SJC-12938

COMMONWEALTH vs. DONDRE SNOW.

Suffolk. September 11, 2020. - January 11, 2021.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Homicide. Firearms. Cellular Telephone. Constitutional Law, Search and seizure, Probable cause. Search and Seizure, Probable cause. Probable Cause. Practice, Criminal, Motion to suppress.

Indictments found and returned in the Superior Court Department on February 26, 2016.

A pretrial motion to suppress evidence was heard by Maureen B. Hogan, J.

An application for leave to prosecute an interlocutory appeal was allowed by Gants, C.J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by him to the Appeals Court. After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Cailin M. Campbell, Assistant District Attorney (David D. McGowan, Assistant District Attorney, also present) for the Commonwealth.

Amy M. Belger for the defendant.

[1] Justice Lenk participated in the deliberation on this case prior to her retirement.

Jennifer Lynch, Andrew Crocker, & Mark Rumold, of California, Hannah Zhao, of New York, Matthew R. Segal, Jessie J. Rossman, & Jessica J. Lewis, for American Civil Liberties Union of Massachusetts, Inc., & another, amici curiae, submitted a brief.

LOWY, J. On the night of December 5, 2015, the defendant, Dondre Snow, and two other men were arrested in connection with a fatal shooting that had occurred earlier that evening in Boston. Police officers seized the defendant's cell phone, and a police detective later applied for and received a search warrant to search it for evidence related to the crime. Before trial, the Commonwealth moved to introduce certain evidence found on the defendant's cell phone. The defendant moved to suppress the cell phone evidence. The judge allowed the defendant's motion, ruling that the warrant had issued without probable cause because it lacked a sufficient nexus between the murder and the defendant's cell phone. Although the judge did not explicitly rule on whether the search authorized by the warrant was sufficiently particular, she apparently factored it into her analysis, noting at the hearing that the search was not limited in time.

The Commonwealth filed an application for interlocutory review in the county court, which a single justice of this court allowed and reported to the Appeals Court. The Appeals Court, in a divided opinion, reversed the judge's decision and remanded

for a determination whether the warrant was properly limited in scope. The matter was entered in this court following our grant of further appellate review.

We consider, first, whether there was probable cause to search the defendant's cell phone and, second, whether the search exceeded the permissible scope of the warrant. We conclude there was probable cause to search the defendant's cell phone, based on the defendant's cell phone call shortly after the crime had been committed to the person who had rented the getaway car, as well as on the inference that the joint venture crime was planned ahead of time. We also conclude that the search of the phone was not sufficiently particular because it lacked any temporal limit. The order allowing the defendant's motion to suppress is vacated, and we remand to the Superior Court for further rulings regarding partial suppression.[2]

1. Background. The following facts are taken from the search warrant affidavit. On the evening of December 5, 2015, Maurice Scott was shot several times as he stood on a Boston street. He later died from gunshot wounds. One eyewitness heard a number of shots fired and then saw a "heavy set black male" standing over the victim as he lay on the ground.

[2] We acknowledge the amicus brief submitted by the American Civil Liberties Union of Massachusetts, Inc., and the Electronic Frontier Foundation.

The shooter fled the scene in a light-colored car with out-of-State license plates driven by another party. During the shooting, the getaway car had been parked up the street. The car then headed toward the Dorchester neighborhood of Boston. Several minutes later, a second witness saw a light gray sedan being driven quickly down a street in Dorchester. The driver of the car slammed on its brakes, backed up, and took a left turn onto a dead-end street before coming to a stop. The witness noticed the occupants of the car moving about, as if they were changing their clothes. A large man climbed out of the passenger's seat, pulled his sweatshirt down, and returned to the car. The witness telephoned the police.

When police arrived, they noticed a light gray 2016 Nissan Altima with a New Hampshire license plate parked near the dead end of the street. Three men were sitting in the car: the defendant in the driver's seat, Dwayne Diggs in the front passenger's seat, and Daquan Peters in the back seat. Officers noted that Diggs had a heavy build and fit the eyewitness's description of the shooter. Based on the matching witness descriptions of the car used in the shooting and Diggs as the shooter, the officers removed all three men from the car. The defendant was talking on his cell phone as officers removed him from the car.

Officers discovered a .40 caliber firearm near the car and, by using thermal imaging, found that the heat signature indicated that the firearm recently had been discarded. Officers also discovered nine .40 caliber spent shell casings at the scene of the shooting. A fingerprint from the magazine of the gun matched Diggs's fingerprint. Both the defendant and Diggs were wearing global positioning system (GPS) monitors, which placed each of them at the crime scene at the time of the shooting. Police seized the defendant's cell phone, Peters's cell phone, and a third cell phone from the Nissan's center console with Diggs's partial fingerprint on it.

The defendant told officers that the car was rented to his girlfriend, and asked repeatedly during the booking process how she could get it back. The next day, police interviewed the defendant's girlfriend. She told officers that although she had a car, she had rented the Nissan to assist her with a move to Fall River. She also noted that she had rented a different car earlier in the week, but switched it for the Nissan on December 5. Finally, she told officers that the defendant had called her from his cell phone to let her know he was about to be arrested.

Officers also recovered the victim's cell phone, and a search revealed violent and threatening text messages exchanged with a contact named "Slime Buttah." Interviews with the victim's acquaintances revealed that the victim and Diggs had

been arguing via text message and social media in the days before the murder. Diggs's street names included "Butta" and "Butta Bear." Based on both of these pieces of information, detectives believed "Slime Buttah" to be Diggs.

On February 23, 2016, a detective applied for and received a warrant to search the defendant's cell phone for the following information:

> "Cellular telephone number; electronic serial number, international mobile equipment identity, mobile equipment identifier or other similar identification number; address book; contact list; personal calendar, date book entries, and to-do lists; saved, opened, unopened, draft, sent, and deleted electronic mail; incoming, outgoing, draft, and deleted text messages and video messages; history of calls sent, received, and missed; any voicemail messages, including those that are opened, unopened, saved, or deleted; GPS information; mobile instant message chat logs, data and contact information; internet browser history; and any and all of the fruits or instrumentalities of the crime of Murder."

The detective requested and received permission to search unfettered by date restriction because, he said, it was unknown "when the weapon used was acquired and when any related conspiracy may have been formed."

2. Discussion. a. Probable cause. On appeal, the Commonwealth challenges the judge's ruling that the contents of the warrant affidavit failed to establish a nexus between the crime and the defendant's cell phone sufficient support a finding of probable cause to search it. The Commonwealth contends that a sufficient nexus may be derived from the

affidavit's allegations concerning the defendant's call to his girlfriend, who had rented the getaway car, the reasonable inferences of planning and coordination that may be drawn from the change of clothing, and Diggs's violent text messages to the victim. For the reasons explained infra, we agree and thus vacate the judge's order suppressing the evidence recovered from the search of the defendant's cell phone.

"Both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights 'require a magistrate to determine that probable cause exists before issuing a search warrant.'" Commonwealth v. Holley, 478 Mass. 508, 521 (2017), quoting Commonwealth v. Cavitt, 460 Mass. 617, 626 (2011). Probable cause requires a "'substantial basis' to conclude that 'the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.'" Holley, supra, quoting Commonwealth v. Kaupp, 453 Mass. 102, 110 (2009). In other words, the government must show not only that there is probable cause that the individual committed a crime but also that there is a "nexus" between the alleged crime and the article to be searched or seized. Commonwealth v. White, 475 Mass. 583, 588 (2016). The nexus does not need to be based on direct observation; it can be found in "'the type of crime, the

nature of the [evidence] sought, and normal inferences as to where such' evidence may be found" (citation omitted). Id. at 589. "While 'definitive proof' is not necessary to meet this standard, the warrant application may not be based on mere speculation," Holley, supra, quoting Commonwealth v. Augustine, 472 Mass. 448, 455 (2015), or a "[s]trong reason to suspect," Commonwealth v. Upton, 394 Mass. 363, 370 (1985).

Probable cause is a "fact-intensive inquiry and must be resolved based on the particular facts of each case." Commonwealth v. Morin, 478 Mass. 415, 426 (2017). With respect to cell phone searches, "police may not rely on the general ubiquitous presence of cellular telephones in daily life, or an inference that friends or associates most often communicate by cellular telephone, as a substitute for particularized information that a specific device contains evidence of a crime." Id. at 426.

"When considering the sufficiency of a search warrant application, our review begins and ends with the four corners of the affidavit" (quotation and citation omitted). Holley, 478 Mass. at 521. The affidavit is to be "considered as a whole and in a commonsense and realistic fashion" and should not be "parsed, severed, and subjected to hypercritical analysis." Commonwealth v. Dorelas, 473 Mass. 496, 501 (2016), quoting Commonwealth v. Donahue, 430 Mass. 710, 712 (2000). "All

reasonable inferences which may be drawn from the information in the affidavit may also be considered as to whether probable cause has been established." Holley, supra 521-522, quoting Donahue, supra.

Here, the affidavit provided a substantial basis to conclude both that the defendant had committed the homicide as Diggs's coventurer and that it was reasonable to expect that his cell phone would contain evidence related to that specific crime.[3] Not only was the defendant apparently calling his girlfriend to ask her to retrieve the car soon after the crime, but his girlfriend had an improbable explanation for having rented a car at all, given that she already owned one. See, e.g., United States v. Winters, 782 F.3d 289, 299-301 (6th Cir. 2015) (implausible explanation for renting car was one factor giving rise to reasonable suspicion). When she was later interviewed by police, the defendant's girlfriend asserted that, although she had a car, she had rented an extra car to assist in her move to Fall River. The rental car was a Nissan Altima -- a sedan -- not the typical truck or van one might rent for moving. Moreover, she noted that she had rented a different vehicle earlier in the week and had exchanged it for the Nissan on that day, but did not provide a reason for the change.

[3] The defendant does not dispute that the warrant contained probable cause that he committed a crime.

Additionally, when he was being booked, the defendant asked officers how his girlfriend could get her car back, and stated that he did want not to have a bill for a late fee. Given that the defendant was about to be arrested for murder, it seems unlikely that he was calling his girlfriend merely to ensure that she could pick up the rental car and avoid a charge for a late rental return. The rental car contained evidence related to the shooting: a T-shirt and a third cell phone, both of which presumably belonged to Diggs.[4] Given the context, it seems probable that the defendant's call was motivated by a concern that evidence could be discovered in the car, not by a possible late fee.

Finally, there was some evidence that the crime had been planned ahead of time. The search warrant affidavit noted that a witness saw "people moving around in the car leaving the impression on him that they might be changing their clothes." This leads to an inference that the crime had involved, at a minimum, enough prior planning and coordination for the parties to bring a change of clothes.[5] Further, the evidence that Diggs

---

[4] Diggs's cell phone likely would have contained evidence of communications between him and the victim, given that the victim's cell phone contained threatening text messages from "Slime Buttah," believed to be Diggs.

[5] A black T-shirt, size 6X, and a black sweatshirt, size large, were recovered from inside the Nissan. Given the disparity in sizes, it is likely that these items did not belong to the same person. The affidavit permits an inference that the

had been communicating with the victim via cell phone leading up to the murder gave rise to an inference that the coventurers also communicated about the crime via cell phone, particularly where the theory of the crime required a shared mental state. See Commonwealth v. Zanetti, 454 Mass. 449, 455 (2009) (joint venture theory requires that coventurers have shared mental state). Given these facts, one could infer from the affidavit that the call was related to the crime, that the crime was preplanned, and that some of that planning may have utilized cell phones, including the defendant's.

Although in isolation none of these facts would be sufficient to support a nexus between the crime and the defendant's cell phone, in determining whether an affidavit

---

T-shirt belonged to Diggs, and that he changed out of it after the shooting: a witness to the shooting stated that the shooter had a heavy build, and indicated in a showup identification that Diggs's body type matched that of the shooter. The witness stated that what Diggs was wearing during the identification was not what the shooter had worn at the time of the shooting; the shooter had been wearing a "dark top." Thus, it is likely Diggs shed the T-shirt after the shooting. Further, we infer that the size large sweatshirt belonged to either the defendant or Peters, who each had a thin build. Moreover, the attenuated connection between the parties and the defendant's girlfriend's rental car makes it unlikely that the extra clothing was there by happenstance. Thus, given our "considerable latitude . . . for the drawing of inferences," it is reasonable to infer that multiple parties changed their clothes (citation omitted). Commonwealth v. Santiago, 452 Mass. 573, 576 (2008). See Commonwealth v. Robertson, 480 Mass. 383, 387 (2018) ("Inferences drawn from the affidavit must be reasonable and possible, but no showing that the inferences are correct or more likely true than not true is required").

supports a finding of probable cause we must take it as a whole, and not "parse[], sever[], [or] subject[] [it] to hypercritical analysis" (quotation and citation omitted). Dorelas, 473 Mass. at 501. Here, the facts add up to a nexus between the defendant's cell phone and the crime.

That equation does not, however, accord significant weight to a factor that the Commonwealth stresses. The Commonwealth argues that the defendant's use of a cell phone soon after the crime automatically implicates the phone "in an active cover up of the crime," irrespective of the additional context. See Holley, 478 Mass. at 526 (fact that codefendant was sending text messages as he was fleeing scene of crime was factor supporting nexus between crime and his cell phone). Although the defendant was using his cell phone close in time to the murder, it is unclear whether he was doing so before he saw police approaching and understood that he was about to be arrested. Even though using a cell phone while fleeing the scene of a crime may lend support to an inference that the communication is about the crime, using a cell phone just prior to or during arrest, in and of itself, does not. One might even expect that an arrestee would use a cell phone when about to be arrested. Whether it be to call one's attorney, to ask a friend or family member to post bail, or to arrange child care, using a cell phone when one is

about to be apprehended by police cannot, without more, justify a nexus to search one's cell phone.

Nothing in our decision today disturbs the holding in White, 475 Mass. 583. There, we held that to support a nexus between a crime and a cell phone, the Commonwealth needed more than evidence of a joint venture crime and the opinion of investigating officers that coventurers often use cell phones to communicate. Id. at 590. The only evidence supporting a seizure of the defendant's cell phone was that a crime had been committed by several people, that the defendant was likely one of those people, and that he owned a cell phone. Id. The detectives had no specific evidence that any cell phone had been used in the crime, or that any particular piece of evidence was likely to be found on the defendant's cell phone. Id. In short, White did not contain sufficient facts to add up to a nexus. See id.

Here, in contrast, there is more than a joint venture crime in which the participants all owned cell phones: there is evidence that the defendant made a cell phone call soon after the shooting to the person who rented the car used in the murder, there is a reasonable inference that the crime was preplanned, and there are records of threatening cell phone communications between Diggs and the victim. Thus, given these additional facts, it was reasonable to infer that the

defendant's cell phone would contain evidence related to the crime.

b. Particularity. In response to the Commonwealth's appeal, the defendant argues that the warrant was not sufficiently limited in scope.[6] Because the lack of particularity of the warrant may have factored into the judge's ruling, and because we are vacating the order granting the motion to suppress, we take this opportunity to provide additional guidance on the proper scope of cell phone search warrants. We hold that (1) the correct remedy for the warrant lacking particularity in this case is partial suppression; (2) the search of text messages, call logs, and Snapchat video recordings was proper;[7] yet (3) the lack of time restriction rendered the warrant impermissibly broad, and we must remand to determine whether the proffered evidence fell outside what would have been a reasonable temporal limit.

To determine whether a search warrant was proper in scope, we ask whether it "describe[d] with particularity the places to

---

[6] The defendant also argues that the eighty-day delay in seeking the warrant to search his cell phone was an additional art. 14 violation. Because this argument was not raised in the trial court, we do not consider it here. See Commonwealth v. Yasin, 483 Mass. 343, 349 (2019).

[7] "Snapchat is a social media website on which a member may share information with a network of 'friends.'" F.K. v. S.C., 481 Mass. 325, 327 (2019).

be searched and the items to be seized." Holley, 478 Mass. at 524, quoting Commonwealth v. Perkins, 478 Mass. 97, 106 (2017). The dual purposes of the particularity requirement are "(1) to protect individuals from general searches and (2) to provide the Commonwealth the opportunity to demonstrate, to a reviewing court, that the scope of the officers' authority to search was properly limited" (citation omitted). Holley, supra. The particularity requirement acts as "a safeguard against general exploratory rummaging by the police through a person's belongings." Commonwealth v. Freiberg, 405 Mass. 282, 298, cert. denied, 493 U.S. 940 (1989).

Although "[i]n the physical world, police need not particularize a warrant application to search a property beyond providing a specific address, . . . in the virtual world it is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found." Dorelas, 473 Mass. at 501-502. For a cell phone search, such a limit is akin to no limit at all. See Kerr, Digital Evidence and the New Criminal Procedure, 105 Colum. L. Rev. 279, 303 (2005) ("limiting a search to a particular computer is something like . . . limiting a search to the entire city"). "[G]iven the properties that render [a modern cell phone] distinct from the closed containers regularly seen in the physical world, a search of its many files must be done with special care and satisfy a

more narrow and demanding standard." Dorelas, 473 Mass. at 502. See Riley v. California, 573 U.S. 373, 393 (2014) (noting that searches of physical items are to cell phone searches as "a ride on horseback" is to "a flight to the moon"). We have noted that, at a minimum, the standard for the proper scope of a cell phone search must be restricted to whether the evidence "might reasonably be found in the electronic files searched." Dorelas, supra at 503 n.13.

i. Partial suppression. The Commonwealth argues that if the warrant was not properly limited in scope, the correct remedy is partial suppression only of the evidence that fell outside what would have been a reasonable scope. We agree.

The search warrant here allowed officers to search virtually every area on the cell phone, including the address book, contact list, personal calendar, date book entries, to-do lists, e-mail messages, text and video messages, photographs, video recordings, Internet browser history, and more. The officer requested permission to search "for all data described without any date restriction" because, he claimed, it was unknown "when the weapon used was acquired and when any related conspiracy may have formed." We are hard pressed to imagine what content on the cell phone might have been excluded from the broad scope that this warrant allowed. But because the Commonwealth seeks to introduce specific categories of data

only, we do not opine on the precise parameters of what would have been a reasonable search of the defendant's cell phone.

Our decision turns on whether the Commonwealth's proffered evidence would have fallen within a reasonable scope.[8] The defendant is not prejudiced by an overbroad warrant if the Commonwealth does not seek to exploit the lack of particularity in the warrant. Holley, 478 Mass. at 525. For example, in Commonwealth v. Hobbs, 482 Mass. 538, 550-551 (2019), we held that the defendant was not prejudiced by an overbroad warrant for three and one-half months of his cell site location information (CSLI), because the Commonwealth only introduced CSLI from the date of the crime itself. We noted that an overbroad warrant generally requires only partial suppression of the information for which there was not the requisite nexus, as long as the Commonwealth had not "relied on or otherwise

---

[8] Whether this determination is made on interlocutory appeal or after trial is immaterial. The concurring opinion in the Appeals Court erroneously relied on Commonwealth v. Vasquez, 482 Mass. 850, 867 (2019), for the proposition that the determination hinges on whether review is before or after trial. See Commonwealth v. Snow, 96 Mass. App. Ct. 672, 686 (2019) (Henry, J., concurring). In Vasquez, supra at 867-868, we suppressed all thirty-two days of cell site location information (CSLI) data because the Commonwealth never met its burden to establish probable cause to search the CSLI data at all, not because the warrant was overbroad. Although we commented that the search for thirty-two days of CSLI was likely overbroad, that was not the basis for suppression. Id. at 867. Full suppression was required because there was no probable cause. Id. at 868.

exploited" it at trial. Id. at 550. See Commonwealth v. Wilkerson, 486 Mass. 159, 168-169 (2020). Here, too, we believe partial suppression is the correct remedy.[9] Thus, we decide only whether the Commonwealth is seeking to exploit what is likely an overbroad warrant. In order to further this determination, we must analyze the specific evidence that the Commonwealth seeks to introduce from the cell phone.

ii. Content on the cell phone. After the motion to suppress had been allowed, the Commonwealth moved for permission to supplement the record with a summary of the cell phone evidence it sought to introduce. The judge agreed that such a list would provide context on appeal, and thus stated for the record what items the Commonwealth had proposed to introduce in

---

[9] This is not to say that partial suppression is always the correct remedy. See Wilkerson, 486 Mass. at 168 ("severance doctrine is not without limits"). In Commonwealth v. Lett, 393 Mass. 141, 145-146 (1984), we noted that "all evidence seized pursuant to a general warrant must be suppressed. The cost to society of sanctioning the use of general warrants -- abhorrence for which gave birth to the Fourth Amendment -- is intolerable by any measure" (citation omitted). See Aday v. Superior Court of Alameda County, 55 Cal. 2d 789, 797 (1961). ("We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirement of particularity, and that wholesale seizures might be made under them, in the expectation that the seizure would in any event be upheld as to the property specified. Such an abuse of the warrant procedure, of course, could not be tolerated"). The warrant here was not a general warrant, because it contained a description of the places to be searched and thus did not vest the officers with unbridled discretion. See Commonwealth v. Rutkowski, 406 Mass. 673, 675-676 (1990); United States v. Fleet Mgt. Ltd., 521 F. Supp. 2d 436, 443 (E.D. Pa. 2007).

evidence. That list included various call logs, text messages, and Snapchat video recordings.[10]

As discussed supra, police had probable cause to search the defendant's cell phone for evidence of the joint venture. Based on the defendant's cell phone call to his girlfriend and the inference that the coventurers could have planned some or all of the night's events beforehand, there was a substantial basis for police to search areas of the cell phone that contain communications. See, e.g., Holley, 478 Mass. at 525, 528 (search of defendants' text message communications would have been sufficiently limited in content and scope).

Communications are not limited to words. In Commonwealth v. Dorelas, 473 Mass. at 505, we noted that communications can also come in the form of photographs. There, we analyzed whether a permissible search for photographic communications included only photographs attached to text messages -- which

[10] The full list consisted of (1) text messages between the defendant and Diggs; (2) call logs between the defendant and Diggs; (3) text messages between the defendant and Peters; (4) call logs between the defendant and Peters; (5) text messages between the defendant and someone named "Sista" that referenced "Snapchatting with guns"; (6) text messages between the defendant and someone named "Staxx," which the Commonwealth interpreted as the defendant's attempt to buy a gun; and (7) three Snapchat videos -- one from November 30, 2015, that depicted the defendant with both a gun that resembled the murder weapon as well as one that did not, and two that depicted the defendant holding a gun that resembled the murder weapon. The dates of the latter two videos are unclear from the record, as are the dates of the calls and text messages.

were clearly communications -- or whether it could extend to the photograph application stored locally on the cell phone as well. Id. at 500. Because it was reasonable that communications in the form of photographs could be found there, we concluded that the search could extend to the photograph files as well. Id. at 503.

The evidence that the Commonwealth seeks to introduce here falls squarely within the realm of communications: text messages, call logs, and Snapchat video recordings. Text messages and calls are methods of communication from one party to another. Snapchat is a social media application that allows users to send or post still images or video recordings. Video recordings stored on the application have been sent, or are drafts that can be sent, from one party to another. The Snapchat video recordings are thus communications analogous to the photographs attached to text messages discussed in Dorelas, 473 Mass. at 500. Consequently, when looking for evidence related to the planning and coordination of a joint venture, it was proper here for the officers to search call logs, text messages, and Snapchat video recordings.

iii. Temporal limit. Finally, the defendant argues that the lack of any temporal limits to the search of the cell phone rendered it not sufficiently particular. We agree.

The magnitude of the privacy invasion of a cell phone search utterly lacking in temporal limits cannot be overstated. In Riley, 573 U.S. at 394, the United States Supreme Court noted that a cell phone's large storage capacity means that a search for "even just one type of information [can] convey far more than previously possible" because "the data on a phone can date back to the purchase of the phone, or even earlier." The Court noted that the "sum of an individual's private life" could be reconstructed from the contents of one's cell phone. Id.

Consequently, to be sufficiently particular, a warrant for a cell phone search presumptively must contain some temporal limit. See United States v. Winn, 79 F. Supp. 3d 904, 921 (S.D. Ill. 2015). See also United States v. Zemlyansky, 945 F. Supp. 2d 438, 459 (S.D.N.Y. 2013) (noting temporal restriction is "indic[ium] of particularity" [citation omitted]). Because of the privacy interests at stake, the temporal restriction in an initial search warrant for a cell phone should err on the side of narrowness. If, during that initial search, officers uncover information giving rise to probable cause to broaden their search of the cell phone, nothing precludes them from returning to the judge and requesting a broader warrant. As one commentator notes, this is possible because, under Riley, officers are free to seize and hold cell phones, leaving little need to carry out a search quickly. Gershowitz, The Post-Riley

Search Warrant: Search Protocols and Particularity in Cell Phone Searches, 69 Vand. L. Rev. 585, 627 (2016).

Determining the permissible parameters for a cell phone search is a "fact-intensive inquiry and must be resolved based on the particular facts of each case." Morin, 478 Mass. at 426. Similar to the nexus analysis, the inquiry can be based on "the type of crime, the nature of the [evidence] sought, and normal inferences" about how far back in time the evidence could be found (citation omitted). White, 475 Mass. at 589. For example, in a case involving the sale of stolen firearms where there is evidence that such sales usually take place quickly, the warrant should not reach back far in time. See, e.g., United States v. Roberts, 430 F. Supp. 3d 693, 717 (D. Nev. 2019) (cell phone warrant extending back four days before theft of firearms was not reasonable where sales were unlikely to have taken place until after theft). In contrast, in an insider trading case where the tenor of the parties' relationship is critical to the claim, it could be reasonable to look back further in time. See, e.g., United States v. Pinto-Thomaz, 352 F. Supp. 3d. 287, 307 (S.D.N.Y. 2018) (warrant without temporal restriction authorizing search of digital devices for information regarding relationship between parties upheld because general tenor of relationship was relevant to tipper-tippee theory and could not be confined to specific time frame).

In Holley, 478 Mass. at 525, 527-528, we noted that, although a warrant for seventeen days of text messages lacked particularity, messages exchanged two to four days before the shooting were within a reasonable temporal scope.[11] That determination was based on the particular facts of the case and did not amount to a general rule as to the temporal scope of cell phone searches. Such cases stand on their own facts and analysis. See id.

Here, the detective sought permission to search all of the defendant's data without any date restriction because, he claimed, "it [was] unknown as to when the weapon used was acquired and when any related conspiracy may have been formed." The affidavit did, however, contain a statement from a witness who asserted that Diggs and the victim had had a dispute "in the days leading up to the murder," as well as a statement from the defendant that he had borrowed the car earlier that day. A feud beginning mere days before, and a car borrowed earlier that day, do not support a reasonable inference that evidence related to the crime could be found in the defendant's cell phone data from years, months, or even weeks before the murder.

---

[11] In Holley, 478 Mass. at 510,there were two codefendants: Holley and Pritchett. We found that the Commonwealth did not exploit an insufficiently particular warrant when it introduced Holley's text messages from a period beginning two days before the shooting and Pritchett's text messages from a period beginning four days before the shooting. Id. at 525, 528.

Because the record is largely silent with respect to the dates of the Commonwealth's proposed evidence, we remand to the Superior Court for determination whether each piece of proffered evidence would have fallen within a reasonable temporal limit.[12]

3. Conclusion. The order allowing the defendant's motion to suppress is vacated and set aside. The matter is remanded to the Superior Court for further proceedings consistent with this opinion, including to determine whether the search exceeded the permissible scope of the warrant.

So ordered.

[12] Without knowing what search protocol was used in this case, we do not know whether any of the proffered evidence could be admissible under the plain view exception. We have noted in the past that application of the plain view doctrine to digital searches must, at least, be "limited," and we have declined squarely to decide whether the plain view doctrine applies in searches of electronic records. See Dorelas, 473 Mass. at 505 n.16; Preventive Med. Assocs. v. Commonwealth, 465 Mass. 810, 832 (2013). Here, there is no argument that any of the proffered evidence could be admissible under the plain view doctrine, and no showing that officers came across any of the data inadvertently. Thus, we do not address whether the plain view exception is applicable in this case, or in cell phone cases more generally.