



1 of 25 DOCUMENTS

**COMMONWEALTH vs. JASHUA M. GONZALEZ (and a companion case ).<sup>1</sup>**

1 Commonwealth vs. Norberito Garcia.

**13-P-1349**

**APPEALS COURT OF MASSACHUSETTS**

**85 Mass. App. Ct. 1126; 10 N.E.3d 670; 2014 Mass. App. Unpub. LEXIS 776**

**June 23, 2014, Entered**

**NOTICE:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

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**JUDGES:** Grasso, Grainger & Milkey, JJ.

**OPINION**

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

A Boston Municipal Court judge allowed the defendants' motion to suppress evidence that police seized at their apartment. On the Commonwealth's appeal, we affirm.

*Background.* None of the judge's factual findings is challenged on appeal. On September 10, 2011, Massachusetts State Trooper James Farrell ran a random license plate check on a silver Mercedes car. He learned that the owner of the car, defendant Norberito Garcia, had an active warrant for operating a motor vehicle on a suspended license, subsequent offense, and unlicensed operation of a motor vehicle. Farrell activated his lights to stop the Mercedes, but gave up the pursuit after the car sped away. Later, Farrell accessed the Criminal Justice Information System website and verified that Garcia's warrant was still active, although he also learned that Garcia now had a valid license. The next day, Farrell went to Garcia's address in East Boston, which he had obtained through running the license plate check. After seeing the silver Mercedes in a nearby parking lot, Farrell decided to serve the warrant on Garcia. While several police officers waited at the back of Garcia's apartment building, Farrell and two other officers entered the building from the front and stood outside the door to Garcia's apartment. One of the officers knocked and said that he was delivering a pizza. Someone from inside the apartment told the police that they could not come in without a warrant. After an officer repeatedly knocked

and identified himself, there was no response. The police then heard the sounds of a toilet flushing several times and what one police officer believed to be a door opening to the outside. Farrell kicked the front door open to prevent Garcia from fleeing the apartment. The police immediately discovered Garcia, whom they recognized from his license photo, standing at the threshold of a back door that led from the kitchen to an outside porch. Garcia complied with a request to move away from the door and lie prone on the floor.

At that point, Farrell noticed other people in the apartment and decided to do a protective sweep. He found the second defendant, Jashua Gonzalez, in the closest bedroom and ordered him to the kitchen area near Garcia. In a second bedroom, Farrell discovered several rounds of ammunition, as well as clear plastic bags with cut corners, a spoon with white powder residue, and a scale.<sup>2</sup> While Farrell was sweeping the apartment, a second police officer conducted a protective sweep of the back porch and found a small plastic bag of white powder near the spot where Garcia had been standing when the police entered the apartment. The police officers read the defendants their Miranda rights and placed them under arrest. Both defendants were charged with unlawful possession of ammunition, G. L. c. 269, § 10(h), and possession of a Class B substance, G. L. c. 94C, § 34.

2 Two other people found in the apartment were allowed to leave after they told the police that they were only visiting.

*Discussion.* On appeal from a suppression order, we give "substantial deference" to the judge's conclusions of law but independently review the correctness of the judge's application of constitutional principles to the findings of fact. *Commonwealth v. Mello*, 420 Mass. 375, 381 n.8, 649 N.E.2d 1106 (1995). "While executing an arrest warrant, police may conduct a protective sweep, 'a quick and limited search of the premises' to protect the officers' safety, if they have a reasonable belief based on 'specific and articulable facts' that the area could harbor a dangerous individual." *Commonwealth v. Matos*, 78 Mass. App. Ct. 156, 159, 935 N.E.2d 1285 (2010), quoting from *Maryland v. Buie*, 494 U.S. 325, 327, 334, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990). "The presence of a person . . . without a reasonable basis for suspecting that the person poses a danger to police or others is insufficient to justify a protective sweep of the premises." *Commonwealth v. Dubois*, 44 Mass. App. Ct. 294, 296,

690 N.E.2d 466 (1998).

On appeal, the Commonwealth contends that the police could have inferred from the sound of the flushing toilet that an occupant of the apartment was destroying drug evidence. See *Commonwealth v. Silva*, 440 Mass. 772, 784-785, 802 N.E.2d 535 (2004). Moreover, when police saw Garcia standing at the back door, they could have deduced that Garcia was not the person who flushed the toilet. According to the Commonwealth, the sweep was justified to protect the police from other occupants of the apartment potentially involved in drug trafficking.<sup>3</sup>

3 In *Commonwealth v. DeJesus*, 70 Mass. App. Ct. 114, 120, 872 N.E.2d 1178 (2007), we noted that a "record of violent felonies and firearm possession charges" may constitute one of the specific and articulable facts justifying a protective sweep. Although the police also were aware that Garcia had once been charged with illegal possession of a firearm, the Commonwealth disclaimed any reliance on that knowledge to support the sweep.

We are unpersuaded. While the police may have known that there were other persons in the apartment when they arrested the defendant, they lacked specific and articulable facts that those occupants posed a danger. The sound of a toilet flushing, without more, could not have supported a reasonable belief that the apartment contained a threat that warranted a protective sweep. The police found and apprehended the subject of the arrest warrant immediately after they entered the apartment. At the point that Garcia was lying on the kitchen floor, the police had accomplished the purpose that brought them there. Remaining at the apartment and conducting a protective sweep was not justified by the facts.<sup>4</sup>

4 Even if the toilet flushing gave the police some basis for believing that evidence was being destroyed, under the circumstances of this case, it did not rise to the level of justifying a search of the apartment. Compare *Commonwealth v. Streeter*, 71 Mass. App. Ct. 430, 437, 439-440, 883 N.E.2d 290 (2008) (sweep justified in part to prevent destruction of evidence where police smelled a strong odor of fresh marijuana, and the defendant was acting nervous and admitted that he had smoked marijuana earlier that day).

As the motion judge concluded, this case is

distinguishable from *Commonwealth v. Matos, supra*. There, we upheld a protective sweep of the defendant's house that the police had entered to serve a warrant for drug distribution. Here, by contrast, the police came to the defendant's apartment to serve an arrest warrant for mere motor vehicle offenses. In this context, the police lacked specifically articulable facts to believe that the others in the defendant's residence presented a danger sufficient to justify a protective sweep.

In sum, because we agree with the judge that the facts did not justify the protective sweep through which the evidence was found, we affirm the allowance of the motions to suppress.

*So ordered.*

By the Court (Grasso, Grainger & Milkey, JJ.),

Entered: June 23, 2014.