

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

25-P-69

Appeals Court

COMMONWEALTH vs. ALLAH J. MALLORY (No. 2).

No. 25-P-69.

Plymouth. December 9, 2025. - April 21, 2026.

Present: Vuono, Shin, & Smyth, JJ.

Controlled Substances. Practice, Criminal, New trial, Affidavit. Search and Seizure, Affidavit, Probable cause. Probable Cause. Constitutional Law, Search and seizure, Probable cause.

Indictments found and returned in the Superior Court Department on June 28, 2016.

Motions for a new trial, filed on February 8, 2021, and February 29, 2024, were heard by Mark C. Gildea, J.

Matthew Spurlock, Committee for Public Counsel Services, for the defendant.

Arne Hantson, Assistant District Attorney, for the Commonwealth.

Mitchell Kosht, Radha Natarajan, & Sara Silva, for New England Innocence Project & another, amici curiae, submitted a brief.

SHIN, J. While executing a search warrant on an apartment in Brockton, police recovered evidence that was later used to

convict the defendant of drug trafficking and firearms offenses.¹ On the defendant's motion for a new trial, a Superior Court judge, who was also the trial judge, found that statements in the warrant affidavit were materially false and that, with these statements removed from the affidavit, the warrant was stale. The judge nonetheless denied the defendant's motion, concluding in essence that the defendant had no remedy because he failed to demonstrate either ineffective assistance of counsel or that newly discovered evidence entitled him to a new trial, and the defendant appeals.² We reverse.³

Background. On April 15, 2016, Brockton police Detective Matthew Graham applied for and obtained a search warrant for the third-floor apartment of a multifamily building in the city of

¹ Specifically, the defendant was convicted of trafficking in heroin, trafficking in cocaine, unlawful possession of a firearm without a firearm identification card, unlawful possession of ammunition without a firearm identification card, and possession of a firearm during a felony. After a bifurcated trial, the defendant was found guilty on two charges of committing firearms violations after having been previously convicted of three predicate crimes under the Massachusetts armed career criminal act, G. L. c. 269, § 10G (c) (ACCA).

² The defendant also filed a direct appeal, raising additional arguments concerning his convictions of unlawful possession of a firearm and unlawful possession of ammunition and the ACCA verdicts. We address that appeal in a separate published opinion issued today. See Commonwealth v. Mallory (No. 1), 106 Mass. App. Ct. (2026).

³ We acknowledge the amicus brief filed in support of the defendant by the New England Innocence Project and the Massachusetts Association of Criminal Defense Lawyers.

Brockton. Graham submitted an affidavit in support of the search warrant application in which he described an investigation of the defendant for drug trafficking. According to the affidavit, Graham spoke to a confidential informant (CI), who claimed to have purchased drugs from the defendant on prior occasions. The CI, while working with officers, then made three controlled drug purchases. On each occasion the CI would call the defendant's telephone number in the presence of Graham and a second officer, order heroin, and enter the third-floor apartment to buy the heroin from the defendant with money provided by Graham. The second controlled purchase occurred nine days after the first, and the third purchase fourteen days after the second.⁴

At issue is the third controlled purchase, which the affidavit describes as follows. Graham, accompanied by Detective "B." Donahue,⁵ met the CI at a prearranged location, where the CI called the defendant to order heroin. The defendant told the CI to come to the multifamily building. While conducting surveillance of the building, Donahue saw the

⁴ Although the warrant affidavit stated that the third controlled purchase occurred "[o]n or about" the fourteenth day after the second purchase, Graham testified at the motion hearing that the third purchase occurred precisely on the fourteenth day, and the judge credited this testimony.

⁵ Although not stated in the affidavit, there is no dispute that the second officer was Detective Brian Donahue.

CI enter the side door and leave a few minutes later. The CI then returned to the prearranged location while being observed by Graham and Donahue and handed Graham a substance that appeared to be heroin, which the CI claimed to have bought from the defendant in the third-floor apartment. Graham took the substance to the police station, field tested it to confirm that it was heroin, and stored it in the evidence locker.

Based on Graham's affidavit, a search warrant issued for the third-floor apartment. The search itself occurred six days after the third controlled purchase and twenty days after the second purchase. During the search, police recovered drugs, a firearm, and ammunition, among other items.

In his motion for a new trial, the defendant claimed that his trial counsel was ineffective for failing to investigate the veracity of the warrant affidavit and requested an evidentiary hearing under Franks v. Delaware, 438 U.S. 154 (1978). According to the defendant, trial counsel should have discovered that the affidavit falsely asserted that Detective Donahue was present during the third controlled purchase. To support this claim, the defendant attached police time sheets, obtained through a public records request, revealing that Donahue was not working on the day of the third purchase.

The judge ordered an evidentiary hearing, prior to which the Commonwealth produced more detailed time sheets for both

Donahue and Graham. These time sheets revealed that, although Donahue was in fact working on the day of the third controlled purchase, the purchase could not have occurred as the warrant affidavit described. The time sheets showed that the only period in which both Donahue and Graham were working that day -- and thus the only period they could have observed a purchase together -- was between 9:13 A.M. and 1:07 P.M. But as shown by the defendant's cellular telephone records, which his trial counsel had obtained before trial, the defendant did not receive any calls during that period, casting doubt on the warrant affidavit's description of how the third controlled purchase unfolded.

After the evidentiary hearing, the judge found that Graham's statements in the affidavit attesting to Donahue's presence during the third controlled purchase were materially false and were, at a minimum, recklessly made. After receiving supplemental briefing, the judge then determined that excising the statements regarding the third purchase from the affidavit rendered the warrant stale. The judge concluded, however, that the defendant was not entitled to a new trial, reasoning, on the one hand, that trial counsel was not ineffective for failing to discover the false statements but, on the other hand, that the defendant failed to show that the new evidence was not reasonably discoverable through reasonable pretrial diligence.

Discussion. We review a judge's decision denying a motion for a new trial "to determine whether there has been a significant error of law or other abuse of discretion."

Commonwealth v. Acevedo, 446 Mass. 435, 441 (2006), quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986). We owe special deference to the motion judge where, as here, he was also the trial judge. See Acevedo, supra at 441-442.

1. Franks violation. As a threshold matter, we agree with the defendant that the judge did not clearly err in finding that the warrant affidavit's averments regarding Detective Donahue's presence during the third controlled purchase were false, requiring that they be excised from the affidavit pursuant to Franks, 438 U.S. at 156. See Commonwealth v. Brown, 479 Mass. 163, 168-169 (2018) (motion judge's factual findings reviewed for clear error). At a Franks hearing, the defendant has the burden to show by a preponderance of the evidence that "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Franks, supra at 155-156. Here, the judge found that the defendant met his burden of showing that the statements describing the third controlled purchase were false and that the falsity "was, at a minimum, reckless." The Commonwealth does not challenge this factual finding, and we see no clear error.

2. Probable cause. The question then becomes whether, after excising the "material that is the subject of the alleged falsity or reckless disregard," the remaining content of the affidavit establishes probable cause. Franks, 438 U.S. at 171-172. Contrary to the Commonwealth's contention, in answering this question, we do not measure probable cause only at the time the warrant issued; probable cause must continue to exist at the time of the search. See Commonwealth v. Reddington, 395 Mass. 315, 322-323 (1985); Commonwealth v. Cromer, 365 Mass. 519, 524 (1974). That the police complied with G. L. c. 276, § 3A, which requires that a search be conducted within seven days of issuance of the warrant, does not vitiate this requirement. See Reddington, supra; Cromer, supra.

We agree with the judge that the remaining information set forth in Detective Graham's affidavit was stale by the time of the search. Because drugs can be rapidly consumed and distributed, probable cause to search for drugs diminishes in a short period of time. See Commonwealth v. Malone, 24 Mass. App. Ct. 70, 73 (1987). In Commonwealth v. Pina, 453 Mass. 438, 442 (2009), the Supreme Judicial Court concluded that a single observation of the defendant driving from his apartment to a location where he sold drugs to an informant was insufficient to establish that drugs would be found in the apartment at the time of the search, noting that "[t]he lapse of time between that

observation and the application for the search warrant (three days) raise[d] further concerns." Here, if the references to the third controlled purchase are set aside, a lapse of twenty days occurred between the last incriminating event (the second purchase) and the search. This span of time diminished the likelihood of drugs remaining in the apartment to the extent that the warrant was no longer supported by probable cause. See Pina, supra ("Probable cause to search a particular location for contraband requires a timely, as well as a substantial, nexus to the illegal activity"). Cf. Commonwealth v. Tapia, 463 Mass. 721, 728 n.15 (2012) (warrant affidavit established timely nexus where three controlled purchases were made over eight days, with "the third controlled purchase taking place only two days prior to the issuance and execution of the warrant").

Indeed, the Commonwealth does not contest that a twenty-day lapse would be too long for probable cause to exist if the controlled purchases were isolated transactions. The Commonwealth argues, however, that staleness is not a concern because the defendant was engaged in a continuous criminal operation. It is true that otherwise stale information can support probable cause if the warrant affidavit establishes that the illegal activity was protracted and continuous. See Reddington, 395 Mass. at 323; Malone, 24 Mass. App. Ct. at 74. But the affidavit here does not establish continuous activity.

This case resembles Malone, where two informants, whose reliability was assumed, each observed, more than a week apart, evidence of drugs in the defendant's apartment. See Malone, supra at 71-72. We concluded that these two observations "were of isolated incidents, not a continuing criminal operation," such that the warrant was stale by the time it issued one to two weeks after the second observation. Id. at 74. Likewise, here, the first two purchases described in the affidavit did not constitute "a series of observed transactions" sufficient to establish continuous criminal conduct. Id., quoting Commonwealth v. Zayas, 6 Mass. App. Ct. 931, 931 (1978). See Reddington, supra (tip had become stale by time warrant issued seven months later where affidavit did not establish "[p]rotracted and continuous activity . . . inherent in a large-scale narcotics operation" [citation omitted]); Commonwealth v. Hart, 95 Mass. App. Ct. 165, 168 (2019) ("isolated observation of one weapon by a single individual" did not establish that possession of firearms was continuous).

We do not agree with the Commonwealth that Commonwealth v. Rice, 47 Mass. App. Ct. 586 (1999), is analogous. There, "the affidavit averred ongoing activity over some fifteen months from November, 1995 (first tip), through February, 1997 (controlled buy)." Id. at 590. The information establishing ongoing activity included a tip from an unnamed informant; a

corroborating tip from a named, reliable informant; a second corroborating tip from a different named informant; and a controlled purchase. See id. at 587-588. We concluded that these observations, spread out over fifteen months, rated "high" on the "quality scale" and established that the defendant was engaged in a continuous criminal operation. Id. at 590.

Here, in contrast, the remaining content of the warrant affidavit describes only two controlled purchases, which occurred nine days apart. These incidents do not establish that the defendant was engaged in a continuous criminal operation of "the duration and nature of" that established in Rice, 47 Mass. App. Ct. at 591. Cf. Commonwealth v. Cruz, 430 Mass. 838, 843 (2000) (warrant affidavit established protracted and continuous criminal conduct where it "described six controlled purchases of increasing amounts of cocaine over a period of four weeks, and also asserted that plans were being made to buy more cocaine from the defendants in the future"); Commonwealth v. Spano, 414 Mass. 178, 182-185 (1993) (warrant affidavit established ongoing drug operation by describing detailed tips from two informants, one controlled purchase, and police observations of known users visiting premises over period of five months). Moreover, the averments here were not corroborated or freshened by police surveillance. Cf. Spano, supra at 183-184. Although the Commonwealth urges us to also consider "the defendant's prior

reputed history of selling narcotics to the [CI]," this alleged history does not establish a pattern of purchases prior to the first purchase, where there is nothing in the affidavit showing that the CI, who is unnamed, has provided reliable information in the past. See Reddington, 395 Mass. at 324 (tips from "informants of unestablished reliability" inadequate to show continuous criminal conduct). Likewise, the affidavit's averments about the defendant's prior arrests for "narcotics offenses" do not add anything material to the analysis, where the affidavit sets out "no details about the purported arrest[s], including when [they] occurred, whether charges were brought, whether contraband was seized, or the ultimate disposition." Commonwealth v. Reyes, 423 Mass. 568, 572-573 (1996).

For these reasons we conclude that, when the references to the third purchase are excised from the warrant affidavit, the remaining allegations do not establish that probable cause existed at the time of the search. The warrant was therefore invalid. See Franks, 438 U.S. at 156.

3. Remedy. As discussed, although the judge likewise determined that the warrant was invalid, he ultimately concluded that the defendant was not entitled to a new trial. The judge reasoned that trial counsel's failure to discover the false statements in the warrant affidavit did not constitute

ineffective assistance because the defendant failed to demonstrate that an ordinary fallible attorney would have investigated the veracity of the affidavit. At the same time, the judge rejected the defendant's alternative argument that a new trial should be granted based on newly discovered evidence, on the apparent basis that the defendant failed to demonstrate that the evidence would not have been reasonably discoverable through reasonable pretrial diligence by a different attorney.

We agree with the judge that trial counsel was not constitutionally ineffective. In an affidavit submitted with the defendant's new trial motion, trial counsel averred that the defendant told him before trial that "the alleged buys never occurred" and asked him to file a motion to suppress under Franks. Trial counsel further averred that he "obtained the defendant's cellular telephone records for the period during which the alleged controlled buys occurred" and, "[a]fter consideration and investigation, [he] saw no basis for a motion under Franks." As those records show, the defendant received numerous telephone calls of short duration on all three days of the alleged purchases. Thus, rather than supporting the defendant's account that none of the purchases occurred, the records appeared to corroborate the statements in Detective Graham's sworn affidavit. In these circumstances trial counsel could reasonably have disbelieved his client and determined that

the controlled purchases did occur as described in the affidavit. In addition, there is no evidence in the record to suggest that trial counsel should have been aware that the affidavit contained false statements regarding the third purchase in particular. We therefore conclude that trial counsel's decision not to investigate the veracity of those statements -- and instead to focus on other grounds in support of suppression -- did not fall below the standard of an ordinary fallible attorney. See Commonwealth v. Walker, 443 Mass. 213, 225-226 (2005) (counsel not ineffective for failing to investigate mental health defense where he had no information to suggest defendant was suffering from mental illness).

But for the same reason, i.e., because a reasonable attorney would not have been alerted to the presence of false statements in the affidavit, we conclude that the evidence showing the statements to be false qualifies as newly discovered. "Evidence is newly discovered where it was 'unknown to the defendant or his counsel and not reasonably discoverable' through 'reasonable pretrial diligence.'" Commonwealth v. Epps, 474 Mass. 743, 764 (2016), quoting Grace, 397 Mass. at 306. A defendant may raise a claim of newly discovered evidence for the first time in a posttrial motion for a Franks hearing. See Commonwealth v. Ramirez, 416 Mass. 41, 47 n.12 (1993).

Here, that the warrant affidavit contains falsehoods about Detective Donahue's presence during the third controlled purchase was not known to the defendant or his counsel before trial and, we conclude, not reasonably discoverable through reasonable pretrial diligence. There is nothing on the face of the affidavit to suggest that Detective Graham's sworn statements were false, and again nothing that would have led trial counsel to focus on the allegations regarding the third purchase in particular. Although an exceptionally diligent attorney might have obtained the officers' time sheets and discovered the false statements before trial, the standard is whether the evidence was reasonably, not theoretically, discoverable, and the defendant has met his burden of showing it was not. See Ramirez, 416 Mass. at 47 n.12 (evidence suggesting that warrant affidavit fabricated existence of CI was newly discovered because "defendant could not reasonably [have been] expected to uncover" it earlier). We therefore agree with the defendant's argument -- unchallenged by the Commonwealth on appeal -- that the evidence invalidating the warrant was newly discovered. See id. at 52-53, quoting People v. Lucente, 116 Ill. 2d 133, 150 (1987) ("Rejecting the defendant's showing [about falsehoods in warrant affidavit] would erect an insurmountable barrier in anonymous informant cases that effectively would nullify the intent of Franks to 'provide

meaningful, albeit limited, deterrence of and protection against perjurious warrant applications").

In this situation Ramirez entitles the defendant to a remedy -- namely, the search warrant must be invalidated, and the evidence seized must be suppressed. See Ramirez, 416 Mass. at 47 n.13.⁶

Conclusion. The order denying the motion for new trial is reversed. The judgments are vacated, and the verdicts are set aside.⁷

So ordered.

⁶ Deciding the appeal on this basis, we need not reach the defendant's claim under Brady v. Maryland, 373 U.S. 83 (1963).

⁷ As discussed in our separate opinion resolving the defendant's direct appeal, see note 2, supra, we also vacate the convictions of unlawful possession of a firearm and unlawful possession of ammunition pursuant to Commonwealth v. Guardado, 491 Mass. 666, S.C., 493 Mass. 1 (2023), cert. denied, 114 S. Ct. 2683 (2024), and reverse the ACCA verdicts. For the reasons stated in that opinion, the defendant may not be retried on the counts of the indictments charging him under the ACCA. See Mallory (No. 1), 106 Mass. App. Ct. at .