NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

19-P-376

COMMONWEALTH

vs.

VICTOR ARRINGTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Boston police department (BPD) gained custody of two cell phones belonging to Victor Arrington after Arrington was the victim of a shooting by an unknown assailant. Fifteen months later, Arrington was identified as a suspect in a home invasion and murder that occurred on March 31, 2015, eight days before Arrington was shot. Once Arrington became a suspect, the police sought and obtained a warrant to search the contents of his two phones, which were still in BPD's possession, as well as warrants for various data maintained by his cell phone carriers. Arrington (hereafter, the defendant) was subsequently indicted in connection with the March 31, 2015 crimes, and successfully moved to suppress all evidence obtained from the two phones and the cell carriers for those phones on the ground that the phones

were improperly seized and maintained without a warrant.[1] The Commonwealth now appeals from the order allowing the defendant's motion to suppress. We vacate and remand.

Background. The following facts regarding the alleged crimes are taken from a single affidavit by BPD Detective Philip J. Bliss in support of the application for multiple search warrants. The procedural history is derived from the docket and the hearing on the defendant's motion to suppress.

1. Police custody of the cell phones. On April 8, 2015, the defendant and Jeromie Johnson were shot in a vehicle in the Dorchester section of Boston. Johnson died as a result. The defendant was transported to a hospital for the treatment of three gunshot wounds and survived.

Police seized at least two cell phones in connection with the April 8 shooting. The first, a black Samsung cell phone, described as a "flip phone," was found outside the driver's side door, where the defendant was seated. The second, a white iPhone cell phone in a blue case (iPhone), was "[s]eized from [the defendant's] property at the hospital."

[1] A grand jury indicted the defendant on charges of murder in the first degree, see G. L. c. 265, § 1; home invasion, see G. L. c. 265, § 18C; arson of a dwelling, see G. L. c. 266, § 1; armed assault with intent to murder, see G. L. c. 265, § 18 (b); unlawful possession of a firearm, see G. L. c. 269, § 10 (a); and two counts of kidnapping, see G. L. c. 265, § 26.

Two days later, the police interviewed the defendant about the shooting of which he was a victim.[2] In that interview, the defendant reported that both the Samsung cell phone and the iPhone belonged to him and he provided the number associated with each phone. Both phones have remained in police custody since the day of the shooting.

2. The charged crimes. On March 31, 2015, eight days before Johnson and the defendant were shot, three men entered an apartment at 332 Harvard Street in Dorchester. The assailants bound and then shot two of the occupants before setting a fire in the apartment. One occupant died as a result of his injuries.

Later that same day, the police recovered a jacket consistent with one worn by one of the assailants on fire on a driveway about one and one-quarter miles from 332 Harvard Street. Deoxyribonucleic acid (DNA) on that jacket matched an individual in the Combined DNA Index System (CODIS) database.

On December 5, 2015, the police first interviewed the individual identified through the DNA testing (cooperating witness), who denied any knowledge of the March 31 crimes.[3] During a second interview on June 16, 2016, the cooperating

[2] The Commonwealth represents that this interview occurred on April 10, 2015, and the defendant accepts this representation.
[3] The identity of the cooperating witness is confidential under a protective order.

witness reported that he, along with Johnson and a third individual, were involved in the March 31 crimes. During a third interview on July 1, 2016, the cooperating witness first identified the third assailant as "Vic" and explained that "Vic" was the same person who was shot in the vehicle with Johnson when Johnson was killed. The cooperating witness also viewed a photographic array and selected the defendant as the third assailant.

The police already had Johnson's cell phone records from March 13, 2015, to April 8, 2015, in connection with an investigation of a homicide committed on March 14, 2015. Those records reflected two telephone calls between Johnson and a phone number associated with the defendant shortly before the March 31, 2015 crimes. Pursuant to an administrative subpoena, the police obtained records related to the two cell phone numbers provided by the defendant during his April 10, 2015 interview with the police.[4] Those records show that there were numerous calls and texts between the defendant's two phones and Johnson's one phone. Moreover, the records show that there were a total of nine telephone calls and text messages between

[4] The record does not reflect the date that the administrative subpoena issued, which could have been immediately after the April 10, 2015 interview or fifteen months later in July 2016. The unknown date of issue does not affect our analysis. Nor does the record indicate the date range for the administrative subpoena.

Johnson and the defendant from 10:48 A.M. to 10:56 A.M. on March 31, 2015, around the time of the home invasion and murder, when the cooperating witness said that Johnson was looking for "Vic" just after entering 332 Harvard Street.[5] The affidavit does not identify whether these nine communications include both of the defendant's phones or only one, and if so, which one.

3. Search warrants and affidavit. On July 8, 2016, fifteen months after the police seized the defendant's cell phones and one week after the cooperating witness identified the defendant as the third assailant in the March 31, 2015 crimes, the BPD applied for and obtained warrants to search the defendant's two cell phones and to receive data from "TMobile" (T-Mobile warrant), the cell phone carrier for the defendant's iPhone recovered from the hospital.[6]

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[5] Video footage from directly across the street from 332 Harvard Street depicts three people walking towards the door of that address at 10:51 A.M., before the home invasion and murder, and leaving at 11:19 A.M., which is consistent with the estimate of one of the victims that the assailants were inside the residence for thirty minutes.

[6] The Commonwealth's brief represents in numerous places that three warrants issued and in several other places that four warrants issued. The record only contains two search warrants, one for "[t]wo separate cell phones," which are then described, and one for various data maintained by T-Mobile. We deny without prejudice the Commonwealth's motion to expand the appellate record to include a search warrant issued to American Telephone and Telegraph Company (AT&T), the carrier for the Samsung phone, which was supported by the same affidavit as the other two warrants in the record. That motion, filed three days before oral argument, should have been submitted to the Superior Court in the first instance because the defendant disputes, and

4. Motion to suppress and related hearing. Prior to trial, the defendant moved to suppress all evidence obtained from the defendant's two cell phones and from their carriers, on various grounds, including that the initial warrantless seizures of the cell phones were illegal and that the subsequently-obtained search warrants were not supported by probable cause, lacked particularity, and were overbroad. The defendant's motion was supported by an affidavit from his counsel attesting that the information in the motion and supporting memorandum was based on his review of the relevant discovery.

The motion judge held a nonevidentiary hearing over the course of two days, March 14 and 16, 2018. The Commonwealth filed its written opposition to the defendant's motion on the first day of that hearing. The Commonwealth attached four exhibits: the Bliss affidavit, two police reports that describe the circumstances in which the defendant's personal property was collected from the crime scene and the hospital on April 8,

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the record is unclear, whether the AT&T warrant was ever submitted to the motion judge. See Commonwealth v. Zoe, 95 Mass. App. Ct. 500, 502 n.6 (2019) (request to expand record denied where documents not before motion judge). See also Commonwealth v. Woody, 429 Mass. 95, 97 (1999) (appellant bears burden of producing adequate record for appellate review); Mass. R. A. P. 8 (e) (1), as appearing in 481 Mass. 1611 (2019) (lower court on motion shall settle dispute on purported omission from appellate record). Because we remand on the issue of the T-Mobile warrant, we do not foreclose the Commonwealth from raising the issue for resolution before the Superior Court during further proceedings consistent with this decision.

2015, and a timeline of events. The Commonwealth represented in its papers that "the defendant never sought the return of either phone, consistent with abandonment, or indifference to their return."

On the first day of the hearing, the court received conflicting representations from counsel: the Commonwealth represented that the defendant never requested the return of the cell phones, and counsel for the defendant represented that the defendant asked the police more than once to return his property, including his cell phones. Also on the first day of the hearing, the motion judge requested that the parties submit supplemental briefing on certain legal issues.

Both parties filed their supplemental briefs prior to the second day of the hearing. The defendant's supplemental briefing included an affidavit from the defendant stating that he did not consent to the seizure of his iPhone by the police, that he expected the iPhone would be returned to him by hospital staff, and that following his release from the hospital approximately two weeks after he was shot, he went to the police station to collect his jewelry and the two cell phones. The defendant further represented that the police refused to return his cell phones even after he made several trips to the police station to collect his property. In its supplemental brief, the Commonwealth argued that even assuming the victim, i.e., the

defendant here, had requested their return, which it denied, it was entitled to seize and maintain custody of the cell phones in the circumstances of the case.

The parties did not request, and the motion judge did not hold, an evidentiary hearing on the motion to suppress. The parties did not stipulate to any evidence, and none was taken by the motion judge.

After the hearing, the motion judge issued a memorandum of decision and order allowing the defendant's motion to suppress on the basis that the seizures of the defendant's cell phones were unlawful. The decision included a recitation of facts that the judge indicated "may be gleaned from the case record, and are undisputed." The judge included facts from the Bliss affidavit and the police reports that were favorable to the Commonwealth's position.[7] He also accepted facts from the defendant's affidavit that supported the defendant's position, including that the defendant demanded the return of his two cell phones at the police station after he was discharged from the hospital. In reference to the defendant's request for the cell

[7] For example, the judge found that the police gained custody of the bag of the defendant's personal effects at the hospital "[f]ollowing correct and expected procedure," that the seizure of the bag with the defendant's bloodstained clothes was proper, and that the police were unaware at the time they took the bag that it also contained the defendant's iPhone, jewelry, and belt.

phones' return, the motion judge concluded, "At a minimum, at that point, the BPD was obligated to return [the defendant's] iPhone."

The motion judge also rejected the Commonwealth's argument that the police were permitted to retain the cell phones because the surface of the phones might contain blood or other trace evidence related to the April 8 shooting of Johnson and the defendant. The motion judge explained that there was no reason why any such evidence would belong to anyone other than the defendant, and, though nearly fifteen months had passed before the police obtained search warrants, "the Commonwealth did not present any evidence of any tests it conducted on the phones, which likely confirms the futility of its argument."

Discussion. The Commonwealth challenges both the suppression of evidence obtained from the searches of the cell phones and the suppression of the cell site location information (CSLI) and other data maintained by the two carriers. We address each issue in turn.

1. Defendant's cell phones. Following the procedure outlined by the Supreme Judicial Court in Commonwealth v. Rodriguez, 456 Mass. 578 (2010), the defendant's suppression motion should have been resolved based on facts adduced at an evidentiary hearing or stipulated to by the parties. See id. at 588-590 (explaining what should happen to resolve defendant's

motion to suppress). Here, however, no evidence, either stipulated or otherwise, was taken with respect to the defendant's motion to suppress and, instead, the motion judge relied on certain documents not in evidence to support his factual findings. This was error. See Commonwealth v. Lawson, 79 Mass. App. Ct. 322, 326 n.4 (2011), overruled on other grounds by Commonwealth v. Campbell, 475 Mass. 611, 617 n.9 (2016), quoting J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 2-3[d][3] (2010) ("The permissible findings of fact at the evidentiary hearing must find support in the evidence -- the testimony and exhibits, which have been introduced in evidence at the suppression hearing"). Notably, the motion judge impermissibly relied on the defendant's affidavit to support the proposition that the defendant sought the return of his cell phones to no avail several weeks after he was released from the hospital. See Lawson, supra (affidavit submitted with motion to suppress demonstrates entitlement to evidentiary hearing, but affidavit "is not evidence and may not be considered by the judge for purposes of deciding the motion to suppress" [citation omitted]). See also Commonwealth v. Mubdi, 456 Mass. 385, 389 n.4 (2010) (same).

Given the error in the factual predicate of the judge's findings, we are tasked with determining whether the record

before us provides a basis to affirm or reverse the suppression order. While both sides argue that the record supports their respective positions, we are not inclined to rule on the matter in the absence of stipulated facts or findings of fact based on properly admitted evidence. See Commonwealth v. Va Meng Joe, 425 Mass. 99, 102 (1997) (appellate court may affirm on different grounds than motion judge if "supported by the record and the findings"). In these rare circumstances where the record is devoid of evidence, we vacate and remand for an evidentiary hearing.[8] Cf. Commonwealth v. Gray, 466 Mass. 1012,

[8] Relying on our decision in Commonwealth v. Rodriguez, 74 Mass. App. Ct. 314, 315 (2009), S.C., 456 Mass. 578, 590 n.12 (2010), the defendant contends that he must nonetheless prevail because his motion and affidavits satisfied his threshold burden of raising a constitutional issue, and the Commonwealth did not meet its burden of production. We agree that the defendant's motion and affidavits were sufficient to demonstrate entitlement to an evidentiary hearing, and that the burden now rests with the Commonwealth to produce evidence, and not mere assertions from counsel, establishing the legality of the warrantless seizures. See Rodriguez, 74 Mass. App. Ct. at 315-317. See also Mubdi, 456 Mass. at 389. We deem remand to be the appropriate course here because the Commonwealth was permitted to argue as a preliminary matter that the defendant's motion must be denied summarily, and because neither the parties nor the judge sought the introduction of evidence even when it became apparent that a developed factual record was needed to resolve the motion. In the future, a clear ruling on the adequacy of the defendant's motion and supporting affidavit would put both parties on notice as to how to proceed. Cf. id. (affidavit accompanying motion to suppress "must be sufficient to enable a judge to determine whether to conduct an evidentiary hearing"); Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 204 (2004) ("it is incumbent on a judge to ascertain that the requirements of [Mass. R. Crim. P. 13 (a) (2)] have been

1014 (2013) (vacating suppression order and remanding matter where judge's key finding was clearly erroneous, necessitating another finding by judge); Rodriguez, 456 Mass. at 587-590 (remanding for new suppression hearing where only finding of fact was based upon oral representation of prosecutor, judge's only ruling of law was erroneous, and appellate court was unable to assess constitutional issue in light of absence of evidence); Mubdi, 456 Mass. at 389 n.4 (affidavit "is not a substitute for the defendant's testimony at [an evidentiary] hearing").

On remand, unless the parties stipulate to the relevant facts, an evidentiary hearing should be held so that the judge may determine the circumstances surrounding the seizures and the BPD's continued retention of the cell phones. The judge should, at a minimum, make findings as to whether the defendant ever requested the return of his cell phones and the facts relevant to the Commonwealth's position that it was authorized under G. L. c. 258B, § 3 (r), to hold the cell phones for fifteen months for "law enforcement or prosecution purposes" in connection with the April 8 shooting of Johnson and the defendant.

2. Records from cell phone carrier. As the Commonwealth correctly argues, suppression of the cell phones does not

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satisfied before scheduling an evidentiary hearing on a proffered motion to suppress").

require suppression of records obtained from the carriers and, therefore, a separate analysis is required. However, given the scope of the data sought by the T-Mobile warrant and the absence of any information about what data was actually obtained in response to the warrant, remand also is necessary on this issue in order that a judge, in the first instance, can determine whether the warrant was sufficiently particular with respect to the information sought by the warrant.

a. Knowledge of the defendant's phone numbers. The defendant argues that to the extent the cell phones were unlawfully seized, the records obtained from the carriers also must be suppressed. However, the defendant provided the police with his telephone numbers during an interview conducted as part of the investigation into the April 8 crimes. Regardless of whether the cell phones were in police custody at the time, the police were permitted to interview the defendant as both a victim and an eyewitness about those crimes, and to ask him questions during that interview, including to inquire as to his telephone numbers. See Commonwealth v. Ramirez, 92 Mass. App. Ct. 742, 744 (2018) ("The police may converse with, and even ask questions of, members of the public without requiring constitutional justification"). He, in turn, was entitled to choose whether to answer those questions. See Commonwealth v. Martin, 457 Mass. 14, 20 (2010) (defendant under no obligation

to respond to police officer's inquiry). Here, the defendant provided the telephone numbers for his cell phones to the police, and the police were permitted to later use that information in support of their search warrant application.[9] See Commonwealth v. Vasquez, 482 Mass. 850, 868 n.27 (2019) ("If the Commonwealth can show, by a preponderance of the evidence, that it has an untainted source for the telephone number, connecting the defendant to the ownership of the device for which the [cell site location information] is requested, it is not precluded from doing so"); Commonwealth v. Estabrook, 472 Mass. 852, 860 (2015), quoting Commonwealth v. Bradshaw, 385 Mass. 244, 258 (1982) (Commonwealth may use information obtained through "means sufficiently distinguishable [from any unlawful seizure] to be purged of the primary taint"). Indeed, the defendant did not move to suppress the cell phone numbers. Accordingly, we find no basis to excise the defendant's telephone numbers for the iPhone and the Samsung cell phones from the affidavit supporting the T-Mobile warrant even if the evidence obtained from the cell phones themselves is suppressed on remand.

[9] We also note that the police had already obtained Johnson's cell phone records in connection with a separate investigation, and those records reflected that Johnson used his cell phone to communicate with at least one of the defendant's telephone numbers shortly before the March 31 crimes.

b. Scope of the warrant. The Supreme Judicial Court has explained that the term "cell site location information" (CSLI) "is a record of a subscriber's cellular telephone's communication with a cellular service provider's base stations (i.e., cell sites or cell towers) during calls made or received," Estabrook, 472 Mass. at 853 n.2, that "may be used to identify the approximate location of the cellular telephone based on the telephone's communication with a particular cell site." Commonwealth v. Fredericq, 482 Mass. 70, 71 n.2 (2019).

Here, while the Commonwealth characterizes the T-Mobile warrant as seeking CSLI, that warrant seeks data well beyond CSLI. For example, the T-Mobile warrant authorized the search of records during a defined period for other types of data, including any cloud storage services and their contents, all stored photographic or video images, any data communications or access, the contents of incoming and outgoing text messages, and the contents of all stored voicemail messages.

To the extent that the warrant authorized search of CSLI data as well as phone call logs, voicemail messages, and text messages on March 31, 2015, we agree that the affidavit established probable cause to support that search. The affidavit contains information that the three assailants used their cell phones to communicate in the minutes leading up to the crimes and during the crimes, traveled to the crime scene

separately, and later attempted to conceal evidence of the crimes. See Commonwealth v. Robertson, 480 Mass. 383, 387-388 (2018) (probable cause to search CSLI where affidavit established that victim and defendant were speaking on phone immediately before murder).

However, to the extent that the Commonwealth obtained information beyond the CSLI from T-Mobile in response to the warrant, remand is necessary for consideration of the scope of the warrant. Where, as here, an affidavit in support of a search warrant established probable cause to search the call logs and contact lists of a phone, "[t]he police were not authorized to rummage through the entirety of the defendant's cellular telephones." Commonwealth v. Perkins, 478 Mass. 97, 106 (2017). The Commonwealth has the burden of demonstrating that "there is a reasonable expectation that the items sought will be located in the particular data file or other specifically identified electronic location that is to be searched." Commonwealth v. Broom, 474 Mass. 486, 496 (2016). Thus, the Commonwealth must demonstrate the requisite nexus between the crimes and the defendant's iPhone, and that the scope of the data sought by the T-Mobile warrant was not constitutionally overbroad.[10] See Commonwealth v. Snow, 96 Mass.

[10] In the affidavit, Detective Bliss appears to confuse the telephone numbers associated with the defendant, Johnson, and

App. Ct. 672, 676-680 (2019), further appellate review granted, 484 Mass. 1104 (2020). Similarly, the parties have not briefed, and we do not decide, whether the time frame for the information sought by the warrant was reasonable.

Conclusion. We vacate the order allowing the defendant's motion to suppress, and remand the matter for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Vuono, Henry & Hand, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: August 26, 2020.

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the cooperating witness. However, applying a commonsense reading, the affidavit reflects that both of the defendant's cell phones were used to communicate with Johnson around the time of the March 31 crimes. See Commonwealth v. Jordan, 91 Mass. App. Ct. 743, 748 (2017) ("[A]ffidavits in support of search warrants are to be approached with a view toward common sense, read in their entirety and with considerable latitude allowed for the drawing of inferences" [citation omitted]). To the extent that the iPhone was not used to communicate with Johnson in the minutes leading up to those crimes, the defendant is not precluded from raising a challenge on that basis on remand.

[11] The panelists are listed in order of seniority.