

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-337
20-P-338
20-P-339
20-P-343
21-P-745

COMMONWEALTH

vs.

MATTHEW E. MINORI (and four companion cases¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This consolidated interlocutory appeal of a judge's denial of motions to suppress evidence involves five codefendants charged with drug-related crimes after a lengthy investigation by law enforcement agencies in Berkshire County. On appeal, the defendants raise a variety of claims concerning a series of wiretap warrants issued and extended pursuant to G. L. c. 272, § 99. We affirm.

Background. Between March and July of 2017, a Superior Court judge authorized a series of eleven wiretap warrants and

¹ Commonwealth vs. Robert R. Jessamy; Commonwealth vs. Candace D. Mateo; Commonwealth vs. Damien Greene; and Commonwealth vs. Christopher Davis.

extensions requested by Berkshire County Law Enforcement Task Force (BLETF) detectives as part of their investigation into an alleged organized criminal drug distribution network. The overarching theme of these successive requests was the need for wiretaps to uncover the full scope of the conspiracy, drug "stash" locations, and the sources of the drug supply.

On March 31, 2017, investigators filed a request and accompanying affidavit submitted by two veteran law enforcement officers involved in the investigation, pursuant to G. L. c. 272, § 99, for authorization to wiretap Matthew Minori's cell phone. The affidavit (Minori affidavit) described an investigation of Minori dating back to 2001. It set forth in detail the techniques utilized during the investigation, including use of confidential informants, undercover drug buys, execution of search warrants at the homes of Minori's suspected associates, use of pen registers and toll records, physical surveillance, and photographic and video surveillance. The affidavit also outlined the limitations of some of these approaches and explained why other traditional investigative methods, such as grand jury investigation, trash pulls, one-party consent monitoring, and interviews with Minori's associates, would be of limited or no value in uncovering the full scope of the conspiracy.

On April 7, 2017, based upon information gathered from electronic surveillance of Minori's cell phone and further police investigation as outlined in an affidavit (Addendum A), the judge extended the Minori wiretap and authorized a wiretap for two additional cell phones belonging to Minori associates Michael Hodges and Naquan Miller. On April 13, 2017, BLETF detectives filed a third application for a warrant in conjunction with this investigation, accompanied by an affidavit (Addendum B). Investigators sought authorization to review all recorded telephone calls made by Robert Jessamy while he was serving a sentence at the Berkshire House of Correction from March 15, 2017 to April 13, 2017, based upon information from the Berkshire County Sherriff's Office that Jessamy spoke repeatedly with Hodges about what sounded to them to be illegal drug activity. This application asserted that Hodges was running Jessamy's drug operation while the latter was incarcerated, and linked Jessamy to Minori through Hodges.² On April 19, 2017, investigators filed an application and affidavit (Addendum C) requesting another extension of the original Minori

² Addendum B also cited text messages found on a cell phone seized from Jessamy during his 2015 arrest, which included a communication between Minori and Jessamy. Because evidence of these messages was suppressed by the motion judge, we do not consider it. See Commonwealth v. Streeter, 71 Mass. App. Ct. 430, 440 (2008) (improperly contained information excised from warrant application before review).

wiretap, as well as authority to wiretap a second Hodges cell phone and Jessamy's cell phone. On April 24, 2017, detectives submitted an application and affidavit (Addendum D) seeking extension of the Addendum C wiretaps and permission to wiretap a second Minori cell phone and a second Jessamy cell phone. On May 5, 2017, the wiretaps on both of Minori's cell phones, Hodges' second cell phone,³ and Jessamy's two cell phones were extended based upon an affidavit (Addendum E) that listed ten drug transactions conducted by Jessamy between April 24, 2017 and May 3, 2017, and provided surveillance photos connecting Minori and Jessamy.

On May 5, 2017, investigators also sought a wiretap for Christopher Davis' cell phone. Davis was identified as one of Jessamy's drug suppliers based upon text messages and conversations intercepted on Jessamy's cell phone between April 23, 2017, and May 3, 2017. The affidavit (Addendum #1) supporting the request to wiretap Davis' cell phone also included a description of police observations of Davis meeting Jessamy on two occasions in order to sell him illegal narcotics. Additionally, it detailed BLETF information, dating back to March of 2015, that Davis was running a large-scale drug distribution operation in Pittsfield, Massachusetts.

³ Investigators did not seek extension of the wiretap on Hodges' first cell phone because they learned he had stopped using it.

On May 17, 2017, based upon the cumulative information obtained through the investigative techniques described in prior affidavits and wiretap interceptions, BLETF detectives filed an application and affidavit (Addendum F) seeking authorization to search several residences for evidence of illegal drug distribution. Addendum F listed fourteen drug transactions conducted by Jessamy between May 2, 2017, and May 17, 2017. The final transaction was between Jessamy and Minori, and it resulted in their arrests in a vehicle containing a kilogram of cocaine and approximately \$34,000 in cash. The authorized search locations included the residence shared by Jessamy and his wife Candace Mateo; the residence of Damien Greene, whom investigators believed to be one of Jessamy's drug distributors and whose apartment was used as a base of operations; and three residences connected to Minori. Mateo and Greene were arrested at their respective residences prior to the execution of the warrants.

Meanwhile, on May 17, 2017, investigators also obtained the first of several extensions or expansions of the Davis wiretap. The affidavit in support of this application (Addendum #2) recited information from a combination of traditional investigative techniques and intercepted communications. Over the next two months, Davis changed cell phones three times. The judge authorized wiretap extensions as well as new wiretaps for

each of these new cell phones based on updated and expanded affidavits (Addenda #3-6). On July 21, 2017, following the issuance of the warrant supported by Addendum #6, Davis was arrested for crimes including trafficking cocaine.

In each successive application for wiretap renewal or expansion in this investigation, BLETF detectives incorporated all prior affidavits by reference, included results of prior wiretap interceptions, described ongoing investigative efforts, and reviewed the effectiveness and limitations of various traditional investigative techniques in the context of the investigation as a whole and as they related to the particular wiretap being requested.

Discussion. We begin with the proposition that citizens have a paramount privacy interest under both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights in the contents of their cell phones. In today's electronic world, it is not unusual for a cell phone to be the primary holder of its owner's most personal information, thoughts, and communications. See Commonwealth v. Carrasquillo, 489 Mass. 107, 116-117 (2022). Nevertheless, this privacy interest must give way to the government's legitimate need to investigate certain criminal conduct under appropriate circumstances, such as requests to wiretap pursuant to G. L. c. 272, § 99.

"A wiretap warrant may only issue '[u]pon a showing . . . that there is probable cause to believe that a designated offense has been, is being, or is about to be committed . . .[,]'" Commonwealth v. Long, 454 Mass. 542, 555 (2009), quoting G. L. c. 272, § 99 E (2), and that a nexus exists between the offense and organized crime. See id. at 556; Commonwealth v. D'Amour, 428 Mass. 725, 735 (1999). In addition, a warrant authorizing a wiretap is proper only upon "a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried." G. L. c. 272, § 99 E (3). See Commonwealth v. Fenderson, 410 Mass. 82, 83 (1991). This necessity requirement "is meant to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. . . . In determining whether the Commonwealth has met its burden, the affidavit should be read in a practical and commonsense manner" (quotations and citations omitted). Id. at 83-84.

1. Standard of review. Where the motion judge relied solely on documentary evidence, we review both his findings of fact and conclusions of law de novo. See Commonwealth v. Johnson, 481 Mass. 710, 714 (2019), quoting Commonwealth v. Monroe, 472 Mass. 461, 464 (2015). Ultimately, these appeals turn on whether the motion judge erred in concluding that the

facts set forth in the affidavits and addenda were "'minimally adequate' to support findings made by the issuing judge."

D'Amour, 428 Mass. at 736, quoting United States v. Smith, 726 F.2d 852, 864 (1st Cir. 1984).

2. Minori wiretaps. Minori's sole challenge focuses on the necessity requirement of G. L. c. 272, § 99. He asserts that traditional investigative techniques employed by BLETF detectives were highly successful in uncovering information on the alleged illegal drug conspiracy, thereby rendering the wiretaps sought through the warrant application merely a "useful additional tool" in furthering the investigation rather than a necessity. We disagree.

An affidavit is adequate to establish necessity for the purposes of the statute "if it indicates a reasonable likelihood that normal investigative techniques have failed in gathering evidence, or would fail if attempted." Fenderson, 410 Mass. at 83-84. "Failure" is relative in this context -- "[t]he Commonwealth need not show that traditional investigative techniques were wholly unsuccessful or that the police had exhausted all other investigative procedures before filing its application for a warrant authorizing a wiretap." Id. at 83, quoting Commonwealth v. Wilson, 405 Mass. 248, 250 (1989). To be sure, investigators mined a significant trove of incriminating evidence against Minori and a number of his

associates through traditional investigative methods. The Minori affidavit, however, averred that investigators believed that there was more to learn about this highly organized, experienced, and complex network that they could not discover using traditional means. See United States v. Santana-Dones, 920 F.3d 70, 77 (1st Cir. 2019) ("the inquiry must be directed to whether traditional investigative procedures already have succeeded or would be likely to succeed in laying bare the full reach of the crimes that are under investigation"). It described ten different investigative methods and explained which were successful or at least provided limited information, which largely failed, and which were not attempted based upon the view that they likely would be fruitless.⁴ Based upon our

⁴ The affidavit stated: (1) confidential informants provided investigators with valuable information, but could not disclose fully the inner workings of the organization; (2) undercover police work was ruled out because of potential danger after detectives learned that informants were compelled to ingest fentanyl; (3) pen registers and toll records were obtained, however they offered limited value because they did not identify the caller or reveal the content of the conversation; and (4) physical surveillance, (5) photographic surveillance, and (6) trash pulls likewise proved to be of limited use due to Minori's familiarity with police and because observations of members of the organization frequently did not disclose the purpose of their meetings. The affidavit stated that detectives did not utilize (7) the grand jury, (8) search warrants, (9) one-party consent monitoring, or (10) interviews, based upon their belief that those techniques were not feasible alternatives due to expected lack of cooperation and insufficient information regarding potential search locations. They also were concerned about prematurely exposing the investigation to other potential targets.

review of the Minori affidavit, we are satisfied that the facts were at least "minimally adequate" to support the issuing judge's implicit finding that a wiretap was necessary to achieve the specific, reasonable goals of the investigation, the prior successes of the investigative team notwithstanding.⁵ D'Amour, 428 Mass. at 736. The motion judge did not err in denying Minori's motion to suppress the wiretap evidence.

3. Jessamy wiretaps.⁶ Jessamy contends that (1) absent certain inadmissible information included in them, the relevant affidavits failed to establish probable cause for a wiretap of his cell phone, and (2) the motion judge erroneously "transferred" the showing of necessity required for a wiretap from Minori to Jessamy where the affidavits failed to show necessity as to Jessamy.

a. Probable cause. On appeal, Jessamy does not dispute that Minori was involved in an organized criminal drug enterprise, only that he and Hodges were "part of the interconnected, Minori-centered world." Addendum A, however,

⁵ The goals for the wiretap, which are set out in the Minori affidavit, included identifying the scope of the drug distribution operation, detecting locations where drug stashes and illegal proceeds were kept, and determining Minori's sources of supply.

⁶ Our discussion of Jessamy's arguments also addresses Mateo's and Greene's appeals; Mateo was permitted to file a joint brief with Jessamy, and Greene joined in that argument. Mateo's and Greene's appellate arguments track Jessamy's and rise and fall on the same tide.

sets forth facts adequate to support the issuing judge's conclusion that Jessamy and Hodges were key players in a drug operation in which Minori was also involved, and that the operation was related to organized crime. See G. L. c. 272, § 99 A (defining organized crime as "consist[ing] of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services").

According to the relevant affidavits, and specifically Addendum A, Hodges and Minori had a relationship predating April 4, 2017, that involved Hodges supplying Minori with drugs. The affiants averred that Hodges and Minori communicated by text to arrange a meeting on April 4, 2017, and that Hodges delivered a large quantity of heroin to Minori on April 4, 2017. Additionally, the affidavits state that beginning April 5, 2017, Minori expressed his intention to go to Pittsfield, Massachusetts -- where Hodges' operation was based -- to purchase heroin rather than resupplying in Newburgh, New York as he previously had done. This information supported the motion judge's finding of probable cause to believe that a drug link existed between Hodges and Minori. See Commonwealth v. Wallace, 22 Mass. App. Ct. 247, 249 (1986) ("Probable cause exists where the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of

reasonable caution in the belief that an offense has been or is being committed" [quotation and citation omitted]).

Where Addendum A linked Hodges to Minori, Addenda B and C linked Jessamy to Minori through Hodges, as well as by Jessamy's own activities. The affiants asserted that Jessamy and Hodges communicated frequently about drug transactions while the former was incarcerated from March 15, 2017 to April 13, 2017; that these communications reflected that Hodges was running Jessamy's drug distribution operation during that period; that Minori was aware of Jessamy's April 13, 2017 release date from the Berkshire House of Correction; that Minori called Jessamy by phone on April 14, 2017, and arranged to meet him in Pittsfield; that Minori and Jessamy met that same day and Jessamy resupplied Minori with heroin; and that Jessamy was Minori's supplier of Percocet pills prior to his 2017 incarceration. From the Minori affidavit, the issuing judge already was aware of Jessamy's history of drug distribution convictions and that Jessamy was seen by police in 2015 disposing of "dealer blow-outs."⁷ These facts were sufficient for the issuing judge to find probable cause that Hodges and Jessamy were involved with Minori in an organized criminal drug enterprise and that wiretapping their

⁷ The affidavit defined a "dealer blowout" as a plastic sandwich bag with one or both corners missing that is used to package drugs for street sales.

cell phones would produce evidence of their role in the conspiracy.

b. Necessity. Jessamy argues, and the Commonwealth concedes, that the motion judge transferred the necessity showing made by investigators for the Minori wiretap to Jessamy.⁸ The motion judge relied on language from Commonwealth v. Westerman, 414 Mass. 688 (1993), citing the "crucial fact" that the wiretap warrant and subsequent renewals "covered the same organized crime group previously identified; only the number of individuals involved had expanded and the scope of its illegal activities had been clarified." See id. at 697. Thus, "absent a change of circumstances, alternative methods of surveillance remained unlikely to succeed." See id. On its face, that language and the reasoning underpinning it appear logically connected to the circumstances of this case. However, simply applying Westerman to the necessity analysis here fails to recognize important underlying factual differences. In Westerman, the scope of the warrant was expanded to permit interception of different conversations, but for the same target and telephone, in a tightly structured organization. Here, by

⁸ The motion judge determined that "where the Minori affidavit satisfied the necessity requirement, the warrant affidavit to wiretap Jessamy also meets that requirement absent a change of circumstances with respect to whether traditional or alternative investigative methods were likely to succeed," a conclusion the parties agree was not correct on the facts of this case.

contrast, the several wiretap expansions were for different targets and cell phones in a more loosely organized network. Simply transferring the necessity established for the Minori wiretap was not sufficient to satisfy the necessity requirement for the Jessamy application. See G. L. c. 272, § 99 F (2) (b).

To the extent that the parties disagree on whether Massachusetts law allows a direct transfer of a necessity showing from one warrant to another, we need not decide the issue on the facts of this case. At a minimum, Westerman permits a judge to rely on assertions that traditional investigative techniques were tried and failed in a related situation, or were only partially successful, and to conclude that similar efforts would likewise fail, without requiring investigators to go through the motions of trying them in the second case. In Addendum C, investigators incorporated the same list of ten conventional methods outlined in the Minori affidavit, then applied each one to Jessamy, ultimately concluding that for Jessamy, as for Minori, those methods were inadequate to fully accomplish the goals of the investigation.⁹

⁹ In addition to the limitations on conventional methods outlined in the Minori affidavit and which the investigators determined simply would be duplicated here, in part because Jessamy was Minori's supplier and thus took similar precautions against surveillance, detectives pointed to difficulties presented by Jessamy living in a building with multiple occupants as well as to his likely heightened awareness after just having completed a

Based upon this showing, the issuing judge reasonably could have found necessity to issue the Jessamy wiretap. See Fenderson, 410 Mass. at 83-84.

Jessamy's argument that investigators acted too hastily and without putting adequate effort into "normal" investigative techniques before seeking to wiretap Jessamy's phones is misplaced here. First, "[t]here is no rule on the amount of time investigators must try and fail, using other methods, before turning to a wiretap application." United States v. Nelson-Rodriguez, 319 F.3d 12, 33 (1st Cir. 2003). Second, as we have discussed, the affidavits set forth sufficient facts based on a lengthy investigation into the drug operation in which Jessamy was involved to justify the issuance of the wiretap warrants for Jessamy's cell phones, regardless of whatever other steps the investigators might have chosen to take. While a more robust post-incarceration investigation of Jessamy might have been preferable, we acknowledge the different prism through which the issuing judge saw the delicate, real-time balance investigators faced between pursuing further information on a branch of an organized criminal network and risking exposure of their investigation to its targets. Given

jail sentence for a crime that involved discarding drug paraphernalia in the trash.

the full context of the investigation, we are satisfied that the necessity showing made in Addendum C was "minimally adequate to support the findings made by the issuing judge." See D'Amour, 428 Mass. at 736. Accordingly, the motion judge properly denied Jessamy's, Mateo's, and Greene's motions to suppress the wiretap evidence.

4. Davis wiretap. Davis joins in the arguments of his codefendants¹⁰ and separately argues that (1) the relevant affidavit failed to establish probable cause to wiretap his cell phone, (2) expansion of the wiretap to his third cell phone was not supported by probable cause and constituted a complete break in the chain of wiretap warrants, and (3) investigators failed to demonstrate the necessity required to wiretap any of his four cell phones. We are not persuaded.

a. Probable cause. In Addendum #1, investigators described intercepted text messages arranging a meeting between Davis and Jessamy on April 28, 2017, surveilled meetings between them on April 29, 2017, and May 3, 2017, and their subsequent conversations about the weight and quality of the drugs. The affiants also supplied the issuing judge with Davis' and

¹⁰ Although by footnote Davis "joins in [Jessamy's] brief," he does not provide any further explanation or argument on the issues raised there. Accordingly, to the extent that Davis's arguments on the issues raised in Jessamy's brief have not been addressed supra, we do not consider them. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019).

Jessamy's criminal histories involving illegal narcotics distribution. Together, this evidence provided the issuing judge with sufficient information to link Davis to Jessamy and to find probable cause that he was involved in the larger drug distribution operation. Each of Davis' targeted arguments that a probable cause finding was unsupported due to "stale" criminal history, "vague text message conversations," and "no observed hand-to-hand transactions" fails when the information gathered is examined in its entirety. See Commonwealth v. Levy, 459 Mass. 1010, 1012 (2011) (recognizing history with illegal drugs as factor to support probable cause); Commonwealth v. Kennedy, 426 Mass. 703, 711 (1998) (hand-to-hand transaction not required to establish probable cause); Wallace, 22 Mass. App. Ct. at 250 ("innocent explanations . . . do not vitiate the existence of probable cause").

Similarly, Davis' argument regarding the lack of probable cause in Addendum #4 fails.¹¹ On May 17, 2017, and May 19, 2017, Davis disposed of two cell phones. Whereas Davis argues this led to a break in the accumulation of evidence of any new

¹¹ Although not the focus of his argument, Davis asserts that if Addendum #4 did not meet probable cause requirements the evidence seized based upon Addenda #5 and #6 must be suppressed as illegal "fruits" of Addendum #4. See Wong Sun v. United States, 371 U.S. 471, 485-486 (1963). Because his argument regarding Addendum #4 fails, so must this argument regarding Addenda #5 and #6.

criminal conduct, disposing of cell phones in the immediate aftermath of his codefendants' arrests provided further evidence of Davis' involvement in the larger conspiracy and of his intent to evade detection. See Commonwealth v. Ortiz, 487 Mass. 602, 606-607 (2021), quoting Commonwealth v. Beckett, 373 Mass. 329, 341 (1977) ("An inference [drawn from circumstantial evidence] . . . need only be reasonable and possible; it need not be necessary or inescapable"); Commonwealth v. Alessio, 377 Mass. 76, 82 (1979) ("[r]easonable inferences and common knowledge are appropriate considerations in determining probable cause"). Addenda #3 and #4 reflect BLETF detectives' response to this evasion with an active investigation into his new cell phone numbers. These facts, in conjunction with the evidence outlined in the previous addenda and incorporated by reference in Addendum #4, were sufficient for the issuing judge to find probable cause that Davis remained involved with Jessamy in an organized criminal drug enterprise and that wiretapping his third cell phone would produce evidence of his role in the conspiracy.

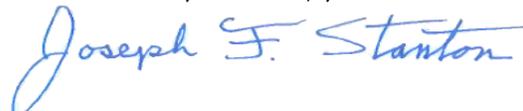
b. Necessity. Davis additionally contends that the investigating officers failed to establish that there were no alternative means of investigation before wiretapping his cell phones, as required by § 99 E (3). We disagree. Mirroring the approach taken with the Jessamy affidavits, Addenda #1 through

#5 describe investigators' efforts to obtain information using traditional techniques and the relative successes, limitations, and failures of each approach. Davis' familiarity with the Berkshire police force, along with inconsistent information regarding his home address, stash locations, and suppliers, were cited by detectives as among the obstacles they faced. As we have discussed, supra, having documented their efforts and demonstrated "a reasonable likelihood that normal investigative techniques have failed in gathering evidence, or [that additional such measures] would fail if attempted," Fenderson, 410 Mass. at 83-84, the affiants provided a sufficient factual basis to support the issuing judge's finding of necessity with respect to each of the Davis wiretaps. The motion judge did not err in denying Davis' motions to suppress wiretap evidence.

Conclusion. The order denying each of the defendants' motions to suppress evidence is affirmed.

So ordered.

By the Court (Desmond, Hand & Brennan, JJ.¹²),



Clerk

Entered: May 25, 2022.

¹² The panelists are listed in order of seniority.