COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2018-00540
2018-00542
2018-00543
2018-00544
2018-00592
2018-00593
2018-00594

COMMONWEALTH

vs.

NELSON MORA, ET AL.,

MEMORANDUM AND DECISION ON DEFENDANTS' MOTIONS TO SUPPRESS EVIDENCE DERIVED FROM POLE CAMERAS

PROCEDURAL AND FACTUAL BACKGROUND

Defendant Nelson Mora ("Mora") is alleged in this case to be an organizer/leader of a large-scale illegal drug distribution operation based in Essex County. It is alleged that Mora was engaged in the illegal distribution of oxycodone, fentanyl, and cocaine. Defendants Gregory Inuyama ("Inuyama"), Frantz Adolphe ("Adolphe"), Randy Suarez, and Aggeliki Iliopoulos ("Iliopoulos") are alleged to have been associated with Mora and involved to varying degrees in his drug distribution operation. Four other alleged participants have already pled guilty to

various drug offenses. [2018-00545, 00546, 00547, and 00548]. Defendant Erick Delrosario ("Delrosario") is alleged to have been an oxycodone supplier for Mora. Lymbel Guerrero ("Guerrero") and Richard Grullon-Santos ("Grullon-Santos") are alleged to have been fentanyl suppliers for Mora.

This case arose out of a long-term investigation by the Office of the Attorney General of the Commonwealth of Massachusetts. The investigation spanned approximately seven months. State police investigators were assisted by investigators from DEA, Lynn Drug Task Force, and Beverly Police Department. In November 2017, the investigation was initiated with the assistance of a confidential informant ("CI") who identified Mora as a large-scale drug distributor. At the time the CI did not know Mora's true name or residential address, but was willing to introduce an undercover officer ("UCO") for purposes of arranging controlled buys from Mora. Over time, the UCO made ten controlled buys of oxycodone and fentanyl from Mora.

On March 19, 2018, the court (Feeley, J.) issued the first of a series of wiretap warrants for a cell phone identified as used by Mora.[1] The intercepted calls assisted investigators in identifying associates/customers of Mora and their cell phone numbers. Continued warrants to intercept communications on the Mora phone, as

[1]All warrants in this case were authorized and issued by the undersigned associate justice. This court (Feeley, J.) has not and will not adjudicate challenges to the validity of the various warrants in this case.

well as new intercept warrants for phones associated with Delrosario and Guerrero, were soon issued by the court, with continued authorization through the middle of May 2018.[2] Telephone ("ping") and GPS warrants were also issued by the court during the active part of the investigation. On May 21, 2018, in conjunction with the arrests of defendants, the court issued search warrants for eight or nine different locations. Those locations included the residences of Mora, Adolphe, Inuyama, Grullon-Santos, Suarez, Guerrero, and Iliopoulos. Thirteen individuals were arrested. Execution of the various residential search warrants yielded almost 2,400 pills, more than a kilogram of heroin/fentanyl, seventy-five (75) grams of cocaine, and approximately $415,000 in U.S. currency.

Before (and after) the issuance of the initial wiretap warrant, investigators installed "pole cameras" on various telephone/electrical poles in public locations near but not on the property of a number of defendants. The purpose was to conduct surveillance of residences, or in one instance a street that the investigation had disclosed was associated with one of more of the defendants and their unlawful activities. The pole cameras were installed without notice to any defendant, without trespassing on any defendants' property, and without prior judicial authorization by

[2]Defendants' motions to suppress wiretap evidence were denied by the court (Lang, J.) on August 9, 2019.

means of a search warrant. The following stipulations were filed with the court:

2. The pole cameras were installed in fixed locations in the area of the following addresses:

   a. 68 Hillside Avenue, Lynn, MA, which is the residence of defendant Nelson Mora. The Hillside Avenue camera afforded a view of a portion of the front of the house, as well as the street on which the house is situated and the sidewalk that run in front of it. The pole camera footage for this location runs from December 6, 2017 at 11:43 a.m. through May 23, 2018, at 3:19 p.m. Mora was regularly seen on the footage from the Hillside Avenue camera. On a few occasions, defendants Inuyama, Adolphe, Guerrero, and Suarez and /or vehicles investigators knew to be operated by them were also seen on the footage from this location.

   b. 8-10 Swampscott Avenue, Peabody, Ma, which is the residence of defendant Randy Suarez. The Swampscott Avenue camera afforded a view of the front of the residence, as well as a driveway in front of the house (partially obscured by a neighboring Dunkin' Donuts), part of a second driveway on the side of the house, and the street on which the house is situated. The pole camera footage for this location runs from March 23, 2018 at 12 p.m. thorough May 23, 2018 at 3:19. Suarez was

regularly seen on the footage from the Swampscott Avenue camera. On a few occasions, Guerrero was also seen on the footage from this location.

c. Shepard Street, Lynn, MA. Defendant Frantz Adolphe resides at 9 Shepard Street, though the Shepard Street camera was not focused on his residence or any other particular residence.[3] The camera afforded a view down the length of Shepard Street, which included a partial view of the top of the driveway to Adolphe's residence. The pole camera footage for this location runs from April 4, 2018 at 8:48 a.m. through May 23, 2018 at 3:20 p.m.. Mora and Adolphe were regularly seen on the footage from the Shepard Street camera. On at least one occasion, defendant Grullon-Santos was seen on the footage from this location.

d. 7 Ruthven Terrace, Lynn, MA, which is the residence of defendant Richard Grullon-Santos. The Ruthven Terrace camera afforded a partial view of the front of the house, which was largely obscured by a tree in a neighboring yard. The pole camera footage for this location runs from May 18, 2018 at 8:13 a.m. through May 23, 2018 at 3:20 p.m. On at

[3]Information from the CI at the beginning of the investigation included a report that Mora (identity then unknown) would use different meet locations in Lynn to conduct his business, but used Shepard Street in Lynn as one of his primary meet locations.

least one occasion, Grullon-Santos was seen on the footage from the Ruthven Terrace camera.

e. 9 South Elm Street, Lynn, MA, which is the residence of Carlos Perez. Perez is not a charged defendant in this case.. The pole camera footage for this location funs from may 9, 2018 at 7:35 a.m. through May 23, 2018 at 3:20 p.m.

3. Each of the cameras captured video but not audio.

4. While the cameras were operating, investigators could remotely view the video from a web-based browser in real time, as well as search and review previously recorded footage.

5. The cameras had zoom and angle movement capabilities, which could be operated remotely by investigators (in real time only). In some instances, the zoom function enabled investigators to read the license plate on a car. None of the pole cameras enabled investigators to see inside any residence. The cameras captured only publicly viewable areas and activity.

6. The cameras did not have any infrared or enhanced night vision capabilities.

7. All cameras recorded without limitation persons coming and going from the above-listed locations.

8. While the investigation was ongoing, the data from each pole camera was

stored on a State Police server. After the cameras were turned off, the data was removed from the server and transferred onto hard drives for storage.

DISCUSSION

1. The Other Defendants

In total, five pole cameras were used, but only three cameras covered the fronts of residences occupied by named defendants. Those three defendants are Mora, Suarez, and Grullon-Santos. Mora and Suarez (and Guerrero) filed motions to suppress.[4] The remaining defendants were permitted by the court to join in those motions. However, the remaining defendants (including Guerrero) are in a different position than those defendants whose residences were subject to continuous pole camera coverage periods ranging from six days to five and one-half months. The camera outside Mora's residence was in place for five and one-half months. The camera outside Suarez's residence was in place for two months. The camera outside Grullon-Santos' residence was in place for six days. The camera on Shepard Street, which focused on the street and only covered the very top of Adolphe's driveway, was in place for one month and three weeks.

The defendants other than Mora, Suarez, and Grullon-Santos (the "other

[4]The motions seek to exclude pole camera evidence at trial. They also seek to excise any pole camera references, or evidence derived therefrom, from search warrant affidavits and to thereafter challenge the warrants as lacking probable cause.

defendants"), concede that they stand on a different footing than Mora, Suarez, and Grullon-Santos, as their residences were never subject to continuous pole camera surveillance. The invasion of their privacy, and their expectation of privacy for those occasions when they were depicted on pole camera footage, was in this court's view, de minimus.[5] Even if an occasional depiction on one of the residential pole cameras at one of the covered residences, or in the middle of Shepard Street, is sufficient to establish standing to contest the constitutionality of the pole cameras, an occasional depiction on pole camera footage at another's residence or street is a far cry from continuous video surveillance coverage of one's residence. The arguments advanced by Mora, Suarez, and Grullon-Santos focus primarily on the continuous and lengthy video surveillance of their residences and the information about the residents' lives that may be reflected on the pole camera footage. The arguments advanced by Mora, Suarez, and Grullon-Santos also gain strength, as opposed to the other defendants, because the pole cameras focused on their homes, and homes are a protection at the heart of the fourth amendment and art.14.[6] The other defendants do not have the

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[5]In fact, two defendants joining in the suppression motions, Delrosario and Iliopoulos, are not depicted on any pole camera footage. Constitutional rights are personal, and Delrosario's and Iliopoulos' motions to suppress pole camera evidence are denied for lack of standing.

[6]The fourth amendment provides in part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Art. 14 of the Declaration of Rights provides in part, "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his

same invasion of privacy and expectation of privacy arguments as are advanced by Mora, Suarez, and Grullon-Santos. An occasional depiction in footage from pole cameras focused on residences of others (or a public street) does not provide a basis to raise the search issued raised by Mora, Suarez, and Grullon-Santos, who can at least argue that their subjective and objective expectations of privacy were infringed by the continuous, long-term pole camera surveillance of the front's of their residences. The motions to suppress filed or joined in by the other defendants will be denied without further discussion.

2. *United States v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019)

On June 4, 2019, the Honorable William G. Young of the United States District Court for the District of Massachusetts issued his amended decision in *United States* v. *Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019) ("*Moore-Bush*"). It was *Moore-Bush* that prompted the defendants' challenges to the use of fixed, long-term surveillance pole cameras in this case.[7] Prior to *Moore-Bush*, federal case law had pretty much uniformly rejected challenges to pole camera surveillance of residences

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possessions."

[7]The motions to suppress pole camera footage were all filed after *Moore-Bush*, and all referenced the recent decision from the United States District Court for the District of Massachusetts. Prior to *Moore-Bush*, defendants had challenged the wiretap warrants issued in this case, but had not challenged the use of surveillance pole cameras. Thus, it is helpful to start this court's analysis with *Moore-Bush,* a non-binding decision with which this court disagrees.

for lack of a objectively reasonable expectation of privacy. [See multiple case cites in Commonwealth's opposition memorandum, D. 25]. Rejecting First Circuit precedent in light of subsequent Supreme Court precedent undermining it, the *Moore-Bush* court considered the pole camera issue before it as a matter of first impression. *Id.* at 144.

The facts in *Moore-Bush* are remarkably similar to those before this court in that a long-term fixed surveillance pole camera was focused on a defendants' driveway and part of the front of her house for eight months. The camera captured video, but not audio. The camera could zoom and angle to read license plates but could not peer inside windows. The camera recorded and produced a digitized searchable database. Over the government's objection and arguments, *Moore-Bush* found the long-term pole camera surveillance of the defendant's house and property to be a warrantless search, implicating the Fourth Amendment of the United States Constitution. *Id.* at 143. The exclusionary rule was applied because no exceptions to the warrant requirement were present, or argued to be present.

Moore-Bush recognized that the First Circuit previously approved the use of a pole camera in *United States* v. *Bucci*, 582 F. 3d 108, 116-117 (1st Cir. 2009), which reasoned that the legal principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public" disposed of the matter. *Id.* at

144, quoting *Bucci*, 582 F.3d at 116-117. The *Moore-Bush* court felt free to decide the pole camera issue differently based on a change in federal law it derived from *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2006 (2018).[8] *Moore-Bush* read *Carpenter* "to cabin" – if not repudiate – that principle (from *Bucci*) with the following: "A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'"[9] *Id.* at 144, quoting *Carpenter*, 138 S. Ct. at 2217, quoting *Katz* v. *United States*, 389 U.S. 347, 351-351 (1967). Although *Moore-Bush* acknowledged that *Carpenter* does not discuss pole cameras, it found that *Carpenter's* logic contradicted the First Circuit's holding in *Bucci* regarding a lack of an objectively reasonable expectation of privacy. *Moore-Bush* found both a subjective expectation of privacy in their and their guests' comings and goings from their house and an objectively reasonable expectation of privacy in their and their guests' activities around the front of the

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[8]Defendants in *Moore-Bush* argued that the *Bucci* holding was limited to the camera used at that time, which had fewer capabilities than the more modern pole camera at issue in their case. *Moore-Bush* rejected their argument, and instead distinguished the *Bucci* holding by finding that *Carpenter* changed the law and required a different result.

[9]This court has no problem with the general statement in *Carpenter*, but it means little if anything outside the context of CSLI. Just as what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected, it also **may not** be constitutionally protected. *Carpenter* found CSLI to be constitutionally protected. It did not find pole camera surveillance focused on the front of a residence to be constitutionally protected.

house for a continuous eight-month period.

3. Analysis

As an initial matter, there is no dispute as to the constitutional protection sought by defendants. It falls under the expectation of privacy prong of federal fourth amendment constitutional jurisprudence. See *Katz*, 389 U.S. at 351. "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause.'" *Carpenter*, 138 S. Ct. at 2213, quoting *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks and alterations omitted). See *Commonwealth* v. *Augustine*, 467 Mass. 230, 241-242 (2014), citing *Commonwealth v. Montanez*, 410 Mass. 290, 301 (1991) (same reasonable expectation of privacy standard under art. 14). However, "[t]he Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady* v. *North Carolina*, 135 S. Ct. 1368 (2015), citing e.g., *Samson* v. *California*, 547 U.S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes was

reasonable).

Although defendants rely on *Carpenter* and *Moore-Bush*, they also rely on a series of Supreme Judicial Court cases that deal with fourth amendment and art. 14 jurisprudence and constrained law enforcement's use of developing and evolving areas of surveillance technology. See e.g. *Commonwealth v. Connolly*, 454 Mass. 808 (2009) (GPS tracking device placed on automobile); *Commonwealth* v. *Rousseau*, 465 Mass. 372 (2013) (GPS tracking devise placed on automobile, passenger standing); *Commonwealth* v. *Augustine*, 467 Mass. 230 (2014) (CSLI); *Commonwealth* v. *Feliz*, 481 Mass. 689 (2019) (personal GPS devise as an automatic condition of probation in sex offender cases); *Commonwealth* v. *Johnson*, 481 Mass. 710 (2019) (personal GPS devise as a condition of probation in a non-sex offender case); *Commonwealth* v. *Almonor*, 482 Mass. 35 (2019) (cell phone providing police with real-time location of phone (i.e. "pinging"), and in essence, the real time location of its user); and *Commonwealth* v. *Fredericq*, 482 Mass. 70 (2019) (police real time tracking of a cellular telephone through which police obtained CSLI).

Carpenter itself involved law enforcement, without a warrant, obtaining historical CSLI records over a period of 127 days, specifically obtaining an average of 101 data points a day, that allegedly showed that defendant's phone was near four robbery locations at the time the robberies occurred. *Carpenter*, 138 S. Ct. at 2212-

2213. Defendants argue that based on *Carpenter*, *Moore-Bush*, and the above cited Supreme Judicial Court cases, among other cases, a trend has been established to extend constitutional protections against law enforcement surveillance techniques that have evolved through advancements in technology. The court does not disagree that recent jurisprudence shows such a trend. However, with the exception of *Moore-Bush*, the trend is limited to surveillance techniques that track a person's movements or location and is limited surveillance by or through cell phones (i.e. CSLI) and/or GPS devises. See *Carpenter*, 138 S. Ct. at 2216, 2219 (CSLI tracking partakes of many of the qualities of GPS monitoring – it is detailed, encyclopedic, and effortlessly compiled – accuracy of CSLI is rapidly approaching GPS-level precision); *United States* v. *Jones*, 565 U. S. 400, 430 (2012) (opinion of Alito, J.) (GPS monitoring of a vehicle tracks every movement a person makes in that vehicle); *Carpenter*, 138 S. Ct. at 2217 (CSLI over 127 days provides an all-encompassing record of the holder's whereabouts).

Other than *Moore-Bush*, which deviated from prior well-established federal law regarding pole cameras, no other "trend-establishing" cases cited by defendants involved use of pole cameras. The trend is not so much a function of any new technology, as it is a trend toward protecting against the use of new technology that tracks or is capable of tracking persons' movements and locations on a continuous

basis in and through public and non-public areas. There is a uniqueness that cell phones (i.e. CSLI) and GPS devises have brought to the forefront of law enforcement surveillance efforts that is lacking in pole camera surveillance. See *e.g., Carpenter*, 138 S. Ct. at 2217 (noting unique nature of CSLI records) .

Carpenter begins by noting that there are 396 million cell phone service accounts in the United States, a nation of 326 million people. *Carpenter*, 138 S. Ct. at 2211. In *Carpenter*, the case involved "the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls." *Id.* at 2215. The Court acknowledged: "This sort of digital data — personal location information maintained by a third party — does not fit neatly under existing precedents."[10] *Id. Carpenter* required the Court "to confront a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals." *Id.* at 2216. Cell phones -- nearly a "feature of human anatomy" – tracks nearly exactly the movements of its owner. *Id.* at 2218, quoting *Riley*, 134 S. Ct. at 2484. "[T]his **newfound tracking capacity** runs against

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[10]The uniqueness of cell phones in light of technological advancements was earlier recognized in a fourth amendment "search incident" case, *Riley* v. *California*, 573 U.S. ___, ___, 134 S. Ct. 2473, 2484 (2014). A "cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 2491. As the *Carpenter* Court later explained: "while the general rule allowing warrantless searches incident to arrest 'strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to' the vast store of sensitive information on a cell phone." *Carpenter*, 138 S. Ct. at 2214.

everyone." *Id.* at 2218 (emphasis added).

This court disagrees with defendants and *Moore-Bush*. *Carpenter* and other CSLI and/or GPS cases have not established a trend outside their subject matters of CSLI or GPS monitoring. It is only those two (although in the future there may be more) technological surveillance advancements that accurately and precisely track persons' movements and locations in areas accessible to and inaccessible to the public. This court concludes that *Carpenter, supra*, did not change the well-established case law rejecting challenges to pole camera surveillance based on the legal principle that "[a]n individual does not have an expectation of privacy in items or places he exposes to the public." *Bucci*, 582 F.3d at 116-117. *Carpenter* specifically did not call into question "conventional surveillance techniques and tools, such as security cameras." *Carpenter*, 138 S. Ct. at 2220.[11]

Fixed, even long-term pole camera surveillance covers a discrete area. Zoom ability does not expand the video coverage area. It is unclear if angling abilities

[11] *Moore-Bush* focuses on the Supreme Court's use of the term "security camera[]" and concludes that the Court was referencing private security cameras. This court focuses on the words "conventional surveillance techniques" and concludes that the Court was referencing law enforcement surveillance tools, such as pole cameras. Private security cameras (residential or commercial) and non-law enforcement government (e.g., cities, schools, public buildings, parks, etc.) installed video cameras are not conventional law enforcement surveillance techniques. Pole cameras are a long-standing conventional surveillance technique.

expand the video coverage area, but if it does, it does so in a de minimus manner.[12] The pole camera does not move from its fixed location. It does not track every movement and every location a person makes during the course of any given day. Pole cameras were installed in public locations and record only areas and activity that were exposed to the public. Footage depict times when an occupant of a covered residence leaves and returns to the residence. It depicts guests who might occasionally stop by the residence, or leave or return to the residence of the subject. It may identify a limited number of associates/friends, but associations not depicted at the front of the residence are unknown to law enforcement. The information obtained from pole cameras as to a subject's associations, lawful or unlawful, is far less complete than associational information obtained from call detail records of a subject's cell phone that can be obtained without a warrant. Pole camera surveillance does not follow its subjects into private residences, doctor's offices, hospitals, political headquarters, houses of worship, known drug houses, locations of unlawful drug activity or residences of known drug dealers, methadone clinics, brothels, locations of sexual liaisons, firearms businesses, and other potentially revealing locales.

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[12]Even *Moore-Bush* rejected the argument that new technological advancements to pole camera justified disregarding First Circuit law as announced in *Bucci, supra*.

ORDER

Defendants' motions to suppress, filed or joined in, are **DENIED** for reasons discussed above, as well as for the reasons advanced in the Commonwealth's opposition memorandum.

Timothy Q. Feeley
Associate Justice of the Superior Court

November 4, 2019