

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

20-P-97

COMMONWEALTH

vs.

FRANCIS SANTOS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Commonwealth appeals from an order allowing a motion to suppress filed by the defendant, Francis Santos. The sole issue in this case is whether the information provided by a confidential informant (CI) was sufficiently corroborated by three controlled purchases of narcotics so as to satisfy the veracity prong of the Aguilar-Spinelli test.¹ We conclude that the search warrant affidavit established the CI's veracity and, in turn, probable cause to issue the warrant. Accordingly, we reverse the order allowing the motion to suppress.

Background. In February and March 2018, State police Trooper Shaun Bellao received information from a CI, whose identity was known to him, regarding the sale of heroin and

¹ See Aguilar v. Texas, 378 U.S. 108, 114 (1964); Spinelli v. United States, 393 U.S. 410, 415 (1969).

fentanyl (narcotics) by a female subject (target) at 8 White Avenue, apartment 1, in Brockton. The CI specifically described the target's appearance and vehicle. Investigators confirmed the presence of that vehicle in a parking lot adjacent to 8 White Avenue on multiple occasions. The CI would acquire the narcotics from the target at apartment 1. To complete the transaction, the CI would call one of the target's two cell phones and arrange the purchase. Once the CI arrived at 8 White Avenue, the CI would proceed to a rear door and call the target again. A Hispanic male would open the rear door and lead the CI into the building and to apartment 1. The transaction would occur in the "front room" after the prepackaged narcotics were retrieved from the kitchen.

Trooper Bellao subsequently discovered that several law enforcement officers responded to a fatal heroin or fentanyl overdose at the target's apartment in February 2017. The target, who confirmed that the apartment was hers, found her roommate unresponsive and called 911. The target stated that she was aware that her roommate had been using narcotics.

The affidavit described 8 White Avenue and apartment 1 in relevant part as follows:

"[A] [three] story, multi-unit residential apartment dwelling, color blue. The residence is covered in beige and white trim with a brick base. . . . There are multiple mailboxes to the left of the front door. There is an asphalt driveway/parking lot to the right of the residence

which leads to the rear door which is in the center of the building. Apartment #1 is in the front left of the residence. The door is a gray metal door. Apartment #1 is the first apartment on the left once you enter the residence of 8 White Avenue."

The CI agreed to complete three controlled purchases of narcotics. Each buy largely proceeded in the same fashion. In Trooper Bellao's presence, the CI contacted the target by cell phone to arrange the transaction in apartment 1. Trooper Bellao searched the CI to ensure that the CI was free from money, weapons, or narcotics, and he provided money to complete the transaction. The investigators, including Trooper Bellao, surveilled the transaction by observing the CI proceed to the rear door of 8 White Avenue. The CI then placed the second phone call and was let into the building shortly afterwards. The CI reemerged approximately five minutes later. The CI described a Hispanic male who opened the rear door and escorted the CI to apartment. The target provided the CI with prepackaged bags of narcotics in exchange for the money.² After proceeding to a prearranged location, the investigators recovered the narcotics from the CI. The CI positively identified the target through a Registry of Motor Vehicles database.

² Prior to the third purchase, the target advised the CI that she was not home, but that the transaction could still go forward. The CI advised investigators that the Hispanic male, as opposed to the target, facilitated the third purchase.

A search warrant was obtained on March 2, 2018, and physical evidence was seized. The defendant was subsequently arrested and charged with one count of possession of a class B substance with intent to distribute and one count of conspiracy to possess a class B substance with intent to distribute. See G. L. c. 94C, §§ 32A (a) and 40. Contending that the search warrant issued without probable cause, the defendant filed a motion to suppress the evidence obtained as a result of the search. A District Court judge allowed the motion. This interlocutory appeal followed.

Discussion. Whether the search warrant established probable cause is a question of law that we review de novo. See Commonwealth v. Ponte, 97 Mass. App. Ct. 78, 79 (2020). Our review is limited to 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). "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). Article 14 of the Massachusetts Declaration of Rights requires application of the two-prong Aguilar-Spinelli test to

ensure that an affidavit based on information obtained from an informant establish the informant's basis of knowledge and veracity.³ See Commonwealth v. Arias, 481 Mass. 604, 618 (2019).

Statements provided by a first-time informant are ordinarily insufficient on their own to satisfy the veracity prong. See Commonwealth v. Figueroa, 74 Mass. App. Ct. 784, 787 (2009). However, "a properly monitored controlled purchase of illegal drugs provides sufficient corroborating evidence to overcome any shortfalls in meeting the constitutional reliability requirements imposed on confidential informants."
Id. at 787-788. See Commonwealth v. Costa, 448 Mass. 510, 514-515 (2007) (independent corroboration of informant's information may make up for deficiencies in either Aguilar-Spinelli prong).

In Commonwealth v. Desper, 419 Mass. 163, 168 (1994), the Supreme Judicial Court set forth the following elements 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."

³ The parties do not dispute the CI's basis of knowledge.

An imperfect controlled buy does not necessarily render information obtained from an informant unreliable. See Commonwealth v. Monteiro, 93 Mass. App. Ct. 478, 483 (2018).

The Commonwealth, relying primarily on Monteiro, asserts that the three controlled purchases of narcotics established probable cause to issue the search warrant. The defendant counters that Ponte, 97 Mass. App. Ct. at 84-86, controls, and also invites us to overrule Monteiro to the extent it conflicts with Ponte. We decline that invitation, and we agree with the Commonwealth.

A perfectly executed controlled purchase is not required to corroborate the CI's veracity. For instance, Monteiro involved a single controlled buy of cocaine where officers observed the informant walk toward a rear door of the defendant's apartment building. See Monteiro, 93 Mass. App. Ct. at 479. The affiant indicated that the defendant lived on the first floor but did not state how many units were in the building, how many units were on each floor, or whether the rear door through which the informant entered led directly into the defendant's unit. See id. at 479 n.2. The police did not observe the informant enter or exit the building through the rear door. Id. at 479-480. In spite of these deficiencies, information that "the CI was observed walking toward the rear door of the defendant's apartment building, returned a short time later under police

surveillance with a quantity of cocaine from the vicinity of the rear exterior door, and informed the officers that they purchased the cocaine from the defendant inside the apartment" sufficiently corroborated the informant's veracity because the remaining elements of a controlled purchase were satisfied. Id. at 484. See Desper, 419 Mass. at 170-171 (probable cause requirement met even though police did not search CI prior to two controlled purchases); Commonwealth v. Warren, 418 Mass. 86, 90 (1994) (fact that police did not observe which of three apartments CI entered was not fatal to warrant application).

So too here. Although police did not observe the CI directly enter or exit apartment 1, the CI was searched prior to each buy to ensure an absence of weapons, narcotics, or money. The CI called the target's cell phone in Trooper Bellao's presence to arrange each purchase. Investigators, including the affiant, observed the CI proceed to the rear door of 8 White Avenue, and place a second phone call. Approximately five minutes later, the CI exited the building. The CI was then secured and searched again, resulting in the recovery of the narcotics. The CI described in detail the process of the sale, including being let into the building and gaining access to apartment 1 by a Hispanic male, handing the money provided by Trooper Bellao to the target, and receiving the narcotics in

prepackaged form in return.⁴ Simply put, despite the fact that investigators did not directly observe any ingress or egress vis-à-vis apartment 1, the CI's veracity was corroborated. See Monteiro, 93 Mass. App. Ct. at 483, citing Warren, 418 Mass. at 90 ("In 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").

We do not agree with the defendant that Ponte controls the outcome of this case. Indeed, there are key differences between the two cases. First, this case involved three controlled purchases, as opposed to just one in Ponte.⁵ See Ponte, 97 Mass.

⁴ During the second purchase, about one minute after the CI entered 8 White Avenue, investigators observed an unidentified white male park his car in the parking lot and proceed towards the building's rear door. The man made a phone call and was let into the building. The CI described that in its presence, the target received a phone call, and gave a "head nod" to the Hispanic male who then left apartment 1. A short time later, the Hispanic male returned with a white male. Given the similarity between the nature of the CI's purchase and what the CI and investigators observed regarding the white male, the magistrate could reasonably infer that another drug sale occurred during the second controlled purchase.

⁵ The defendant contends that during the third purchase, the CI "made an unexplained detour to 365 Crescent Street, Apt#5" to show the uncontrolled nature of the purchase. We disagree. The affidavit stated that, during the third purchase, a law enforcement officer "surveilled [the CI] directly to the residence [at] 365 Crescent Street, Apt#5, Brockton." The very next sentence, however, stated "[w]e then observed [the CI] go directly to the rear door of the residence [at] 8 White Ave.,

App. Ct. at 79-80. Second, the affidavit in Ponte did not allow the court to infer anything with respect to the supervision of the controlled buy. See id. at 86. By contrast, the affidavit here revealed that the CI was let into 8 White Avenue and escorted to apartment 1 by a Hispanic male, which permitted the inference that closer surveillance was impractical. Third, law enforcement officers corroborated the presence of narcotics in apartment 1 through an investigation that revealed a fatal narcotics overdose in that apartment one year earlier.

Finally, the building in the present case differed markedly from the building in Ponte. There, the building at issue was six stories tall, and contained between twelve and thirty-six units. See Ponte, 97 Mass. App. Ct. at 85. The building had an elevator, a building manager, and an electronic buzzer system -- features absent in the present case. See id. The court held that "[i]n 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." Id. at 86. Here, the officers were confronted with a three-story multifamily residential building

Brockton." No other mention of the Crescent Street address is made in the affidavit, and we discern no significance from this ostensible typographic error.

where apartment 1 was "the first apartment on the left." At most, that language in the affidavit permits an inference that there were twelve units in the building (four per floor) -- as opposed to a minimum of twelve units in Ponte.⁶

A search warrant affidavit must be interpreted "in a realistic and commonsense manner" and we are mindful that it should be "read as a whole, not parsed, severed, and subjected to hypercritical analysis." Commonwealth v. Anthony, 451 Mass. 59, 69 (2008), quoting Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). "The probable cause necessary to support the issuance of a search warrant does not require definitive proof of criminal activity." Anthony, supra. We are also mindful that "in order to encourage the police to apply for search warrants, a reviewing court should allow 'a certain leeway or leniency in the after-the-fact review of the sufficiency of applications for warrants.'" Monteiro, 93 Mass. App. Ct. at

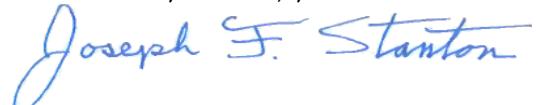
⁶ As the defendant points out, the affidavit in the present case does not set forth many of the details identified by the Ponte court as necessary to "justify a conclusion that the CI in fact purchased drugs from the apartment unit the CI named." Ponte, 97 Mass. App. Ct. at 86. Nevertheless, the Ponte court made clear that it did not "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." Id. Therefore, given the differences between this case and Ponte, we are not compelled to reach the same conclusion.

485, quoting Commonwealth v. Corradino, 368 Mass. 411, 416 (1975). In light of the foregoing, the affidavit demonstrated that the information provided to police by the CI was sufficiently reliable to support a finding of probable cause.

The order allowing the defendant's motion to suppress is reversed and the case is remanded for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Meade, Blake & Lemire, JJ.⁷),


Clerk

Entered: January 12, 2021.

⁷ The panelists are listed in order of seniority.