COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-10355

BARNSTABLE COUNTY

COMMONWEALTH
Appellee

v

EVERETT H. CONNOLLY
Defendant-Appellant

ON APPEAL FROM A JUDGMENT OF
THE BARNSTABLE SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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ISSUES PRESENTED

1. Was the defendant prejudiced by the non-disclosure of the identity of an informant where the informant was not a percipient witness to any of the crimes charged, and whose testimony would have strengthened the Commonwealth's case against the defendant.

2. Was the defendant entitled to suppression when the affidavit provided sufficient probable cause developed during over a year-long investigation into the defendant's drug dealing.

3. Has the defendant waived challenging a *Doyle* error where the defendant chose to have the judge clearly and forcefully charge the jury that the defendant's silence could not be used as evidence against him.

4. Did monitoring of the defendant's vehicle pursuant to a GPS warrant violate the defendant's expectation of privacy.

5. Was the defendant deprived of effective assistance of counsel where trial counsel's tactical choices did not deprive the defendant of an otherwise available, substantial ground of defense.

STATEMENT OF THE CASE

The Commonwealth agrees with the defendant's Prior Proceedings section of his Statement of the Case.

STATEMENT OF FACTS

Trial

In August, 2004, Jenny Margeson was employed by the Orleans Police Department as a summer reserve officer (1/92). Part of her assignment that summer was to work in an undercover capacity with the Cape and Islands Drug Task Force (1/93-94). Her job was to attempt to buy drugs (1/94).

The evening of August 24, 2004, Margeson called the defendant, Everett Connolly, from the pay phone at the White Hen Pantry in Harwich (1/103-104). The purpose of the call was to purchase drugs (1/104).

A man answered the phone (1/109). Margeson told the man that she wanted to purchase two grams of cocaine (1/105). The man, who had a Jamaican accent, told her he would be there in a few minutes (2/165-166).

Margeson identified the defendant in the courtroom as the person who came to the White Hen Pantry in Harwich in response to her phone call looking to purchase cocaine (1/106). The defendant arrived in a gold 1998 Chrysler Town and Country Minivan (1/107). The van was registered to the defendant (2/327-328).

The defendant was driving (1/107). There were two black females in the car with the defendant (1/108-109). One sat in the passenger seat and the other was sitting directly behind the defendant (1/108-109). Margeson did not speak to either woman (1/109).

Margeson had been given $200 in recorded currency for this purchase (1/104-105). Margeson

approached the driver's side of the defendant's vehicle and gave the defendant 2 $100 bills (1/107). She did not say anything when she handed the defendant the money (1/107).

The defendant took Margeson's money and told her to hold on (1/107). He only had one corner-cut baggy at that time (2/167). Margeson recognized the defendant's voice as that of the man she had spoken with on the telephone (1/109). Margeson stepped away from the vehicle and turned around (1/108).

Margeson saw the defendant reach underneath the passenger-side of the dashboard and then sit up again (1/108). The defendant retrieved another corner-cut baggy by reaching up underneath the passenger side of the dashboard (2/167).

After sitting back up, the defendant waived out the window (1/108). Margeson approached the van and the defendant gave her a corner-cut baggy containing a tan rock-like substance (1/108). Margeson reached into the window and the defendant dropped the baggy into her hand (1/108).

Margeson told the defendant that she would be in town for a week and asked if he would be available to meet again if necessary (1/108). The defendant told

her that he would be around, and she was to call him if she needed to meet up with him again (1/108, 2/170). The van then left the parking lot heading toward Harwich (1/108). Margeson immediately returned to the task force office and turned the items over to State Police Detective Lieutenant John Allen (1/111).

On August 25, 2008, Margeson again contacted the defendant (1/112-113). Margeson had been issued $100 by Det. Lt. Allen (1/113). At approximately 7:00 p.m. she again drove to the White Hen Pantry in Harwich and contacted the defendant from there (1/113). She called the same phone number she had used the day before (1/113).

Margeson recognized the male voice that answered the phone as the defendant's (1/114). She told the defendant that she would like to meet him again and wanted to guy a gram of cocaine from him (1/114). The defendant told Margeson that he was in Brewster and he would be at her location in approximately 25 minutes (1/114). Margeson remained at the White Hen Pantry (1/114).

Approximately 25 minutes after the phone call the defendant arrived in the gold minivan he had been driving the night before (1/115). The defendant was

alone in the minivan (2/168). Margeson approached the driver's side window (1/116). The defendant gave Margeson a corner-cut baggy with tan rocks similar to what she had purchased before (1/116). Margeson dropped the money in the car and took the baggy from the defendant's hand (1/116). Margeson then left the White Hen Pantry and met up with Det. Lt. Allen at a pre-arranged location (1/116).

Detective Lt. Allen testified that as of August 2004, there had been an active investigation of the defendant for approximately one year (2/173). The two items purchased by Margeson on August 24, 2004 were analyzed and found to be 1.2 grams of 44% pure cocaine in crack form (2/189). The item purchased by Margeson on August 25, 2004 was analyzed and found to be .56 grams of 45% pure cocaine in crack form (2/192-193).

Massachusetts State Police Trooper Scott McCabe was part of the surveillance team on August 24, 2004 (2/197). At approximately 8:30 p.m. he was located across the street from No. 76, Rte. 28, in Harwich (2/198). There was a gold van in the parking lot (2/198). At this time McCabe was aware that this gold van belonged to the defendant (2/198).

A black male came out of the residence, got into the van, and drove away (2/198-199). McCabe followed the van as it drove to the White Hen Pantry in Harwich (2/198-199). McCabe saw Margeson in the rear corner of the White Hen and he saw her go to the driver's window of the van (2/199-200). After receiving a phone call from Allen, McCabe followed the van back to the residence at No. 76, Rte. 28, Harwich (2/201). He saw the black male re-enter the residence there (2/202).

Harwich Police Detective Robert Brackett was also involved in the investigation of the defendant (2/209). During the first week and a half of September, 2004, Brackett saw the defendant driving the gold Town and Country van almost daily (2/213, 2/215). Brackett never saw anyone but the defendant driving it (2/215).

State Police Trooper John Mawn applied for and received a series of search warrants and an arrest warrant as a result of this investigation (2/316-317). The warrants issued in the early morning on September 9, 2004 (2/318).

On September 9, 2004, at approximately 8:30 a.m., Massachusetts State Police Trooper John Milos was

involved in surveillance at Exit 6 on Route 6 in Barnstable (2/226). Milos was a passenger in a uniformed trooper's cruiser (2/227). At this time Milos saw the defendant drive by his location in the gold van, heading eastbound (2/226). The cruiser followed the defendant and pulled the van over at Exit 8 in Yarmouth and conducted a motor vehicle stop (2/227).

Trooper Thomas, who was in uniform, approached the driver while Milos approached the passenger-side of the van (2/227). The defendant was driving the van (2/226). His daughter Latoya was sitting in the front passenger seat (2/227). They were the only two people in the van (2/228).

Latoya and the defendant were removed from the van (2/228). Milos told the defendant that the police had an arrest warrant for him, and a search warrant for the van and anyone present in the van (2/229).

The defendant was transported to the Harwich police station in a police cruiser (2/229). Milos drove the van to the Harwich police department (2/230). Their intent was to conduct an orderly, controlled search of the van in the police station's garage (2/230).

At the police station Milos made arrangements for Massachusetts State Police Trooper James Bazzinotti to search the van with his drug-detection trained canine (2/230-231). Bazzinotti arrived at the police station with his dog "Hooch" at approximately 10:00 a.m. (2/276). As a result of a search of the van with the canine, Bazzinoti found an item wedged up underneath the dashboard of the van (2/280). It looked like a ball wrapped in black electrical tape (2/281). Bazzinotti turned the item over to Milos (2/281).

Milos unwrapped the ball and found a large hard ball of cocaine, with some powder on the side (2/281). It was a clear plastic baggy containing white chunks (2/233). The item field-tested positive for cocaine (2/234). It already contained sodium bicarbonate, which would allow it to be processed into crack cocaine (2/255).

The item was sent for laboratory ananlysis and was found to be 124.31 grams of 59% pure cocaine (2/236). This cocaine had a value of between $10,000 - $11,000 (2/241). When broken down into gram amounts for sale, it would be worth $12,400 (2/241-242).

During the search of the van the police found a photo identification card/employment identification

card in the defendant's name in the glove compartment (2/335). The card bore a color photograph of the defendant (2/335). There was a registry document showing that the van was registered to the defendant (2/335). There were two excise tax bills from the Town of Harwich in the defendant's name (2/336). There were business receipts handwritten in the defendant's name (2/336). There was a pre-inspection report in the defendant's name for the van (2/336). There were two Enterprise rental agreements in the defendant's name (2/336).

The police executed another of the search warrants at 578 Rte 28 Harwich (2/330). The location was a multi-unit dwelling, but not a motel (2/329). Mawn found sums of money throughout the residence: $310 was found in the pants pockets of a blue pair of pants in the bedroom (2/330); and $1,223 in a blue binder in this same bedroom (2/331). The police found documents addressed to the defendant in the residence (2/329-330).

A search warrant was also executed at No. 76, Rte 28, Harwich on September 9, 2004 (2/328). This location was a motel room (2/340). During the search of the house McCabe found a silver pouch labeled

"Formula X" (2/203). The pouch contained and envelope with $1000 (2/203). It was found in a suitcase in a closet in the residence (2/204).

ARGUMENT

I. THE DEFENDANT WAS NOT PREJUDICED BY THE LATE DISCLOSURE OF A POLICE REPORT, WHICH DETAILED AN UNCHARGED BUY OF NARCOTICS FROM THE DEFENDANT.

A. Standard of review

The government's privilege not to disclose an informant's identity is not absolute, particularly where the demand for disclosure involves the defendant's guilt or innocence. Commonwealth v Healis, 31 Mass. App. Ct. 527, 530 (1991) (further citations omitted). The cases that have required disclosure at trial have all done so using a standard of materiality or something roughly akin thereto. Commonwealth v Lugo, 406 Mass. 565, 571 (1990).

There must be a balancing between the public interest in protecting the flow of information against the defendant's right to prepare his defense. Lugo, supra at 570, *quoting* Roviaro v United States, 353 U.S. 53, 62 (1957). Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration

the crime charged, the possible defenses, the possible significance of the privileged testimony, and other relevant factors. Lugo, supra at 570-571, *quoting* Roviaro, supra at 62.

B. The Commonwealth did not withhold exculpatory evidence by not disclosing the identity of the informant.

During the trial, Officer Jennifer Margeson testified that on August 24, 2004, a confidential informant made a controlled buy from the defendant and then introduced her to the defendant (Tr. 1/95-103). This evidence was stricken from the record and the judge instructed the jury to disregard it (Tr. 1/103). Defense counsel noted at sidebar that neither he nor the prosecutor was aware of the existence of Margeson's report detailing the buy involving the informant (1/134).

The Commonwealth turned over copies of this new police report to counsel upon counsel's request. There was no claim that it was the prosecutor's fault that the defendant had not received this police report (Tr. 1/134, 2/354). The defendant had not been charged with this drug buy.

When Margeson testified that she had an additional police report, defense counsel was given an opportunity to conduct a voir dire examination of her (1/133-155). During the voir dire, defense counsel was allowed to basically conduct an in-depth deposition of Margeson, to explore the circumstances of her introduction to the defendant and the circumstances of her identification of him as the seller of the crack cocaine (Tr. 1/133-147, 151-153). Trial counsel was able to explore the evidence of this third controlled buy and use this information to determine tactically how far he wanted to explore the issue of mis-identification without opening the door to allowing counsel to rehabilitate Margeson with evidence of this third encounter with the defendant.

The evidence of the defendant's participation in a third controlled buy unrelated to the two that were on trial cannot be considered exculpatory. Exculpatory evidence is evidence that tends to negate the guilt of the accused and supports the innocence of the defendant. Commonwealth v Ellison, 376 Mass. 1, 22 n9 (1978), quoting Commonwealth v Pisa, 372 Mass. 590, 595 (1977). What is required is that on a full and fair assessment of the trial record, the absent

evidence would have played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a verdict of not guilty. Commonwealth v Tucceri, 412 Mass. 401, 414 (1992). Because the identity of the informant and any potential information that informant would have provided did not carry a measure of strength in support of the defendant, failure to disclose the identity of the informant did not warrant the granting of a new trial. Id.

C. The defendant was not entitled to disclosure of the informant.

In this case the informant was not an active participant in the crimes charged. The informant could not provide any relevant information pertinent to the defendant's innocence in relation to these two controlled buys by Margeson. The cases cited by the defendant are distinguishable based upon the fact that the informant was present for the criminal episodes at issue at trial, and may have had relevant information based upon the informant's own observations.

There has been no showing by the defendant how disclosure of the informant's identity would have been beneficial to establish the defendant's innocence at

trial. *See* Commonwealth v Abelnour, 11 Mass. App. Ct. 531, 538 (1981). On the contrary, in this case the informant was not present at either controlled buy made by Margeson, but was present for a *third* buy not charged against the defendant.

Rather than providing evidence of the defendant's innocence, the informant would have provided additional corroborating information about Margeson's opportunity to have met and interacted with the defendant. This information was completely unhelpful to the defendant's defense of mis-identification.

Contrary to the defendant's claim on appeal, the defendant's "impossible task of trying to test Margeson's identification" was based upon the evidence of the case, not a disadvantage created by the actions of the Commonwealth. Throughout Margeson's testimony defense counsel tried to sound out the judge to determine how far he could go in questioning Margeson about her identification without opening the door to having the Commonwealth be able to present evidence of this third controlled buy (1/111-112, 1/129-130, 1/155). The trial judge refused to be pinned down, and instead he informed counsel that he would leave it

to counsel's decision and trial tactics (1/111-112, 1/129-130, 1/155).

After the voir dire, and after unsuccessfully trying to gauge the judge's thoughts as to just how much latitude he would be given at trial, defense counsel then made the tactical decision not to further explore Margeson's initial contact with the defendant, preferring not to open the door and expose the jury to evidence of another sale of crack cocaine by the defendant. The fact that the defendant could not further pursue a defense of misidentification was a tactical choice of trial counsel, not the prejudicial result of actions by the Commonwealth.

Trial counsel moved for mistrials in response both Margeson's (1/94, 1/95-103) and Det. Lt. Allen's (2/174, 2/174-180) respective references to the informant. At the close of the evidence, upon the trial counsel's renewed motion for a mistrial, the trial judge ruled that he believed that they had caught the problem before any damage was done (2/351).

In refusing to grant a mistrial, the trial judge disbelieved trial counsel's assertion that trial counsel was mistaken when he did not think that an informant was involved with Margeson (1/102-103). The

trial judge noted that given trial counsel's enormous experience in the field of criminal defense the existence of an informant would have occurred to trial counsel (1/102).

The trial judge ruled that nothing rose to the level of a mistrial, and that his mid-trial instructions cured any problem (2/352; *see* 1/103, 2/180). Jurors are presumed to follow the instructions to disregard testimony. Commonwealth v Qualls, 440 Mass. 576, 584 (2003), *citing* Commonwealth v Cortez, 438 Mass. 123, 130 (2002).

The decision whether to declare a mistrial is within the sound discretion of the trial judge. Commonwealth v Mullane, 445 Mass. 702, 711 (2006), *citing* Commonwealth v Kilburn, 426 Mass. 31, 37 (1997). Where a party seeks a mistrial in response to the jury's exposure to inadmissible evidence, the judge may correctly rely on curative instructions as an adequate means to correct any error and to remedy any prejudice against the defendant. Mullane, supra at 711-712 (further citations omitted).

II. THE DEFENDANT IS NOT ENTITLED TO SUPPRESSION OF THE DRUGS FOUND IN HIS VAN. THE SEARCH WARRANT PROVIDED SUFFICIENT PROBABLE CAUSE TO BELIEVE THAT DRUGS WOULD BE FOUND IN THE DEFENDANT'S VAN.

A. Standard of Review

Where a warrant is used, the judge may consider only the affidavit presented to the magistrate. Commonwealth v Germain, 396 Mass. 413, 416 n4 (1985). Under the *Aguilar-Spinelli* standard, a magistrate must be informed of (1) some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it to be; and (2) some of the underlying circumstances from which the affiant concluded that the informants were credible or their information was reliable. Commonwealth v Desper, 419 Mass. 163, 166 (1994) (further citations omitted). The standard is one of determining whether the affidavit contained enough information for the issuing magistrate to determine that the items sought were related to the criminal activity under investigation and reasonably could be expected to be located in the place to be searched. Commonwealth v. Cruz, 430 Mass. 838, 840 (2000).

B. The information about the controlled buys was not stale.

The motion judge, in his Memorandum and Decision on Motion to Suppress, detailed the multi-year and involved investigation of the defendant's cocaine business (R. 72-75). The motion judge described the probable cause as "exhaustive" (R. 74).

The affidavit detailed a long and dedicated process of building a case against the defendant (R. 30-64). The defendant was trained in police procedures, having been a police officer in Jamaica. The practices of the defendant, in trying to insulate himself from strangers, required the police to slowly and methodically build their case against him.

The information in the affidavit detailed a large-scale drug distribution operation by the defendant. The defendant's drug business involved the use of intermediaries to sell drugs for him, the use of rental cars, and travel to New York City to re-supply himself with cocaine approximately every two weeks. When the defendant left for New York City, he was gone for a day or two at a time (R. 35, ¶20).

Commonwealth v Zayas, 6 Mass. App. Ct. 931 (1978), cited by the defendant, is easily distinguishable from the facts in this case. In Zayas, the affidavit described only one sale of drugs

by the defendant. In this case, there were multiple sales of illegal narcotics, over the space of months. There was also detailed information about how the defendant ran his drug business, including the fact that he went to New York City approximately bi-weekly to pick up new supplies of cocaine.

The facts of this case detailed a continuing, complex illegal narcotics distribution operation. Where conduct is shown to be continuing, the passage of time becomes less important, and staleness may be overcome. Commonwealth v Rice, 47 Mass. App. Ct. 586, 590 (1999) (affidavit detailed 15-month criminal investigation into defendant's drug dealing).

The information was gathered over the passage of months, and set out the defendant's routine in his drug dealing activities. The information was backed up with multiple controlled buys, both by informants and undercover police officers. Controlled buys can establish probable cause. Cruz, supra at 842 n2; *see also* Commonwealth v. O'Day, 440 Mass. 296, 302 (2003).

The most important factor establishing continuity is the number and quantity of observations used to establish a continuing criminal activity. Id. at 590 (further citations omitted). Based upon the detailed

information that the police had, there was probable cause to believe that the defendant's trip to New York City had been to restock his supply of cocaine and that cocaine would be found in the van.

C. The confidential informants provided the search warrant affidavit with sufficient probable cause to search the defendant's vehicle.

The defendant's argument parses out the affidavit and challenges the individual informants and information provided in the affidavit. However, the affidavit is to be read as a whole in a commonsense and realistic fashion. Commonwealth v Toledo, 66 Mass. App. Ct. 688, 692 n8 (2006).

In looking at the affidavit as a whole, the affidavit detailed a massive investigation into the defendant's large and intricate crack cocaine distribution business. The information supplied by the confidential informants, along with the observations and surveillance of the police provided a web of evidence providing probable cause to believe that the defendant was selling crack cocaine.

Basis of knowledge was shown because much of the evidence was based upon the personal observations of the informants. *See* Commonwealth v Byfield, 413 Mass.

426, 429 (1992). This information from the informants also provided a level of detail and specificity about the defendant's actions, from which the magistrate could infer first-hand knowledge of the information. Commonwealth v Beliard, 443 Mass. 79, 85 (2004).

The credibility of the information supplied by the confidential informants as it related to the defendant and his practices in running his illegal drug business was proven when most of this information was confirmed by police investigation and surveillance of the defendant. Id. Many of the informants admitted to purchasing crack cocaine from the defendant in circumstances that could result in criminal charges against them. *See* Commonwealth v Fleurant, 2 Mass. App. Ct. 250, 254 (1974) (An informant's admitted criminal involvement is not conclusive on the issue of reliability, but it may be taken into consideration if other factors indicative of reliability are also present).

Several of the confidential informants purchased crack cocaine from the defendant during controlled buys. An undercover officer also purchased crack cocaine from the defendant. These several controlled purchases, made frequently over the space of several

months, provided probable cause to issue the warrant. Cruz, supra at 843 n2, *citing* Commonwealth v Warren, 418 Mass. 86, 89 (1994), *citing* Commonwealth v Luna, 410 Mass. 131, 134 (1991). The controlled buys did not stand in isolation, and served to corroborate the information previously supplied by the informants, supporting bases of knowledge and their veracity. *See* Commonwealth v Baldasaro, 62 Mass. App. Ct. 925, 926 (2004).

The affidavit provided probable cause to believe that at the time the defendant's van was stopped on his return from a trip to New York City, the police would find cocaine in the van. The motion judge did not err in denying the defendant's motion to suppress.

III. THE AUTHORIZATION OF THE WARRANT ALLOWING TRACKING OF THE DEFENDANT'S VAN PURSUANT TO GPS WAS VALID AND HAD NOT EXPIRED.

A. Trial counsel waived challenging the GPS warrant execution.

At the motion to suppress, trial counsel explicitly waived presentation of any issues involving the execution of the global positioning satellit ("GPS") warrant (M.Tr./4-5). To the extent that the defendant's motion for a new trial attempts to expand the record on appeal and litigate an issue that was

expressly waived, the waiver doctrine applies. The only issue before this court then is the claim of ineffective assistance of counsel because of this waiver of an issue.

The waiver doctrine states that a defendant must raise a claim of error at the earliest possible time. Commonwealth v Randolph, 438 Mass. 290, 294 (2002) (further citation omitted). There is no longer a "resurrection" of issues by a motion for a new trial. Commonwealth v Bly, 444 Mass. 640, 651 (2005). The unpreserved claims of error alleged here by the defendant are evaluated to determine if there was error, and if it amounted to a substantial risk of a miscarriage of justice. Commonwealth v Amirault, 424 Mass. 618, 646-647 (1997) (footnote omitted), *citing* Commonwealth v Gabbidon, 398 Mass. 1, 5 (1986).

A substantial risk of a miscarriage of justice exists when a reviewing court has a serious doubt whether the result of the trial might have been different had the error not been made. Randolph, supra at 297 (further citations omitted). The defendant has not met his burden of showing that there was error at his trial or that he was prejudiced by any error.

B. **The "GPS" tracking, which was carried out pursuant to a warrant did not violate the defendant's reasonable expectation of privacy.**

The facts of United States v Karo, 468 U.S. 705 (1984), relied upon by the defendant, are far different from those in this case. In *Karo*, the police were perceived to have obtained an ability to conduct warrantless beeper surveillance inside a home. The beeper ended up in a residence - a place not open to visual surveillance. Id. at 713 n3. "[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant."
Id. at 714.

The Dissent in *Karo* makes it clear that the dissent is based upon the fact that the beeper infringed upon the defendants' right to privacy upon their property. Id. at 729 n.2 ("Once the delivery had been effectuated, the container was respondents' property from which they had a right to exclude all the world. It was at that point that the infringement of this constitutionally protected interest began.") The Dissent agrees that if personal property is in plain view of the public, possession of the property

is not private, and is therefore unprotected. Id. at 730-731.

Even the Dissent in *Karo*, citing United States v Knotts, 460 U.S. 276 (1983) distinguishes the situation in *Karo* from that of a beeper used to track a moving vehicle. Karo, supra at 731-732. "The [beeper] revealed only the route of a trip through areas open to the public, something that was hardly concealed from public view. The Court held: 'A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.'" Karo, supra at 732, *quoting* Knotts, supra at 281.

In the present case the beeper was installed in the defendant's van. The defendant did not have any reasonable expectation of privacy in the movements of his van on a public way. It is these facts that make this decision factually similar to *Knotts*, and distinct from *Karo*.

The cases of State v Jackson, 150 Wn.2d 251, 256 2003), and United States v Berry, 300 F.Supp.2d. 366 (D.Md. (2004), cited by the defendant, actually support the Commonwealth's position rather than the defendant's. In both *Jackson* and *Berry* the

constitutionality of global position monitoring pursuant to a warrant was upheld.

There is no need to determine if art. 14 provides greater rights than the Fourth Amendment. article 14 only protects a an actual privacy interest that society is prepared to recognize as reasonable. *See* Commonwealth v Blood, 400 Mass. 61, 68 (1987) (further citations omitted). The defendant could have no reasonable expectation of privacy in the movements of his vehicle, which could have been and was tracked by the police during surveillance. *See* Commonwealth v A Juvenile (No. 2), 411 Mass. 157, 160 (1991). That the GPS tracker assisted the police in tracking the vehicle did not give the defendant any greater expectation of privacy in his movements.

C. The execution of the search warrant did not violate G.L. c. 276.

The defendant's argument is based upon a claim that the police carried out a warrantless surveillance of the defendant's van pursuant to GPS. The defendant's argument is based upon a mistake of fact, because the police had a valid search warrant authorizing monitoring of the GPS device on the defendant's vehicle.

The police in this case did obtain a warrant before installing a GPS tracking device in the defendant's vehicle. The police provided more than adequate probable cause to believe that the defendant was engaged in narcotics trafficking. The Commonwealth requested and was authorized to track the defendant's van for 15 days from the installation of the GPS tracking device (R. 28). The device was successfully installed on the defendant's van on August 31, 2004 (R. 28). At all times, the Commonwealth's actions in monitoring the defendant were being overseen by a neutral, detached magistrate.

The service of the warrant to attach the device was effectuated within the seven days required for service of the warrant (R. 28). The Addendum submitted to the Court informed the Court of the successful installation, and that monitoring would continue for 15 days, as authorized by the warrant (R. 28).

A magistrate allowed the 15 days of monitoring (R. 28). This time period included September 9, 2004. The police at all times were acting within the authority granted them by the magistrate. There was

no unlawful search and seizure, or a violation of G.L. c. 276.

General Laws c. 276, §3A does not provide for the exclusion of evidence in the event of a violation of its terms, although common law exclusionary rules may apply. *See* Commonwealth v Torres, 45 Mass. 915, 916 (1998) (further citations omitted). To the extent that the warrant required a return within in seven days, this court can reasonably interpret the Addendum of September 7, 2004 (R. 28) as a return, and as an extension of the warrant, supported by probable cause and authorized by a neutral, detached magistrate.

It was by police observation out on the highway however, not the GPS tracking, that led to the stop of the defendant's van on September 9, 2004. Trooper John Milos testified that he had established surveillance on Route 6 at Exit 6 at approximately 8:30 a.m., on September 9, 2004 (2/226). Milos identified the defendant's van on the road, and observed the defendant driving the van, as it passed him heading eastbound on Route 6 (2/226-227).

The stop and search of the van pursuant to Trooper Milos' observations and the probable cause that the police had at that time, "redacting" for the

purposes of argument the GPS information, was lawful and based upon probable cause (*See* Karo, supra at 720).

The police had both search and arrest warrants relating to the defendant that were independent of the GPS monitoring warrant. As the trial judge found in his Second Memorandum of Decision on Defendant's Motion for A New Trial (R. 110-117), the search warrant issued on September 9, 2004 contained sufficient independent probable cause to believe that the defendant was returning from New York with more cocaine (R. 116).

IV. THE DEFENDANT WAIVED CHALLENGING THE THE *DOYLE* ISSUE BECAUSE HE AGREED TO THE REMEDY TAKEN BY THE JUDGE TO INSTRUCT THE JURY TO DISREGARD EVIDENCE THAT THE DEFENDANT EXERCISED HIS RIGHT TO REMAIN SILENT. THE DEFENDANT WAS NOT PREJUDICED GIVEN THE JUDGE'S AGREED-UPON INSTRUCTIONS TO THE JURY.

After Officer Brackett's fumbled testimony that the defendant had exercised his right to counsel, the judge immediately called a sidebar (2/217-218)[1]. There was then an unrecorded lobby conference (2/218-219).

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[1] The Commonwealth made an offer of proof as to what it had actually expected the testimony to be: "[A]ccording to the police testimony and reports, the Defendant never said, I don't want to say anything. He said, I don't have any questions for you." (2/221).

The judge recapped the lobby conference on the record before the jury re-entered the court room. The judge noted that he had offered the defendant options of instructions to the jury, and that the defendant wanted the judge to instruct the jury directly that the defendant had the right to remain silent, and the jurors could not in consider his right to remain silent in any fashion (Tr. 2/219). Defense counsel agreed that he wanted this direct approach (Tr. 2/219).

The judge then instructed the jurors firmly and thoroughly that they were not to consider this evidence.

> "Jurors, before we took the morning recess, the last series of questions dealt with an event at the station house in Harwich where apparently Mr. Connolly was advised or asked if he had been advised of his Miranda rights. And I know we don't live in a vacuum.
>
> I'm sure you have all had a belly full of Law and Order rerun episodes by now. So, I'm sure you understand what Miranda rights are in a basic form.
>
> And he was asked according to the witness as to whether he, Mr. Connolly, had anything to say. And he said he didn't have anything to say at that time. Absolutely fundamental to our system is that Mr. Connolly's right to do that.
>
> It is so basic to our system that an experienced witness would have known to not have said it. It is not appropriate

> for a jury in any way to consider that event and that response at all in the deliberations. It is to be stricken from the evidence. You're not to consider it during the course of your deliberations.
>
> Mr. Connolly had every right to say what he said. And furthermore, the fact that he said it should never have been mentioned by the witness. Absolutely inappropriate on the part of the witness to say that. Don't consider it in the course of your deliberations.
>
> Does that instruction suffice?
>
> [Defense Counsel]: Yes.
> [Prosecutor]: Yes, Your Honor.
> [Defense Counsel]: Yes, Judge."

(Tr. 2/222-223)

During his final instructions to the jury, the judge gave unobjected-to instructions on the defendant's presumption of innocence (Tr. 3/403, 417).

The error, even if the issue is deemed preserved, was harmless beyond a reasonable doubt. *See* Commonwealth v DePace, 433 Mass. 379, 384 (2001), *citing* Commonwealth v Mahdi, 388 Mass. 679, 696-697 (1983) (listing factors to consider in determining if prejudicial error exists).

First, the officer's testimony, based upon its context, showed that the officer misspoke (Tr. 2/217). From the context of the sidebar, the Commonwealth sought to elicit a statement made by the defendant and

did not ask the question to get the defendant's refusal before the jury (Tr. 3/218-222). Second, contrary to the defendant's contention, the evidence of the defendant's guilt in this case was overwhelming. Lastly, the judge gave strong, explicit instructions to the jury, and the defendant was satisfied with these instructions. The defendant is not entitled to a new trial.

V. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Review of trial counsel's actions is pursuant to the familiar standard of Commonwealth v Saferian, 366 Mass. 89 (1974). The first step in the analysis is to determine whether there has been serious incompetency, inefficiency, or inattention of counsel, i.e. behavior that falls measurably below that expected from an ordinary fallible lawyer. Id. at 96. The second requirement is that the shortcomings of counsel deprive the defendant of an otherwise available, substantial ground of defense. Id. at 96.

The burden is on the defendant to prove that counsel was ineffective. Commonwealth v Bannister, 15 Mass. App. Ct. 71, 75 (1983), *quoting* Commonwealth v Bernier, 359 Mass. 13, 15 (1971). The defendant must

show that he was deprived of an actual, not hypothetical, otherwise available substantial ground of defense. Commonwealth v Urena, 417 Mass. 692, 701 (1994).

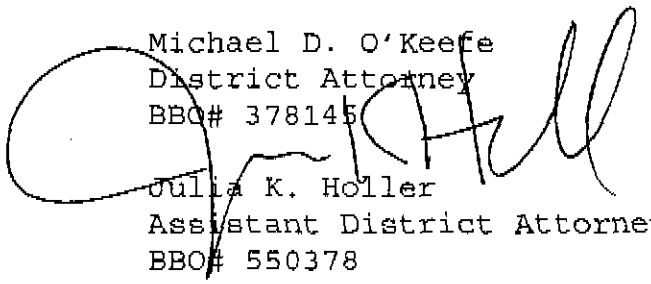
To prove a tactical error, the defendant must demonstrate that trial counsel's tactical decisions were manifestly unreasonable. Commonwealth v Finstein, 426 Mass. 200, 203 (1997). If there is no error of law at trial, there is no basis for a claim of ineffective assistance of counsel. Commonwealth v Adamides, 37 Mass. App. Ct. 339, 345 (1994).

The objective, practical standard of ineffective assistance of counsel is whether better work might have accomplished something material for the defense. Commonwealth v Satterfield, 373 Mass. 109, 115 (1977), *cited in* Commonwealth v Smith, 449 Mass. 12, 22 (2007). The defendant has not met his burden of proving that he was deprived of an otherwise available, substantial ground of defense.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court deny the relief requested and affirm the defendant's convictions.

Respectfully submitted,



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