



## Legal Update

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October 2018

***The Appeals Court holds that police had probable cause, first to seize several cell phones and then to search their digital content, and that an 85-day delay in seeking the second warrant to search the cell phones was not unreasonable because the Commonwealth's interest in preserving the evidence outweighed the defendant's possessory interest in the phones.***

***Commonwealth v. Anthony Arthur***, 94 Mass. App. Ct. 161 (2018): On December 15, 2015, the defendant, Anthony Arthur, and two accomplices, Richie Williams and Keyarn Richardson, participated in a coordinated attack on a home in Dorchester. Boston police officers in the area observed the defendant, who was driving one vehicle, and Williams, driving the other vehicle with Richardson inside, park their vehicles on Brinsley Street. Williams and Richardson walked towards Morse Street, where they approached a house while brandishing a firearm. Police saw one of the men fire shots at the house at 7 Morse Street and take off running. The defendant, who had peered through the yards in the area of 7 Morse Street "as if he was waiting for something to occur," quickly returned to his vehicle. Police stopped the vehicle before it could leave the scene.

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

An officer observed two cell phones in the defendant's car -- one on the driver's seat and one on the front passenger's seat. The officer observed three cell phones in the car initially driven by Williams -- two on the driver's seat and one in the passenger's side door handle. The police impounded both cars and their contents.

Three days after impoundment, on December 18, 2015, the police sought and received the first warrant to search both cars and to seize all the cell phones. The affidavit in support of the first warrant set forth, among other things, the facts of the coordinated attack. The affidavit specifically identified where the cell phones were located and requested authorization to "seize" them. The warrant was executed on the same day, the cell phones were seized, and they were thereafter held as evidence for trial.

The Commonwealth did not seek to view the contents of the cell phones until 85 days after the impoundment when police applied for and received a second search warrant.

The defendant was indicted for armed assault with intent to murder, in violation of G. L. c. 265, § 18(b); attempted assault and battery by discharging a firearm, in violation of G. L. c. 265, § 15F; and possession of a firearm without a license, second offense, in violation of G. L. c. 269, § 10(h)(1). The defendant filed a motion to suppress the evidence found in the cell phones that were taken from his vehicle. The defendant argued that the 85-day delay in seeking the second warrant was unreasonable based on the holding in *Commonwealth v. Onyx White*, 475 Mass. 583 (2016), and that the affidavit supporting the second warrant failed to show a sufficient nexus between the cell phones and the alleged criminal activity. The superior court allowed the motion and the Commonwealth appealed.

**Conclusion:** The Appeals Court concluded that this case is materially distinguishable from the *White* case and it held the following:

1. Police had probable cause to seize the cell phones.
2. The delay in seeking the second the second warrant was not unreasonable and there was a sufficient nexus established between the cell phones and the alleged criminal activity.

**1<sup>st</sup> Issue: Did police have probable cause to seize the phones?**

The Appeals Court found that police had probable cause to seize the phones because police had particularized evidence linking the cell phones to the crime. The police observed the crime in process, which appeared to be a coordinated attack carried out using separate automobiles, where one could readily infer that the occupants had been in communication. The vehicles left in sequence and the defendants left multiple cell phones on the seats of the

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cars, leading to the reasonable inference that the cell phones had been used to coordinate the crime. The facts suggest that the cell phones were "evidence of the crime independent of their content," and that the cell phones would be maintained as evidence regardless of whether their contents were ever searched." The cell phones also would be relevant at trial to provide details as to how the crime was planned and coordinated. The location of the cell phones could also be significant in proving joint venture of the suspects involved in the incident. Regardless of whether the cell phones might contain additional, relevant evidence through digital data, the cell phones alone possessed evidentiary value.

In *White*, by comparison, the police lacked probable cause to seize the cell phone because police did not have any particularized evidence linking the cell phone to the crime. The police seized the cell phone of a high school student who was a suspect in a robbery-murder at a convenient store involving multiple people. Police did not have any particularized reason to believe the student's cell phone was involved in the crime or that it would contain any evidence. The officer simply believed that the cell phone might contain evidence based entirely on his experience and generalized reasoning that, where the robbery was a joint venture, the cell phone might contain relevant evidence. *Id.* at 590.

## **2<sup>nd</sup> Issue: Was the delay in seeking the second warrant unreasonable?**

The delay in seeking the second warrant was not unreasonable because police lawfully possessed the cell phones and would be through trial. There was no substantial interest under the Fourth Amendment requiring that the search of the contents of the cell phones occur expeditiously. Unlike *White*, the police here diligently obtained a search warrant to seize the cell phones within three days of the impoundment of the vehicles.

Further distinguishing *White*, the Appeals Court ruled that the delay in obtaining the second search warrant to search the content of the phones was not unreasonable because the police lawfully possessed the phones and could keep them for use at trial. The Court balanced the Commonwealth's substantial interest in maintaining the cell phones as evidence against the defendant's possessory interest in the phones during the delay. The Court found that the defendant showed no basis to expect the return of the phones to him prior to trial; hence his possessory interest was outweighed by the Commonwealth's need to preserve evidence.

## **3<sup>rd</sup> Issue: Did police establish a nexus between the crimes and the content of the cell phones?**

The Appeals Court found that there was a sufficient nexus between the crimes and the cell phones. As the *White* court noted, the nexus "need not be based on direct observation. "It may be found in the type of crime, the nature of the evidence sought, and normal inferences

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as to where such evidence may be found." *White*, 475 Mass. at 589. In the present case, the particularized facts linked the cell phones to the crime. Here "the factual and practical considerations of everyday life" tell us that the cell phones found on the car seats likely were used to coordinate the crime, including an exchange of calls, text messages, and perhaps other information in the days, hours, and minutes leading up to the attack.

*Commonwealth v. Gentile*, 437 Mass. 569, 573 (2002).

**NOTE:** This case falls in line with those cases that have found particularized facts to support a search of the contents of a cell phone:

- *Commonwealth v. Cruzado*, 480 Mass. 275, 282 (2018) (probable cause to search cell phone found next to sleeping defendant, where he had been recently overheard on a cell phone confessing to crime);
- *Commonwealth v. Holley*, 478 Mass. 508, 522-524 (2017) (sufficient nexus to search cell phone contents where defendant telephoned victim while entering victim's residence shortly before shooting connected to drug transaction);
- *Commonwealth v. Perkins*, 478 Mass. 97, 104-106 (2017) (warrant established probable cause to search call logs of seized cell phones where police had knowledge of defendant's cell phone use to arrange drug transactions);
- *Commonwealth v. Dorelas*, 473 Mass. 496, 502-504 (2016) (probable cause to search cell phone where witness reported defendant receiving threats on his cell phone before shooting). Based on the observations of the police and the facts of the case, the Appeals Court held that there was a sufficient nexus connecting the cell phones to the crime.

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