

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SALEM SUPERIOR COURT
CASE NO. ESCR 17-0435

COMMONWEALTH)
)
v.)
)
EXXXXXXXXX SXXXXXXXX-CXXXX,)
Defendant)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

FACTS

In January of 2017, a confidential reliable informant (SW ¶6)¹ provided information to State Police Trooper Daniel Clemens regarding the interstate cocaine and heroin trafficking activities of a Lebanese male known as "Freddy", later identified as FXXX "Freddy" BXXXXXXXXXX. SW ¶7. Police fully identified BXXXXXXXXXX in the search warrant affidavit by providing his full name, date of birth, phone number, Facebook handle, and vehicle information. SW ¶¶ 7, 8.

On March 1, 2017 police stopped BXXXXXXXXXX, finding him in possession of 150 grams of fentanyl. SW ¶ 12.

¹ The Defendant cites to the search warrant affidavit in this case as follows: SW ¶[paragraph number]. The Search Warrant is attached hereto (Attachment A).

Following a debrief, BXXXXXXXXX agreed to provide information about a bigger fish he called "Kapuya," who police later identified as the Defendant EXXXXXXXX De Jesus SXXXXXX. SW ¶¶ 13, 15.

BXXXXXXXXX related that on multiple occasions, he had been in the Defendant's apartment, 169 West Street, 2nd Floor, Lawrence, MA to purchase both cocaine and heroin. SW ¶ 13.

A record check revealed the Defendant's lengthy criminal history including a superior court drug conviction. SW ¶ 15.

Surveillance confirmed that the Defendant lived on the second floor of 169 West St. Officers observed him on numerous occasions in the window of that dwelling. They also observed him checking the corresponding mailbox. SW ¶ 17.

On April 13, 2017, police used BXXXXXXXXX to conduct a controlled buy of two fingers of opiates from the Defendant. The Defendant agreed to the sale, directing BXXXXXXXXX to his West Street home. There, BXXXXXXXXX met with the Defendant and the Defendant's brother, later identified as co-Defendant LXXXXX DXXXXXX,² in front of the house. GJ 29:4-9. The Defendant's brother conducted the exchange. After the sale, BXXXXXXXXX handed off two fingers of fentanyl to police. SW 16.

² The Defendant references a single volume grand jury transcript as follows: GJ page:line. The Grand Jury Minutes are attached hereto (Attachment B).

On May 8, 2017³ police conducted a second controlled buy. On this occasion, BXXXXXXXXX ordered five fingers of opiates from the Defendant. SW ¶ 19. The Defendant directed BXXXXXXXXX to 4 Pleasant Street, Methuen to conduct the transaction. SW ¶ 20. Surveillance then observed the Defendant's brother leave the West Street dwelling and drive directly to the described address in Methuen, inside which the Defendant's brother gave the five fingers to BXXXXXXXXX. SW ¶ 21. BXXXXXXXXX then returned to 169 West Street, where he delivered payment to the Defendant around the rear of the house. SW ¶ 22.

On May 9, 2017 Trooper Clemens applied to the Lawrence District Court for an order of search and seizure.

In his affidavit, Trooper Clemens requested permission to seize an array of items, including "controlled substances," money, packaging implements, and a variety of documents and papers. SW ¶ 38.

In his application, however, Trooper Clemens requested permission only to seize the following specifically described items:

a) Books, papers, documents, legers [sic], records, accounts, evidencing the possession and/or distribution of heroin/fentanyl, including but not

³ On May 3, 2017 agents learned that BXXXXXXXXX continued to engage in criminal activity, outside of the scope of his informant agreement. Officers expressed an intent to deactivate him after completing the instant investigation. SW 18.

limited to, records and other papers reflecting 1) the purchase or acquisition of heroin/fentanyl 2) the identities of the sources of heroin/fentanyl, 3) the storage of heroin/fentanyl, 4) the distribution of heroin/fentanyl, 5) the identities of persons to whom heroin/fentanyl was distributed.

b) Books, papers, documents, ledgers [sic], records, accounts, electronic or otherwise, evidencing the sources of money or other property used.

Based on Trooper Clemens application, the Court issued Search Warrant No. 1718SW113 on the standard form then in use by the Court.

The standard form contained pre-printed language evidencing a finding of probable cause based on "[proof] by affidavit, which [was there]by incorporated by reference."

Additionally, the warrant described the target premises in the appropriate field: "169 West Street, Apartment 2 in the city of Lawrence, is [sic] a three story structure with gray siding and white trim. Detailed description in the attached affidavit."

On May 9, 2017, police and BXXXXXXXXX coordinated a third and final controlled purchase. GJ 23:22. Police planned to execute the search warrant the same day. GJ 24:17.

BXXXXXXXXX called the Defendant and arranged to purchase 25 fingers of heroin. GJ 24:11, 25:19. The Defendant again directed the informant to Pleasant Street in Methuen. GJ 26:3.

Police saw the co-Defendant's brother exit 169 West Street and get into a taxi. GJ 27:24 - 28:17. Police stopped the taxi, locating 250 grams of heroin in DXXXXXX' pants. GJ 28:21, 29:18.

Police approached 169 West Street to execute the search warrant. Id. Despite having only requested and obtained permission to search for documents and papers, police conducted the search in every respect as if it were a drug raid. As evidenced by the attached photographs, the search was exhaustive, thorough, and destructive. See Attachment D.

Officers entered the building, finding the Defendant running towards the basement door. GJ 32:9. Officers searched him, finding empty sandwich baggies in his pocket, a fake ID in his wallet, and a Samsung telephone. GJ 33:6-12. Officers searched the basement, finding a quarter-kilo press inside a television box. GJ 33:19.

Police then searched the target apartment. Officers found the Defendant's wife, co-Defendant JXXXXXX HXXXX in the apartment with three small children. GJ 35:11-14.

While scrutinizing the contents of the home, police noticed a wall mounted air freshener. Officers recalled having "previously located drugs in an exact -- the exact same type of container." GJ 36:19. Armed with that experience, they searched the air freshener, and in fact found drugs inside. GJ 36:11-24.

In the kitchen police found sandwich bags, a grinder, scales, a suspected drug ledger, protective face masks, and several common

cutting agents - Manitol, Inositol, Lactose, and aloe roots. GJ 35:18, 36:1-10, 38:3.

In a bedroom, police found HXXXX's tax returns and a Dominican Republic identification card with the Defendant's picture on it. GJ 37:8. Police also found over \$7,000 throughout the apartment, much of which was stored in diaper boxes with other stashes located in drop ceilings. GJ 37:1, 37:24 - 38:2.

Officers did not present a copy of the warrant to the Defendant or co-Defendant HXXXX, despite the latter's request to see the same. See Attachment C, Affidavit of Defendant EXXXXXXX SXXXXXX.

ARGUMENT

1. OFFICERS SEARCHED FOR AND SEIZED ITEMS WHICH THE WARRANT DID NOT AUTHORIZE.

"The Fourth Amendment states unambiguously that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' As the Supreme Court explained, the particularity requirement as to the objects of the search serves two distinct purposes: (1) preventing general searches; and (2) providing necessary information to the individual whose property is searched or seized. Without specification of the objects for which permission to search is granted, either in the warrant itself or by specific incorporation from a referenced document attached to the warrant, a reviewing court is unable to conclude with any confidence that the magistrate intended to grant permission to search coextensive with the request contained in the application and in the supporting affidavit. The mere fact that the Magistrate issued a warrant does not necessarily

establish that he agreed that the scope of the search should be as broad as the affiant's request. Additionally, without such specification, the person whose property is being searched and seized is unable to determine the lawful authority of the executing officer, his need to search, and the limits of his power to search."

Commonwealth v. Forish, 61 Mass. App. Ct. 554, 559-560 (2004), citing Groh v. Ramirez, 540 U.S. 551 (2004) (internal punctuation and quotations omitted).

In Forish, the affiant presented a proposed search warrant which, in the section calling for a particular description of the items to be seized, "erroneously indicated not the objects of the search, but the location at which he believed these items would be found -- the defendant's residence." Id. at 557 (emphasis in original). As a result, "the warrant contained no description of the objects for which permission to search had been granted." Id., at 558. The affidavit did, however, particularly describe the machine gun and related items for which the affiant wished to search. Id. at 557. The affiant was present at the search warrant execution, and he confined his search to the items set forth in his affidavit. Id. at 558.

Nevertheless, the Court ruled that the warrant failed for want of particularity. In so holding, the Court explained that the application's lack of "particularity as to the objects of the search is not so problematic as the fact that the search warrant itself lacked such particularity." Id. at 560. The Court held

that the warrant failed “both at issuance and on execution.” Id. (emphasis in original).

At issuance, the warrant did not specify the permissible objects of the search. Moreover, a boiler-plate reference to an attached affidavit failed to cure this deficiency. The Forish warrant contained pre-printed language referencing a finding of probable cause based on “[proof] by affidavit, which is hereby incorporated by reference.” Id. at 558. The Court dismissed the relevance of that language, holding that such a “perfunctory statement ... did not supply the requisite particularity.” Id.

The warrant also failed at execution, given the lack of a particularized warrant at the scene. The Court cautioned that “even though the officers acted with restraint in conducting the search, the inescapable fact is that this restraint was imposed by the officers themselves, not by the magistrate.” Id. at 561, quoting Katz v. United States, 389 U.S. 347, 356 (1967) (internal punctuation omitted).

As in Forish, the instant warrant fails at both issuance and execution though, as explained below, it does so in slightly different ways.

A. ISSUANCE

Here, Trooper Clemens presented an affidavit seeking permission to search for a wide array of items. The actual warrant, however, described a much narrower list of items relating

only to books and papers. Thus, to the extent that Trooper Clemens sought permission to search for items beyond the books and papers specifically listed on the warrant form, the warrant explicitly forbade such a search.

In fact, by virtue of the specific list of items to be seized set forth in the instant warrant, the error in this case is even clearer than that in Forish. In Forish, the affiant altogether forgot to include the objects of the search in the proposed warrant. In that instance, the Court left open the possibility that language referencing an affidavit which the magistrate specifically attached might excuse a failure to list the items to be seized on the face of the warrant. Id. at 560.⁴

Here, however, reading the face of the warrant as a whole reveals that a theory of incorporation and attachment could not apply. Although the instant warrant contained the same perfunctory "incorporated by reference" language as in Forish, the specific notations on the actual warrant foreclose a theory of incorporation.

In the field concerning the place to be searched, the instant warrant set forth the following language: "69 West Street,

⁴ The Court encountered such a scenario three years later in Commonwealth v. Valerio, 449 Mass. 562 (2007), ultimately holding that suppression was not required in the circumstances of that case.

Apartment 2 in the city of Lawrence, is a three story structure with gray siding and white trim. Detailed description in the attached affidavit." (emphasis added). The emphasized language alerts a reasonable person reading the warrant (such as an officer at execution or a resident at the premises) that a secondary document contains a more complete description of the place to be searched.

Critically, the field calling for a description of the items to be seized contains no similar language signaling to a secondary document. Instead, it contains a specific list of items followed by a period, and nothing more.

Thus, the warrant's specific usage of language of incorporation in one section (regarding the place to be searched), excludes an inference of incorporation in another section (regarding the items to be seized) which lacks that specific language. In the absence of specific language of incorporation in the items section, no secondary document, attached or otherwise, can be used to expand the scope of the search to items not listed on the face of the warrant. Indeed, given the narrow list of things to be seized on the face of the warrant, an attached affidavit referencing a broader list of things allows only the inference that the magistrate declined to grant police the broad authority they requested.

Simply, there is no basis upon which this Court can conclude that a magistrate authorized a search of anything but the items specifically listed on the face of the warrant. Forish, supra, at 559 ("The mere fact that the Magistrate issued a warrant does not necessarily establish that he agreed that the scope of the search should be as broad as the affiant's request.") As a result, at issuance, the instant warrant authorized a search only for the narrow list of items set forth on its face. Contrast Valerio, supra, at 563 - 564 (face of search warrant failed to state items to be seized, but specifically incorporated and attached supporting affidavit which contained a description of the things to be seized).

B. EXECUTION

The instant warrant also failed at execution, but in a manner more susceptible to condemnation than that in Forish. That is, the officers in Forish possessed a general warrant but confined their search to only specific items. In contrast, the officers here possessed a narrow warrant, but proceeded as if their authority to search was plenary and limitless.

Where officers unshackle themselves from the constraints of a particularized warrant, "the search is considered an unlawful general search, and the evidence must be suppressed." Valerio, supra, at 568. The search in this case was unquestionably a general search.

At all times, police proceeded as if they had unfettered authority to search for narcotics and any and all items conceivably related to narcotics law violations. They tore down ceiling tiles. They dismantled air fresheners based on their prior experience that such containers would be likely repositories of drugs. They searched shopping bags and inspected various containers to determine if they might contain cutting instruments. The unconstrained nature of the search is evidenced in the aftermath of the search depicted in Attachment D.

Moreover, the Commonwealth failed to present a copy of the warrant to either the Defendant or co-Defendant HXXXX. In fact, officers rejected the latter's specific request to see the same. These events raise doubts as to whether the officers had the warrant or its supporting documents in hand at the time of the search -- in itself a violation mandating suppression. Commonwealth v. Guaba, 417 Mass. 746, 754 (1994). Irrespective of whether the officers possessed a copy of the warrant at the scene of the search, their refusal to produce the same exacerbated the injury created by the unconstitutional search. Contrast Valerio, supra, at 573 (no evidence that the defendant communicated any intention to protest, or challenge, the officers' authority to search).

Rather than a mere technical violation, the officers' excess of the warrant's constraints strikes at the heart of a key concern

which prompted article 14's protections in the first place; to ensure that

"no official [be] armed with unfettered authority to enter on private property, search there, and seize what he pleases. By including the designation of the places to be searched and the items to be seized in the warrant, there is particular assurance that the magistrate has not granted such a general power. It is a recognition of the right of the citizen to be free of such official intrusion except by specific judicial authorization that these specifications must be set out in the warrant itself."

Commonwealth v. Gauthier, 425 Mass. 37, 42 (1997).

In the instant case, the officers contorted the limited authority which the court granted - to search for books and papers - into a license for general rummaging. There is no indication that "police believed that their search was limited in scope to the items set forth" on the face of the warrant. Commonwealth v. Rutkowski, 406 Mass. 673, 677 (1990). To the contrary, police conducted the search following the precise script of a drug raid. Such a substantial violation "contravenes the fundamental purpose of the statutory and constitutional prohibitions against the use of a general warrant." Id. As a result, the Court should suppress the fruits of the warrant.

C. PARTIAL SUPPRESSION

The Defendant maintains that the officers' search in gross excess of the limits of the warrant mandates suppression. If, however, the Court determines that the violation was not

sufficiently substantial to merit suppression of the entire warrant, the Court must - at a minimum - grant partial suppression.

In order to admit in evidence items seized outside the scope of the warrant, the Commonwealth must demonstrate that their seizure is justified by an exception to the warrant requirement. In certain circumstances, the plain view exception may justify the seizure of items outside the scope of a warrant. Commonwealth v. Balicki, 436 Mass. 1, 8 (2002).

In Massachusetts, the plain view exception applies only if police come upon the items inadvertently. Id. In this case, the items were discovered inadvertently in neither the legal nor the common sense of the word.

Under Massachusetts law, the inadvertence requirement is met when "police lacked probable cause to believe, before entering the premises, that specific items would be there." Id. at 14-15.⁵ Thus, the application of the plain view doctrine rises and falls on whether police had probable cause to believe the seized items would be present at the locus of the search.

⁵ The motion judge in Balicki considered inadvertence in the common usage of an unplanned or unanticipated occurrence. Id. at 14. The Court rejected that view, noting that "generalized anticipation undoubtedly exists in conjunction with almost every search and to conclude that its presence negates inadvertence would stretch that requirement beyond its intent and limited purpose." Id.

Here, police unquestionably possessed probable cause to believe that drugs, drug paraphernalia, money, and instrumentalities of the drug trade would be located at the target premises. Police received first-hand information regarding the drug activity at the target premises from FXXX BXXXXXXXXXX - a named and identified informant.

BXXXXXXXXXX had been present in the target premises on multiple occasions to purchase both heroin and cocaine. This establishes his basis of knowledge. Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679, 684 (1991) (informant purchased cocaine and observed stolen goods on the premises).

"Reliability is shown when an informant provides his identity to police and is willing to be named in the affidavit in support of the warrant." Commonwealth v. Beliard, 443 Mass. 79, 85 (2004). Police listed BXXXXXXXXXX's full name, date of birth, Facebook handle, phone number and vehicle information in the search warrant affidavit. By that fact, his reliability was established.

Beyond the specific information of the named informant, police conducted two successful controlled buys from the Defendant. These controlled buys further enhanced BXXXXXXXXXX's veracity. Commonwealth v. Desper, 419 Mass. 163, 168 (1994).

This clear demonstration of probable cause⁶ defeats a finding of inadvertence and consequently, the operation of the plain view exception. Thus, the items which police seized, which were not specifically listed in the search warrant must be suppressed. Commonwealth v. Lett, 393 Mass. 141, 147 (1984) ("The requirement of inadvertent discovery demands that if the police have probable cause to search for an item, and are thus systematically looking for it, they must mention it in their warrant or forfeit its admission in evidence.")

CONCLUSION

For the reasons stated above, the Defendant respectfully requests that this Honorable Court enter an order allowing the Defendant's motion to suppress. The Defendant requests that the Court suppress all evidence flowing from the warrant execution. Alternatively, the Defendant requests, at a minimum, that the Court enter an order of partial suppression, and exclude from evidence

⁶ Alternatively, if the Court finds that the sum total of the police investigation here failed to create probable cause to believe drugs and related items would be found at the premises, the Court must also find that police lacked probable cause to search for the books and papers, which the warrant specifically authorized. On the instant facts, a probable cause finding as to one item (drug related papers and books) necessitates a probable cause finding as to the other (drugs and other tools of the trade). Conversely, a lack of probable cause as to the existence of drugs would necessitate a lack of probable cause as to books and papers related to drug dealing.

any item seized during the warrant execution, which was not specifically listed in the warrant.

Respectfully submitted,
EXXXXXXX SXXXXXX-CXXXX,
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