

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Commonwealth v. Pina

453 Mass. 438 (2009) · Decided March 19, 2009

OPINION

IRELAND, J.

Ireland, J. A Superior Court judge allowed the defendant's motion to suppress cocaine, marijuana, cash, and other items seized by police officers during a search of the defendant's apartment, based on his conclusion that the affidavit on which the search was based contained insufficient facts to establish probable cause to believe that drugs would be found therein.

A single justice of this court granted the Commonwealth's application for leave to pursue an interlocutory appeal, and the Appeals Court *439reversed the judge's decision. *Commonwealth v. Pina*, 71 Mass. App. Ct. 653, 654 (2008).

We granted the defendant's application for further appellate review. Because we agree with the judge that the affidavit supporting the search fails to establish a nexus between the defendant's drug activity and his residence, we affirm the order allowing the motion to suppress.

On January 13, 2006, Bryan Safioleas, a detective in the New Bedford police department's organized crime bureau, applied for a search warrant for an apartment at 984 Sharon Street in New Bedford. A magistrate issued the warrant that same day, and the search of the apartment was executed on January 18, 2006.

The sole issue in this case is the sufficiency of the affidavit that accompanied the warrant application. Read in its entirety, see *Commonwealth v. Donahue*, 430 Mass. 710, 715 (2000); *Commonwealth v. James*, 424 Mass. 770, 777-778 (1997); *Commonwealth v. Jean-Charles*, 398 Mass. 752, 757 (1986), the affidavit presents the following facts.

In November, 2005, Safioleas met with a confidential informant regarding a cocaine delivery service being conducted in New Bedford. The informant told Safioleas that he had purchased, and continued to purchase, cocaine from a male known to him as Robert Pina, who, the informant believed, resided in an apartment at 984 Sharon Street. Safioleas confirmed that the person described by the informant was indeed the defendant and the defendant did live at 984 Sharon Street.

The informant told Safioleas that, in order to purchase cocaine, the informant would call a telephone number that had been provided by the defendant. The defendant would instruct the informant to meet him at a certain location and at a certain time, at which place and time the drug

purchase ultimately would be completed. Armed with this information, Safioleas orchestrated a controlled purchase of a quantity of cocaine from the defendant.

The informant placed a telephone call to the defendant to arrange for the purchase. A second New Bedford police detective observed the defendant leave his apartment and drive directly to the location where the informant had been instructed to proceed. Safioleas observed the defendant and the informant meet briefly and then separate. Safioleas then met the informant at a predetermined location, where the informant delivered to him an unspecified amount of a substance, later field-tested positive as cocaine, which the informant stated had come from the defendant.

Safioleas had maintained constant surveillance of the informant from the informant's initial telephone call to the defendant until Safioleas accepted the cocaine. An eight-year veteran of the police department, Safioleas had received extensive training and experience in narcotics distribution.

As a result of his training and experience, he was familiar with common tactics in the distribution of controlled substances, such as cocaine. One such tactic, generally known to Safioleas and others in law enforcement, is a narcotics delivery service that controls the time and place of each delivery.

The affidavit provides the following information. It is common for drug distributors to assign unique meeting and delivery locations to their customers, in order to assist them in identifying the individual who may have provided information to law enforcement officials resulting in their arrest or the issuance of a search warrant. Varying meeting times and locations also makes it difficult for police to establish set patterns and locations for the deliveries and allows drug sales to be conducted away from a dealer's principal residence, where narcotics intended for distribution are concealed.

The increased foot and motor vehicle traffic attracted by the sale of narcotics would arouse the suspicions of neighbors or police. In addition, by separating the delivery locations from the narcotics storage location, dealers limit law enforcement opportunities to connect them to the narcotics they distribute.

The drug transaction witnessed by Safioleas took place on January 10, 2006. Three days later, he applied for a warrant to search the defendant's apartment. We now address the merits. It is established that, in drug cases such as the present one, the affidavit accompanying a search warrant application must contain facts sufficient to demonstrate that there is probable cause to believe that drugs, or related evidence, will be found at the location to be searched. "The affidavit need not convince the magistrate beyond a reasonable doubt, but must provide a substantial basis

for concluding that [drugs or instrumentalities of the drug trade] will be found on the specified premises.” *Commonwealth v. Donahue*, *supra* at 712.

When that location is a residence, there must be specific information in the affidavit, and reasonable *441 inferences a magistrate may draw, to provide “a sufficient nexus between the defendant’s drug-selling activity and his residence to establish probable cause to search the residence.” *Commonwealth v. O’Day*, 440 Mass. 296, 304 (2003). See generally *Commonwealth v. Upton*, 394 Mass. 363, 370 (1985) (basic question is whether magistrate “has a substantial basis for concluding” that article is “probably in the place to be searched....

Strong reason to suspect is not adequate”). “Information establishing that a person is guilty of a crime does not necessarily constitute probable cause to search the person’s residence.” *Commonwealth v. Cinelli*, 389 Mass. 197, 213, cert. denied, 464 U.S. 860 (1983). It follows that probable cause to expect that drugs will be present in a home is not established by the fact that the defendant lives there.

See *Commonwealth v. O’Day*, *supra*; *Commonwealth v. Stegemann*, 68 Mass. App. Ct. 292, 299 (2007); *Commonwealth v. Chongarlides*, 52 Mass. App. Ct. 366, 370 (2001); *Commonwealth v. Laughlin*, 40 Mass. App. Ct. 926, 927 (1996); *Commonwealth v. Olivares*, 30 Mass. App. Ct. 596, 600 (1991).

In *Commonwealth v. Smith*, 57 Mass. App. Ct. 907 (2003), the Appeals Court held that the fact that a defendant drives from his home to the location of a drug transaction, and returns to his home on the transaction’s conclusion, with no other facts connecting the residence to drug sales, does not provide probable cause to search the residence. See *id.* at 908.

The Appeals Court reasoned: “The ‘fundamental flaw’ in the affidavit before us is that it does not explain why there was probable cause to believe that drugs or related evidence would be found at [the defendant’s home] other than it being the residence of the defendant....

The confidential source cited in the affidavit does not indicate any familiarity with the defendant’s residence... nor does the source claim ever to have been inside [the home].... ‘Notably absent [was] reliable specific information from any quarter placing illegal drugs or drug transactions there in the past.’ ” (Citation omitted.) *Id.*, quoting *Commonwealth v. Kaufman*, 381 Mass. 301, 304 (1980).

We agree with the Appeals Court’s analysis. Here, the affidavit relates that the defendant lived in an apartment at 984 Sharon Street, that he sold drugs over an unspecified time period to a police informant, and that, on one occa*442sion, he was observed driving from his apartment to a location where he sold cocaine to the informant. There are no specific allegations, or particularized information based on police surveillance or otherwise, that would permit a reasonable inference that the defendant likely kept a supply of drugs in his apartment.

In *Commonwealth v. O'Day*, *supra*, police suspicions that the defendant kept drugs at his house were corroborated by details concerning the value and quantity of drugs that defendant sold each evening, the frequency of visitors to his home, and the presence of signs at the defendant's home warning unwanted visitors from entering. See *id.* at 303-304.

Here, the affidavit provides no details about the amount and quantity of drugs the defendant had sold in the past, or any other facts tending to demonstrate that the defendant sold drugs from his apartment or that he kept his supply of drugs there. Contrast *Commonwealth v. Blake*, 413 Mass. 823, 829 (1992) (affidavit alleged that defendant was selling drugs out of his apartment and that he told informant cocaine was "on hand").

It is generally true that the connection between the items to be seized and the place to be searched does not have to be based on direct observation. Safioleas had considerable experience in the methods and practices of drug delivery services and in his affidavit provided an informative context in which to evaluate the manner in which the defendant conducted the drug sale observed by police.

The information, nevertheless, that a defendant's actions may be consistent with a commonly known type of drug delivery service does not, without more, create a sufficient probability that this particular defendant kept a supply of drugs at his home.

The only particularized information contained in the affidavit connecting the defendant's observed drug activity with the apartment in which he lived was a single observation of the defendant driving from the apartment to a location where he sold an unspecified quantity of cocaine to the informant.

The lapse of time between that observation and the application for the search warrant (three days) raises further concerns. Probable cause to search a particular location for contraband requires a timely, as well as a substantial, nexus to the illegal activity. Consequently, we conclude that the warrant to search the defendant's apartment was not supported by probable cause. *443The order allowing the defendant's motion to suppress is affirmed.

So ordered.