

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1588

COMMONWEALTH

vs.

MICHAEL STROUD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

While investigating a suspected drug dealer, police executed a search warrant for 39 Nazing Street, apartment 2. During the search, police discovered a gun in the bedroom of another resident of the apartment -- the defendant in this case. The defendant was charged with possession of a firearm in violation of G. L. c. 269, § 10 (h), and related offenses. Following an evidentiary hearing, a Superior Court judge allowed the defendant's motion to suppress the gun. On the Commonwealth's interlocutory appeal, we reverse.

Background. The following summary of the underlying facts is drawn principally from the motion judge's subsidiary findings. We supplement those findings with unchallenged testimony from the motion to suppress hearing that the judge

explicitly or implicitly credited. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015).

An informant passed along to police that Howard Thompson was selling drugs out of apartment 2 at 39 Nazing Street, in the Dorchester section of Boston. Apartment 2 encompassed the second, third, and fourth floor of a four-story Victorian-style home.<sup>1</sup> Based on the informant's tip, police began surveilling the location in early 2017. After using the informant to conduct two controlled buys from Thompson and after stopping four separate individuals who left the premise in possession of drugs, the police secured a search warrant for the apartment. The affidavit noted, and the motion judge found, that the police previously had received numerous community complaints about this location and had been inside the apartment.

Before police officers executed the search warrant, a "SWAT" team secured the apartment. On the second floor,<sup>2</sup> the SWAT team found an individual named Curtis Austin trying to hide a firearm under his bed. On the third floor, the team located two bedrooms inhabited by several members of a family, including

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<sup>1</sup> Apartment 1 included only the first floor of the structure and was not included in the search warrant.

<sup>2</sup> The second floor of 39 Nazing Street is the first floor of apartment 2. For clarity we refer to floor numbers throughout based on placement of the floors within the structure as a whole.

the owner of the apartment. On the fourth floor, the team found the defendant and Thompson in two separate bedrooms. Following the sweep, the SWAT team briefed the officers who were to conduct the search before they entered the apartment. During the subsequent search, police found a firearm in the room in which the defendant had been located.

As a result of the search, Thompson, Austin, and the defendant all were criminally charged. They each filed a motion to suppress challenging the search warrant as overbroad on the ground that apartment 2 was an illegal boarding house, with each bedroom constituting an independent dwelling unit for which a separate search warrant would need to be obtained. Ruling on all three motions at once, the judge denied the motions filed by Curtis and Thompson, but allowed the defendant's. He explained his view that the defendant "had a reasonable expectation of privacy in his bedroom, and there were insufficient facts from which the police could conclude that right was overridden by the warrant that allowed them to search for evidence of Thompson's crimes." The Commonwealth appeals from the order, arguing, *inter alia*, that the warrant authorizing the search of the entire apartment properly extended into the defendant's room.

Discussion. In reviewing a decision on a motion to suppress, "we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his

ultimate findings and conclusions of law.'" Commonwealth v. Scott, 440 Mass. 642, 646 (2004), quoting Commonwealth v. Jimenez, 438 Mass. 213, 218 (2002).

To the extent that the judge concluded that the defendant had a reasonable expectation of privacy in the bedroom he apparently was occupying, we agree. See, e.g., Commonwealth v. Porter P., 456 Mass. 254, 260-261 (2010) (occupant of homeless shelter had reasonable expectation of privacy as to area in which he was staying). However, unlike in Porter P., the search here was done pursuant to a duly executed search warrant, and that warrant, on its face, covered the entire apartment. If the warrant validly extended to the bedroom in question, the defendant's expectation of privacy in that bedroom is beside the point.

The ground on which the defendant relied in arguing that the search was invalid as to his bedroom was that the warrant was void because it failed to describe the place to be searched with the particularity required by the Fourth Amendment to the United States Constitution, by art. 14 of the Massachusetts Declaration of Rights, and by G. L. c. 276, § 2.<sup>3</sup> See Commonwealth v. Dew, 443 Mass. 620, 625 (2005) (search warrant

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<sup>3</sup> We pass over the fact that the defendant did not flesh out this argument until he filed a supplemental memorandum after the evidentiary hearing on the motion to suppress had concluded.

must describe with particularity specific units for which probable cause exists to search when place to be searched contains multiple units). In other words, the defendant argued that there were separate living units within apartment 2, and that the police should have obtained a search warrant limited to the unit in which Thompson -- the target of their investigation -- was living. In pressing this argument, the defendant had the burden of demonstrating that the police knew or should have known there were multiple units in the apartment at the time they applied for the warrant. See Commonwealth v. Luna, 410 Mass. 131, 137 (1991).

Critically, the judge did not find that the police knew or should have known that there were separate living units within apartment 2 at the time they applied for a warrant. To the contrary, it is plain from the judge's ruling that he concluded that the police acted properly in requesting a search warrant for the entire apartment. For example, after finding that the officers did not observe separate mailboxes outside the home, the judge concluded that before "the police executed the warrant, there was little else the police could do (or should have done) to dispel the expectation that Thompson had access to the complete interior of the apartment in which he was staying." Contrast Commonwealth v. Erickson, 14 Mass. App. Ct. 501, 506-507 (1982) (police should have known building to be searched

contained multiple separate apartments given other multifamily structures in neighborhood, building's separate entrances, and information gathered during surveillance that multiple individuals lived in building and had their own telephone lines and mailboxes). The defendant no longer presses his claim that the warrant was void ab initio as to him.<sup>4</sup>

The judge allowed the motion to suppress based not on what the police knew or should have known when they applied for the warrant, but on the reasonableness of their actions as the execution of the search warrant unfolded. Notably, the judge did not reason that once inside the apartment during the search, the police discovered obvious signs that the apartment contained discrete living units and that faced with such information, the police should have reevaluated the legal basis of the warrant.<sup>5</sup>

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<sup>4</sup> In any event, the defendant would bear the burden of demonstrating that the search warrant was overbroad, and the defendant has not pointed to any evidence of the usual indicators of separate living units, such as separate entrances and mailboxes. The only evidence in the record pointing in that direction was a police report from 2015 responding to a citizen complaint that the premises were being used as an illegal boarding house. However, the judge specifically found that while the police had evidence of illegal room renting in 2015, this was dispelled by a follow-up investigation in 2016 involving an apparent homicide that occurred in apartment 2. The defendant has not argued, much less shown, that this finding was clearly erroneous.

<sup>5</sup> Nothing in this memorandum and order should be taken to suggest that we would agree with such an argument if the facts supported it. We further note that it is well established that, as a general matter, the validity of a warrant is determined as of

In fact, the judge categorically found that "[i]n this case, there were no separately-owned apartments in 39 Nazing Street."

Instead, the judge appears to have reasoned that in the process of executing a valid search warrant of premises that are occupied by people other than the target of the warrant, the police have a duty to reevaluate whether such an occupant's expectation of privacy in a particular area of the premises overrides the force of the warrant. We discern no support for that legal proposition in the cases on which the judge relied.<sup>6</sup>

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the time it was issued. See, e.g., Maryland v. Garrison, 480 U.S. 79, 85-86 (1987) ("the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate").

<sup>6</sup> As noted, Porter P. did not even involve a search warrant; the issue instead was whether the operator of a homeless shelter could give consent for a search of an area in which a resident had a valid expectation of privacy. 456 Mass. at 260-262. The other case relied on by the judge was Commonwealth v. Molina, 476 Mass. 388 (2017), a case that involved a warrant that authorized police to search a multi-bedroom apartment for electronic evidence associated with child pornography. The defendant on whose computer such evidence was found challenged the search warrant as overbroad based on the fact that the police knew that there were multiple occupants of the apartment, yet the search warrant was not particularized to the computer equipment of any specific occupant. The court rejected that overbreadth challenge and found no infirmity in the issuance or execution of the warrant. Along the way, the court stated that "[w]here the defendant's unlocked bedroom showed no indicia of separate ownership from the rest of the apartment, a search of that bedroom as part of the physical address associated with the IP address was proper." Id. at 396. Whatever the particular import of that sentence, we do not interpret it as giving trial

Moreover, under the particular circumstances here, what the police found once inside the apartment was fully consistent with the scope of the warrant they had in hand. Ascending to the fourth floor of the apartment, the police discovered two separate bedrooms across the hall from each other, with Thompson in one and the defendant in the other. The door of the room in which the defendant was located lacked a doorknob altogether, with no locking mechanism visible from the outside. Police encountered nothing to suggest that Thompson could not access the unlocked bedroom to store drugs or other evidence of criminal activity. See Dew, 443 Mass. at 625, and cases cited (where defendant had access to all units in multifamily home, warrant authorizing search of entire home held appropriate). See generally Commonwealth v. Dorelas, 473 Mass. 496, 501 (2016) ("In the physical world, police need not particularize a warrant application to search a property beyond providing a specific address, in part because it would be unrealistic to expect them to be equipped, beforehand, to identify which specific room, closet, drawer, or container within a home will contain the objects of their search. Rather, [a] lawful search of fixed premises generally extends to the entire area in which the

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court judges license to decide that an individual occupant's expectation of privacy invalidates a search conducted within the scope of a duly issued search warrant. If anything, Molina supports the Commonwealth's case.

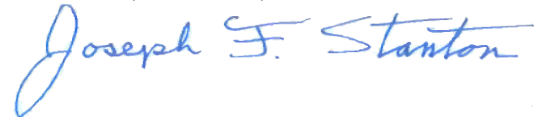


object of the search may be found" [quotation and citation omitted]). Simply put, there was no basis shown on which the police were required to reevaluate the scope of the authority under which they were acting.

In sum, because the police conducted the search in accordance with a valid search warrant, the judge erred in allowing the motion to suppress. The order allowing the motion to suppress as to the defendant therefore is reversed.

So ordered.

By the Court (Milkey, Singh &  
Hand, JJ.<sup>7</sup>),



Clerk

Entered: January 24, 2020.

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<sup>7</sup> The panelists are listed in order of seniority.