Mass. App. Ct. 454 (2006), the Appeals Court reversed the defendant's convictions for possession with intent to distribute cocaine and marijuana in part because of the introduction of an improper expert opinion. The Court referenced Liacos, Brodin & Avery, Massachusetts Evidence § 7.3.3, at 131 (7th ed. Supp. 2005), which states, "[g]iven the apparent confusion created by these cases, and the continued elicitation of such testimony by prosecutors, it may be time for the appellate courts to resolve this problem with a clear statement that the 'consistent with' language is unacceptable as an opinion on the defendant's guilt." Id. at 458. The defendant shares this view. It is a legal fairy tale to believe that a lay jury will find meaning in the use of the "consistent with" language that has been approved by the appellate courts. The Supreme Judicial Court should rule that a police expert may not testify that a hypothetical is "consistent with" a crime in a case such as this.

> whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'"

Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994), quoting Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983), quoting Kotteakos v. United States, 328 U.S. 750, 764-765 (1946). The error in the case at bar was undoubtedly prejudicial to the defendant.

Evidence of the defendant's guilt was far from overwhelming. While he and his wife were breaking down heroin in their kitchen, its total weight was 3.54 grams. Detective Hall conceded at trial that the amount of heroin at issue in this case could be for personal use. (T2. 112). Detective Lavoie testified that a severe drug addict might ingest multiple grams of heroin per day to achieve a high. (T2. 45). Detective Lavoie acknowledged that many tools of a drug dealer's trade were missing from this case. The police did not recover a digital scale, ledger sheets, a safe, or weapons from the apartment. (T2. 33-35). There was no evidence that the defendant possessed a cutting agent or that his apartment door had been reinforced. (T2. 36). The Commonwealth's entire case rested on the fact that

the defendant and his wife were breaking down a relatively small amount of heroin into smaller packages.

This Court cannot say with certainty that Detective Hall's toxic testimony, bolstered by the prosecutor's improper closing argument, either did not influence the jury's verdict or had but a slight effect. Given the weakness of the Commonwealth's case, the jury likely paid considerable attention and gave great weight to Detective Hall's erroneously admitted opinion. Accordingly, this Court should reverse the defendant's conviction and remand the case to the superior court for a new trial.

CONCLUSION

For the reasons stated in section I of this brief, this Court should reverse the motion judge's denial of the defendant's motion to dismiss, vacate the defendant's conviction and dismiss the case. Alternatively, for the reasons stated in section II of this brief, this Court should reverse the motion judge's denial of the defendant's motion to suppress, vacate the defendant's conviction, and remand the case to the superior court for a new

trial. Alternatively, for the reasons stated in section III of this brief, this Court should reverse the defendant's conviction and remand the case to the superior court for a new trial.

Respectfully Submitted,

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By his Attorney,

_____
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CERTIFICATE OF SERVICE

I certify, under the pains and penalties of perjury, that I have provided the following document:

1) BRIEF AND APPENDIX FOR THE APPELLANT

to the Commonwealth by hand-delivering two copies of the document to the Middlesex District Attorney's Office, Appeals Unit, 15 Commonwealth Avenue, Woburn, Massachusetts 01801. The appellant's brief was hand delivered on or before April 25, 2014.

_____ _____

Christopher W. Spring Date

CERTIFICATE OF COMPLIANCE

I, Christopher W. Spring, hereby certify that the foregoing brief complies with the rules of court pertaining to the filing of briefs including, but not limited to, Massachusetts Rules of Appellate Procedure 16, 18, and 20.

_____ _____

Christopher W. Spring Date

ADDENDUM

United States Constitution

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Massachusetts Declaration of Rights

Article XIV

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Massachusetts General Laws

Chapter 94C, Section 32(a)

Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than one thousand

nor more than ten thousand dollars, or by both such fine and imprisonment.

Chapter 279, Section 25(a)

Whoever is convicted of a felony and has been previously twice convicted and sentenced to state prison or state correctional facility or a federal corrections facility for a term not less than 3 years by the commonwealth, another state or the United States, and who does not show that the person has been pardoned for either crime on the ground that the person was innocent, shall be considered a habitual criminal and shall be punished by imprisonment in state prison or state correctional facility for such felony for the maximum term provided by law.

RECORD APPENDIX

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