



## Legal Update

***Search warrant for cell phone was sufficiently particular even though it did not limit areas/files of phone to be searched***

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Commonwealth v Henley, et al. (August 5, 2021)  
SJC 12951-12952

### **Relevant Facts**

Defendants Henley and Zachery were members of a local gang. The victim in the case was a member of a rival gang. Henley and the victim both worked at a nonprofit organization that served at-risk youth, providing them with vocational training and job opportunities.

On February 11, 2015 Henley's supervisor told him that the victim was going to be at the same job site that day and to "keep it cool." Shortly thereafter, Henley reached out to Zachery and they began exchanging texts and phone calls. Henley provided the job site location and a description of the victim's clothing to Zachery who then traveled via MBTA to the job site.

At 10:20 Zachery sent a text saying, "I see the van Cant find yall." After two brief calls, Zachery shot the victim in the head and ran off. The victim died.

Zachery was stopped shortly thereafter and ultimately arrested. Police seized Zachery's cell phone and obtained a search warrant to review its contents. Police also recovered a CharlieCard from his possession.

Both defendants were charged with murder. They were convicted of murder in the second degree. The defendants argue that the motion to suppress the search of Zachery's cell phone as well as the CharlieCard information police received from the MBTA should have been allowed.

### **Discussion**

#### Search of Zachery's cell phone

Search warrants must "particularly describe" the area/place to be searched and the items to be seized. In this case, the search warrant for the cell phone sought eight specific types of

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evidence: “ownership of the cell phone, contacts with persons at the homicide, discussion or knowledge of the homicide, familiarity with persons involved in the homicide, familiarity or contact with locations or items associated with the homicide, communications that led Zachery to arrive at the scene of the shooting, evidence of gang activity, and discussions of firearms.”

The search warrant was silent as to where on the phone the information might be found. The court noted the requirement first articulated in Commonwealth v. Dorelas, 473 Mass. 496 (2016) that search warrants for cell phones must limit the search to certain parts/files of a cell phone, but recognized in this case that such information is not always known by police when they apply for a warrant.

When information as to where on the phone items could be found is not known to officers, the particularity requirement can be met when officers clearly articulate the items they want to seize. The court found that the warrant in this case, “properly limited the search to enumerated categories of evidence related to the crime without limiting where in the electronic contents of the cell phone the search would take place.”

The court did mention in a footnote: “In a case where police know precisely where the evidence for which they are searching is stored, the Dorelas requirement limiting the parts of the cell phone or types of files on the cell phone to be searched stands.”

The court also reiterated the principles set forth in prior cases that search warrants for cell phones must contain a temporal limit and should err on the side of narrowness. The court also states in a footnote that it is unclear whether the plain view doctrine would apply to a digital search. The court noted that, if officers come across evidence inadvertently during a valid search, the proper course to take would be to stop the search and apply for another warrant.

#### CharlieCard

After Zachery was arrested, his CharlieCard was seized. A CharlieCard records when an individual pays a fare to enter the MBTA travel system but it does not track their movements beyond that point; however, the MBTA can use the CharlieCard information to locate surveillance camera footage of the individual. MBTA surveillance cameras are in plain view wherever CharlieCard transactions occur.

In this case, officers asked the MBTA for the travel history, video footage, and still photos for the CharlieCard found on Zachery. Even though no time frame was specified, the police only received information related to two dates, including the date of the murder. The data and video footage revealed Zachery’s travel path on the morning of February 11, 2015 to the murder scene.

The court found that the police investigation of Zachery’s CharlieCard travel history in this case did not constitute a search in the Constitutional sense. Zachery did not have a reasonable expectation of privacy in the CharlieCard information because of the short time period involved and the “aggregation of data points” did not reveal extensive details about Zachery’s movements. For these reasons, the Commonwealth’s use of the information was lawful.

The court did caution in a footnote: “In this kind of case, the better course may be for police to obtain a search warrant for the data. This is especially so where they do not appear to be in control of the amount of data they receive or the time span covered by the data.”

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