

#140

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.
BRCR2013-00983

COMMONWEALTH

vs.

AARON HERNANDEZ

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION TO SUPPRESS EVIDENCE SEIZED FROM 599 OLD WEST
CENTRAL STREET, APARTMENT A12, FRANKLIN, MASSACHUSETTS
ON JUNE 26, 2013 AND ALL DERIVATIVE FRUITS OF THAT SEARCH**

INTRODUCTION

Defendant Aaron Hernandez moves to suppress all evidence obtained during the June 26, 2013 execution of a search warrant for Apartment A12 at 599 Old West Central Street in Franklin, Massachusetts and all evidence derived as a result of that search. The Commonwealth does not oppose the motion, but only, according to its Response, “[i]n the interests of justice, and to avoid any delay in the proceedings that might be occasioned by appellate review.” The wording of the Commonwealth’s Response warrants an explanation by the court as to the reasons that the motion to suppress is **allowed**.

BACKGROUND

On June 26, 2013, Massachusetts State Police Trooper Michael Bates applied to the Wrentham District Court for a search warrant to seize a particularly described cell phone at Hernandez’s apartment in Franklin. Trooper Bates supported the warrant application with an affidavit in which he set forth the following facts:

Police conducted a lengthy investigation into the June 17, 2013 homicide of Odin Lloyd in

the early morning hours of Monday, June 17, 2013, in North Attleboro. As part of their investigation, they interviewed Carlos Ortiz on June 25 in Bristol, Connecticut. Ortiz confirmed that he was with Aaron Hernandez on the night Lloyd was killed. Ortiz stated that Hernandez has a second address in Franklin that not many people know about. He further stated that on the night after the incident, he and Hernandez stopped by this apartment, at which time he inadvertently left his cell phone inside the apartment. The affidavit describes the phone as a Samsung cellular "flip" style telephone. Police showed Ortiz a video they had taken of the outside of the apartment complex at 599 Old West Central Street in Franklin and the door labeled A12. Ortiz stated that it looked like Hernandez's apartment that he had visited on the night after the incident. During the investigation, Hernandez's barber told the police that he had been to an apartment in Franklin belonging to Hernandez and showed police a text from Hernandez that identified the address of his apartment as 599 Old West Central Street in Franklin. When driven to the apartment complex by the police on June 26, 2013, Olivares guided them inside building A directly to the door of apartment # A12, and he identified this specific location as Hernandez's apartment, which he had visited. The property manager for the apartment complex showed police a lease for apartment #A12 from May 1, 2013 through April 30, 2014. The lessor on the lease is Hernandez. The lease is attached to the affidavit.

A justice of the Wrentham District Court issued a warrant authorizing a search for the flip phone exactly as described in the affidavit at 599 Old West Street, Apartment #12 in Franklin.

Police executed the warrant the same day. According to the return, a Samsung SCH U365 cell phone was taken pursuant to the search warrant. While in the apartment executing the warrant,

police made observations which led them to apply for and obtain five additional search warrants.¹

DISCUSSION

The Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights require the magistrate to determine that probable cause exists before issuing a search warrant. Commonwealth v. Escalera, 462 Mass. 636, 641-642 (2012); Commonwealth v. Anthony, 451 Mass. 59, 68 (2008). The court's inquiry as to the sufficiency of a search warrant application begins and ends with the four corners of the affidavit. Commonwealth v. Clagon, 465 Mass. 1004, 1004 (2013); Commonwealth v. Escalera, 462 Mass. at 638. Accordingly, the judicial officer issuing the warrant cannot consider matters that may have aired publicly in the media.

To establish probable cause, the affidavit must contain a substantial basis for concluding that the item sought is related to the criminal activity under investigation and may reasonably be expected to be located in the place to be searched at the time the search warrant issues. Commonwealth v.

¹ Two of the additional warrants granted permission to seize at 599 Old West Street, Apartment #12 in Franklin (1) "any/all ammunition of all calibers and weapons to be associated/utilized with ammunition. Search should also include any and all records/paperwork/standing associated with person(s) who may have been staying within the dwelling;" (2) "white colored hooded sweatshirt consistent with the one worn by Hernandez, Aaron as seen in the surveillance videos on the night of the 06-17-13 homicide. Also, a baseball hat with cranberry colored back & brim and light blue front face panel. This hat has the word "Society" written backwards on the front." Three of the additional warrants granted permission to search a Hummer motor vehicle. They authorized the seizure of (1) "any/all ammunition of all calibers and weapons to be associated/utilized with ammunition. Search should also include any and all records/paperwork/standing associated with person(s) who may have been staying within the dwelling/vehicle;" (2) "gunshot residue, physiological fluids, palm prints, shoe prints, fibers, foot prints, finger prints, hair, saliva, and blood;" and (3) "any/all ammunition of any caliber and weapon (firearm) to be associated with any ammunition. Search will include any place within the motor vehicle that a secret 'electronic hide' or natural void within the motor vehicle could be found that may contain a firearm or ammunition." The affidavit in support of the first Hummer search warrant states that while executing the warrant for the Samsung flip phone, the police located Hummer keys and that, when tested, a remote alarm linked those keys to the Hummer motor vehicle parked outside the apartment.

Kaupp, 453 Mass. 102, 110 (2009); Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). Although an affidavit should be read as a whole in a commonsense and realistic fashion, Commonwealth v. Clagon, 465 Mass. at 1004; Commonwealth v. Kaupp, 453 Mass. at 111, a purely conclusory affidavit will not suffice to establish probable cause. The underlying circumstances giving rise to an affiant's belief must be stated. See Commonwealth v. Cuddy, 353 Mass. 305, 308 (1967). See also Commonwealth v. Penta, 352 Mass. 271, 274 (1967) (affidavit which stated only that affiant had information that stolen car would be located at garage, but did not disclose source of information, insufficient to establish probable cause).

There are no facts in the affidavit that tie either Hernandez or Ortiz in any way to the killing of Lloyd. The bald fact that the police may have conducted a lengthy investigation does not give rise to an inference that Ortiz's cell phone may have some evidentiary value in furthering that investigation. The affiant failed to disclose any of the relevant facts that had been unearthed in the investigation. Most telling, there are absolutely no facts that link Hernandez in any way at all to the crime under investigation. Had Trooper Bates taken the simple step of attaching and incorporating by reference the affidavit in support of the search warrant to search Hernandez's residence,² the presence of Ortiz together with Hernandez very well may have been sufficient to support a reasonable inference that Ortiz's phone might have some evidentiary significance.

² Trooper Bates did not author the affidavit in support of the search warrant for Hernandez's North Attleboro residence, but he did prepare the application for that warrant. The contents of that affidavit are set forth in detail in the Court's Memorandum of Decision and Order on Defendant's Motion to Suppress Fruits of June 18, 2013 Search (Digital Recorder, Hard Drive, and Cell Phone with Specified Number) docketed on July 14, 2014. By contrast, when Trooper Giossi sought a search warrant for Hernandez's phone, his affidavit attached and incorporated by reference the ten-page affidavit of Trooper Cherven that had been submitted in connection with the search warrant application for Hernandez's North Attleboro residence.

The mere fact that two people may have been together on the night that someone else was killed in the early morning hours gives rise to no inference of criminal involvement on the part of either in the killing and gives rise to no inference that the phone of one of the two would aid in the investigation of the death. The additional fact that the two stopped by an apartment rented by one of them the night after the incident adds nothing from which a reasonable inference could be drawn that either of the two were suspected of involvement in the killing or that the phone of either would aid in the homicide investigation. The affidavit contains enough information for an issuing magistrate to determine that the item sought reasonably may be expected to be located in the place sought to be searched, but it does not contain enough information for an issuing magistrate to determine that the item sought is related to the criminal activity under investigation.

In its Response to the defendant's motion to suppress, the Commonwealth stated: "[i]n the interests of justice, and to avoid any delay in the proceedings that might be occasioned by appellate review, the Commonwealth does not oppose said motion and waives the opportunity to be heard at any hearing on same." If the Commonwealth intended by its Response to represent that it conceded that the search of the Franklin apartment was not based on adequately articulated probable cause and that all the fruits of that search must be suppressed, there would, of course, never be an occasion for appellate review of a decision by this court allowing the defendant's motion to suppress. The rationale set forth in the Response for not opposing the defendant's motion has no applicability if the Commonwealth agrees with the defendant's legal position. The Response suggests, therefore, that the Commonwealth does believe that there is a legal basis to uphold the warrant, but it is choosing not to make that argument either because this court might find the Commonwealth's position persuasive, deny the motion to suppress, and an interlocutory review delaying the trial might

follow or because this court might find the Commonwealth's position not to be persuasive and allow the motion to suppress, at which time the Commonwealth would not want to seek an interlocutory appeal in order not to risk delaying the trial.

In contrast to the wording in its Response to the Motion to Suppress, in the Commonwealth's Motion for Ex Parte Order of Impoundment, filed the same day, the Commonwealth told the court that "the government conceded [in its Response] that the search in question was, in fact, not based on adequately articulated probable cause, and agreed that the fruits of that search must be suppressed."

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the Defendant's Motion to Suppress Evidence Seized from 599 Old West Central Street, Apartment A12, Franklin, Massachusetts on June 26, 2013 and All Derivative Fruits of that Search be **ALLOWED**. It is further **ORDERED** that the following items of evidence be suppressed:

1. Samsung SCH-U365 Cell Phone; SKU SCHU365HPP, Fed ID: A3LSCHU365 Flip Phone
2. Two keys to a Hummer H2 Motor Vehicle
3. Box of Remington Ammunition (.22 caliber)
4. Box of DPX Ammunition (.45 caliber)
5. Box of Wolf Ammunition (.7.62 caliber)
6. New England Patriots Check to Aaron Hernandez
7. PUMA check
8. Three boxes of Wolf Ammunition (7.62 caliber)

9. Two boxes of Seminole Arms Ammunition (.45 caliber)
10. Box of Remington Ammunition (.45 caliber)
11. Box of Hornady Ammunition (.45 caliber)
12. Single rifle round
13. Kay Jewelers Bag with Receipt in the name of Aaron Hernandez
14. Hertz rental agreement
15. Western Union Receipt
16. Valet Retrieval Sticker #C151245 from the "W" Hotel in Boston
17. White colored hooded sweatshirt
18. Baseball hat, cranberry & blue colored "Society" reversed on face
19. Two receipts from Larry's Motor Sales in the name of Aaron Hernandez
20. Glock .45 caliber magazine clip loaded with .45 caliber ammunition
21. Ohio Temporary Registration in the name of Aaron Hernandez
22. Express Mail Envelope addressed to Aaron Hernandez
23. One black colored cologne bottle - glass
24. Two Arcadia Bottles - plastic
25. One CD - "Nora"
26. One bottle "Beautiful Day" Lotion - Plastic
27. One CD - GPS Disc
28. One CD = "Reedy N Boyz"
29. Latent (Interior driver door)
30. Latent (Transmission knob)

31. Latent (Transmission Arm - left)
32. Latent (Transmission Arm - right)
33. Latent (Driver rear door frame)
34. Latent (Passenger side rear door)
35. Latent (Door frame rear passenger pillar)



E. Susan Garsh
Justice of the Superior Court

DATED: October 2, 2014