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18-P-1539

Appeals Court

COMMONWEALTH vs. JOSEPH PONTE.

No. 18-P-1539.

Bristol. December 9, 2019. - February 13, 2020.

Present: Green, C.J., Blake, & Kinder, JJ.

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

Indictment found and returned in the Superior Court Department on February 25, 2016.

A pretrial motion to suppress evidence was heard by Thomas F. McGuire, Jr., J.

An application for leave to prosecute an interlocutory appeal was allowed by Scott L. Kafker, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court.

Mary E. Lee, Assistant District Attorney, for the Commonwealth.

Fred J. Burkholder for the defendant.

BLAKE, J. This interlocutory appeal by the Commonwealth stems from an order allowing the defendant's motion to suppress

evidence based on the lack of probable cause to support the issuance of a search warrant.¹ This appeal presents the question whether a controlled buy of narcotics from an apartment within a large multiunit apartment building, in which police observe a confidential informant (CI) enter and leave the building but do not observe which apartment the CI approaches to complete the purchase, is sufficient corroboration of the CI's veracity to satisfy that prong of the Aguilar-Spinelli reliability test.² On the facts of this case, we conclude that more was required and therefore affirm the order allowing the motion to suppress.

1. Motion to suppress. The defendant moved to suppress the evidence seized, contending that the police did not have probable cause to conduct the search. Both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights "require a magistrate 'to determine that probable cause exists before issuing a search warrant.'" Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011), quoting Commonwealth v. Byfield, 413 Mass. 426, 428 (1992). We

¹ The defendant was indicted for trafficking in cocaine in an amount of one hundred grams or more, following the execution of the search warrant. Following a hearing, a judge of the Superior Court allowed the defendant's motion to suppress. A single justice of the Supreme Judicial Court allowed the Commonwealth's application for leave to appeal.

² See Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964).

review a search warrant affidavit de novo to determine if it establishes probable cause. See Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 748 (2017). We do so by looking within the four corners of the affidavit. Commonwealth v. Estabrook, 472 Mass. 852, 866 (2015).

Here, the search warrant application and supporting affidavit of Detective Kevin Barbosa of the New Bedford Police Department, dated January 29, 2016, sought permission to search 280 Acushnet Avenue, apartment 2F, in New Bedford. The police had received information from a CI, and they knew both the name and the address of the CI. The CI was an admitted cocaine user who had personally purchased cocaine from a "Joe Ponte" at apartment 2F in the past. The CI was familiar with terminology related to cocaine purchases, including packaging and street level sales. The affidavit did not contain any information about the track record or prior history of the CI. The affidavit also did not indicate what the CI's history had been with the police department though it did state that the information provided by the CI had been given in the past thirty days. The CI expressed fear of physical retaliation by the defendant if the CI's identity were disclosed.

The affidavit stated that the CI provided Barbosa with the defendant's telephone number and indicated that the number had been used to arrange to buy cocaine. The CI described the

process as follows. The CI would go to 280 Acushnet Avenue and enter through the front entrance; the defendant would "buzz" the CI in, and the CI would take the elevator to the second floor. The CI would exit the elevator and take an immediate left, and would then be in front of apartment 2F. The CI would knock and the defendant would open the door.

The CI provided a description of the defendant to the police, who then compared it to a photograph of the defendant. The two were consistent. Barbosa met with the building manager of 280 Acushnet Avenue and was "then able to access the tenants that currently reside in the building." Apartment 2F was "labeled [as the address for] Joseph Ponte." This, as well as information gained independent of the CI, confirmed that the defendant lived at that address. The defendant's board of probation records showed twenty-nine adult arraignments, which included narcotics offenses and charges of assault and battery by means of a dangerous weapon. The affidavit did not describe the dispositions of any of these offenses.

The police arranged a controlled buy using the CI. Barbosa instructed the CI to contact the defendant for the purpose of buying cocaine. The CI did so and arranged a meeting. The CI was searched by the police and given money to make the buy. The police watched the CI enter the building through the front entrance. They did not see the CI interact with anyone before

or after the buy, and the affidavit fails to demonstrate that the CI purchased the drugs from apartment 2F. The police met with the CI after the buy and retrieved the substance that the CI said it³ had purchased from the defendant at apartment 2F. A subsequent search of the CI revealed that the only difference between the two searches was that the CI no longer had the money for the buy. The substance was field tested and had a positive reaction for cocaine.

The application for the search warrant described the apartment building as a "multi-unit housing structure with six floors and a brick facade. The building has the numbers 280 attached to the left of the front door and the apartment has 2F attached to the door." Barbosa did not detail the total number of units in the building nor the number of units per floor. The motion judge found that there were more than a few, as 2F "likely indicates there were at least six apartments on that floor." The search warrant return indicated that the police seized 109 grams of cocaine in twelve plastic bags, \$3,866 in cash, a safe, a scale, sandwich bags, inositol, a pair of scissors, a calibration weight, and records in the defendant's name.

³ We use "it" as a pronoun for the CI because the gender identity of the CI was not revealed in the affidavit.

2. Aguilar-Spinelli test. "Probable cause means a 'substantial basis' to conclude 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. Long, 482 Mass. 804, 809 (2019), quoting Commonwealth v. Alexis, 481 Mass. 91, 102 (2018). "Probable cause is a 'fact intensive inquiry, and must be resolved based on the particular facts of each case.'" Long, supra, quoting Commonwealth v. Holley, 478 Mass. 508, 522 (2017). When a search warrant affidavit is based on information supplied from an informant, art. 14 requires the magistrate to apply the familiar Aguilar-Spinelli standard, which requires that an affidavit based on information from a CI establish the CI's basis of knowledge and veracity. See Spinelli v. United States, 393 U.S. 410, 415 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964); Commonwealth v. Upton, 394 Mass. 363, 374-376 (1985). "[T]he affidavit is considered as a whole and in a commonsense and realistic fashion," Commonwealth v. Dorelas, 473 Mass. 496, 501 (2016), quoting Cavitt, 460 Mass. at 626, and "[a]ll reasonable inferences which may be drawn from the information in the affidavit may also be considered." Commonwealth v. Donahue, 430 Mass. 710, 712 (2000).

To establish the reliability of the CI, the Commonwealth must show the basis of knowledge of the CI, known as the basis of knowledge test, and the underlying circumstances demonstrating that the CI's information was credible or reliable, known as the veracity test. Commonwealth v. Depiero, 473 Mass. 450, 454 (2016). Independent police corroboration may make up for deficiencies in one or both prongs of the Aguilar-Spinelli analysis. Id.

a. Basis of knowledge. The defendant concedes, and we agree, that the basis of knowledge test was satisfied by the CI's statement that the CI purchased cocaine from the defendant inside the target apartment within seventy-two hours of the warrant issuing. See Commonwealth v. Desper, 419 Mass. 163, 166 (1994). Therefore, the issue is whether the CI met the veracity test.

b. Veracity. Here, the informant's "identity" and "whereabouts" were known to the police, which alone do not confirm the CI's reliability. Commonwealth v. Alphonso A., 438 Mass. 372, 375 (2003). The affidavit does not indicate that the CI had a prior history with the police department, and thus the judge inferred that the CI was a first-time informant. See Commonwealth v. Monteiro, 93 Mass. App. Ct. 478, 479 n.1 (2018). The CI's veracity was not established by the statement to the police that the CI had purchased and used cocaine in the past.

More specifically, the statement was not against the CI's penal interest because the CI "would [not] have had a reasonable fear of prosecution," particularly without physical evidence of the drugs. Commonwealth v. Melendez, 407 Mass. 53, 56 (1990). See Commonwealth v. Ilges, 64 Mass. App. Ct. 503, 509 (2005).

As to the details provided by the CI, the police verified innocent details, including that the defendant resided in apartment 2F at 280 Acushnet Avenue. The CI further described the steps taken to purchase cocaine from the defendant, but the police did not have highly specific details that were either self-verifying or that they in fact verified. Compare Commonwealth v. Tapia, 463 Mass. 721, 730 (2012) ("The informant's description of the defendant's method of operation closely matched the practice corroborated by the police in three controlled purchases, thus establishing the informant's veracity"), and Alphonso A., 438 Mass. at 377 (police knowledge of CI's description of weapons recently stolen was "strong indicator of reliability"), with Commonwealth v. Mubdi, 456 Mass. 385, 397 (2010) (corroboration only of "innocent facts" like location of vehicle and number of passengers does not establish CI's veracity).

As to the defendant's relevant criminal history, the affidavit detailed arraignments for drug possession and distribution, but nothing more. "[T]he magistrate was told no

details about the purported arrest[s], including when [they] occurred, whether charges were brought, whether contraband was seized, or the ultimate disposition of the arrest[s]."

Commonwealth v. Reyes, 423 Mass. 568, 572-573 (1996). See Desper, 419 Mass. at 167 (convictions of "uncertain vintage" given no weight in probable cause determination). Contrast Depiero, 473 Mass. at 457 ("the fact that [the officer] was informed that the defendant was on probation for the same type of criminal activity of which he was suspected further corroborated the anonymous call"). We agree with the motion judge that the foregoing does not establish the CI's veracity.

3. Controlled buy. The dispositive issue, then, is whether the controlled buy within this large multiunit apartment building furnished sufficient corroboration to establish the CI's veracity in combination with the minimal corroboration by the defendant's arraignment record and details provided by the CI. Generally, "[a] controlled purchase of narcotics, supervised by the police, provides probable cause to issue a search warrant." Commonwealth v. Warren, 418 Mass. 86, 89 (1994). In detailing the circumstances of the controlled buy, the affidavit must provide enough context and details for a determination that the police properly supervised the controlled buy and that the evidence yielded was reliable. See id. at 90-

91. In Desper, 419 Mass. at 168, the Supreme Judicial Court set forth the minimum essential components of a controlled buy:

"(1) a police officer meets the informant at a location other than the location where [it is] suspected that criminal activity is occurring; (2) the officer searches the informant to ensure the informant has no drugs on his person and (usually) furnishes the informant with money to purchase drugs; (3) the officer escorts or follows the informant to the premises where it is alleged illegal activity is occurring and watches the informant enter and leave those premises; and (4) the informant turns over to the officer the substance the informant has purchased from the residents of the premises under surveillance."

If the police fail to comply with one of the four minimum investigatory steps, probable cause may still be established where the aggregate of information is sufficient for the magistrate to conclude that the CI was credible. Monteiro, 93 Mass. App. Ct. at 483-484.

Here, the defendant argued, and the motion judge agreed, that the controlled buy was insufficient as the police only saw the informant enter and exit the apartment building and did not observe the CI approach or enter apartment 2F. This argument has some force, as the corroborative value of the controlled buy and the adequacy of police supervision of that buy lessens when the number of apartments in a multiunit building increases. However, "[i]n cases involving a controlled buy of drugs from a seller who is located inside a multiunit building, we do not require that the police observe the informant enter the particular apartment where the transaction is reported to have

occurred in order to demonstrate the reliability of the informant." Monteiro, 93 Mass. App. Ct. at 483, citing Warren, 418 Mass. at 90 ("It is not fatal to the warrant application that the police did not observe which of the three apartments the informant entered. Based on the information provided by the informant and their own observations, the police could infer that the defendant was dealing drugs from his second-floor apartment"). "[T]he police were not required to risk disclosure of their surveillance by observing the apartment in a small multi-apartment building an informant actually enters in the course of executing a controlled buy." Desper, 419 Mass. at 169. "The Warren case involved a three-story building with three apartments. [Desper] involves a four-story brick townhouse." Id. Therefore, in buildings of that size, a reasonable inference could be made that the CI in fact purchased drugs from the apartment unit in question. Id. The question then becomes whether the same holds true for larger multiunit buildings.

Indeed, unlike in Warren⁴ and Desper,⁵ where the buildings had only a few units, the inference that the CI purchased the

⁴ In Warren, 418 Mass. at 87, the affidavit set forth details of the defendant's apartment, including where the defendant stored the drugs therein. The target apartment was a second-floor apartment in a three-unit building. Id.

drugs from the target apartment becomes attenuated in the case of a large apartment building. See Commonwealth v. Figueroa, 74 Mass. App. Ct. 784, 788 (2009) ("The fact that the apartment building in Warren -- like the apartment building in the present case -- contained only a small number of units was a key factor in concluding that police were entitled to rely on the controlled purchase there in establishing probable cause to search").⁶ Here, we do not know how many units were in the building, nor how feasible it would have been for the police to observe the CI more closely.⁷ There is evidence to suggest that here the building was significantly larger than three or four

⁵ In Desper, 419 Mass. at 164, there was also a separate anonymous tip that implicated the defendant in drug dealing. The target apartment was apartment number three on the second floor of a four-story building. Id.

⁶ In Figueroa, 74 Mass. App. Ct. at 785, there were also several complaints about heavy traffic going to and from the third floor of the defendant's building; some neighbors believed this was consistent with drug activity.

⁷ We note that page five of the search warrant affidavit was inadvertently excluded from the record that was filed with the motion judge. Page five contains a request for the warrant to be issued as a nighttime warrant to "allow detectives assigned to the entry team to use the cover of darkness, allowing detectives an advantage to make a swift approach to the target address undetected." The affiant further asserted that officers previously executed search warrants at the apartment building, that there was high foot and motor vehicle traffic in the area, and that people were constantly entering and exiting the building. Because we review the sufficiency of the search warrant de novo, we consider this page, though it does not change our result.

units. We know from the affidavit that it was a six-story building. The target apartment was numbered 2F, leading to an inference that there were at least two apartments on each floor, for a total of twelve units in the building, assuming "F" stands for "front" and "R" for "rear." That is not the only inference that could be drawn. Indeed, the motion judge found that there were likely six apartments on each floor (F being the sixth letter in the alphabet) for a total of thirty-six units in the building. The inference that this building is larger than those in Warren and Desper is bolstered by the presence of a building manager, an electronic buzzer entry system, and an elevator -- all indicia of a multiunit building. And such a building presents different considerations than a three- to four-unit building does. This difference was enough to support the conclusion that more information was needed to determine whether the CI purchased the drugs from the defendant in the target apartment or elsewhere. Moreover, the affidavit was devoid of any indication of the extent to which closer observation of the actual drug purchase in the controlled buy would have been feasible or if, conversely, it could not have occurred without compromising the safety of the officers or the investigation.

Additional details concerning the layout of the building would have assisted the magistrate in determining whether it was safe for the police to attempt a more direct observation of the

controlled buy without jeopardizing their investigation. If the police believe they cannot safely monitor a CI in a multiunit building as the CI comes and goes from the target apartment, the reason should be set out in the affidavit. Moreover, if the purpose of the controlled buy is to test the accuracy of the CI's information, the more units there are in a building, the less potency the controlled buy has in corroborating the claim as to one particular unit if the controlled buy is not monitored appropriately.

Our holding in Monteiro, 93 Mass. App. Ct. at 483-485, is not to the contrary. In Monteiro, the court was faced with a CI without a prior track record, and therefore a controlled buy was the basis for the corroboration of the CI's veracity. Id. at 481-482. Monteiro lived on the first floor of an apartment building, but the affidavit filed in support of the search warrant did not otherwise describe the building. Id. at 479 n.2. The police observed the CI enter and exit through the rear exterior door of the building. Id. at 479. We held that on the facts presented the controlled buy was properly monitored, but we cautioned that the result "should not be understood as encouragement to conduct controlled buys without strict compliance with the investigatory steps set forth in Desper." Id. at 483 n.6. Here, the affidavit is not a model of completeness, but more importantly, the affidavit does not

provide sufficient detail about the supervision of the controlled buy, and we cannot infer it. To do so would expand the holding of Warren, and we decline to do so.

We do not, however, purport to prescribe a bright-line rule with respect to the required level of detail of police observations of the particular unit within a multiunit apartment building from which a controlled buy is made, or the force of circumstances justifying some degree of uncertainty in a particular case. However, the affidavit must contain sufficient details with respect to the attendant circumstances surrounding the controlled buy -- i.e., the layout of the building, the number of apartments, the location of the defendant's apartment, the details of the interior of the apartment, where the defendant stored the drugs in the apartment, and the feasibility (or unfeasibility) of observing the CI enter a particular apartment (and not another apartment) to conduct the controlled buy -- in order to justify a conclusion that the CI in fact purchased drugs from the apartment unit the CI named. In the circumstances of a controlled buy, police observation of a CI entering and exiting a large multiunit building containing a large number of individual apartments on multiple floors,

without more, does not sufficiently corroborate the CI's veracity.⁸

Order allowing motion to suppress affirmed.

⁸ The defendant requested in his brief the payment to him of costs and reasonable attorney's fees pursuant to Mass. R. Crim. P. 15 (d), as amended, 476 Mass. 1501 (2017). Within fourteen days of the date of this decision, the defendant is invited to file a detailed affidavit setting forth counsel's hourly rate, the time spent on this matter, and the costs incurred. See Commonwealth v. Augustine, 470 Mass. 837, 840-841 (2015); Commonwealth v. Gonsalves, 432 Mass. 613, 617 (2000), S.C., 437 Mass. 1022 (2002), and 441 Mass. 1007 (2004). The Commonwealth will have fourteen days thereafter to respond.