



## Legal Update

### Pole Camera Surveillance of a Residence for 15 days was a Search

---

Commonwealth v. Comenzo SJC-13119 (February 11, 2022)

Relevant facts: In 2013 police received information from the National Center for Missing and Exploited Children about images that were posted to the social media platform Tumblr. The detective determined that two of the images constituted child pornography. The detective was able to trace the IP address to an account that belonged to the defendant and a three-level multifamily house.

Police established surveillance of the building and found a relationship between the comings and goings of the defendant and the operation of lights in certain areas of the building. They were able to narrow the defendant's apartment down to two units. Despite conventional surveillance techniques and detective work (which included inquiries to National Grid, Verizon, and the United States Postal Service), officers were unable to determine which of the two apartments belonged to the defendant.

A pole camera was installed across the street from the building and captured views of the front door, left side of the building, and the driveway for approximately 15 days. The police did not obtain a warrant prior to installing the camera. The views captured by the camera could be seen by someone physically present at the scene. The camera had a live feed and also recorded. When officers were watching the live feed, they could move the camera 45 degrees in both directions and could zoom in or out. The recordings were searchable by date and time.

Based upon the pole camera video footage officers were able to identify the unit/apartment the defendant resided in. This information was used to apply for a search warrant for that unit. During the execution of the search warrant, the defendant's computer and hard drives were seized. The defendant was indicted for possession of child pornography. He moved to suppress the evidence arguing that the pole camera surveillance constituted an unlawful search.

**For specific guidance on the application of these cases or any law, please consult your supervisor or your department's legal advisor or prosecutor.**

## Discussion:

“Whether the use of a pole camera without a warrant is unconstitutional depends on (1) whether it was a search under art. 14 and, if so, (2) whether there was probable cause to conduct the search at the time it began.”

A search occurs in the Constitutional sense if the actions of the government intrude upon an individual’s reasonable expectation of privacy. A person must prove two things to establish a reasonable expectation of privacy:

1. they manifested a subjective expectation of privacy in the item to be searched; and
2. society would recognize that expectation as reasonable.

In support of his motion to suppress, the defendant submitted an affidavit stating he was unaware that there was a pole camera monitoring the front door of the building and that he did not expect police to monitor his movements using such a camera. This was enough to prove his subjective expectation of privacy.

The court then turned to the question of whether society would recognize that expectation as reasonable. The court reiterated its finding in prior cases such as Commonwealth v Mora, 485 Mass. 360 (2020) that “pole cameras trained on a suspect’s home are ‘of greater constitutional significance’ than those directed at public spaces.”

In Mora the court found that pole camera surveillance targeting two “residences for more than two months was a ‘search’ under art. 14. In the future, before engaging in this kind of prolonged surveillance, investigators must obtain a warrant based on probable cause.” The Mora court did not specifically define what “prolonged surveillance” means.

In this case, the camera was across the street and captured footage of the front door, left side of the building and the driveway for approximately 15 days. The camera allowed officers to view the building in real time or to search the footage later. “We conclude that under these circumstances the defendant’s expectation of privacy was reasonable; thus, the pole camera surveillance constituted a search under art. 14.”

The court found that the police had probable cause to believe someone in that building was engaged in the distribution of child pornography. The police also “had probable cause to believe that the pole camera surveillance would lead to additional evidence of the crime, including, but not limited to, determining the defendant’s unit number so that they could apply for a search warrant.”

The motion to suppress was properly denied.

NOTE: This investigation took place before the Mora decision issued. If this investigation took place after Mora, officers would have been required to get a search warrant before installing the camera.

**For specific guidance on the application of these cases or any law, please consult your supervisor or your department’s legal advisor or prosecutor.**