SJC-12989

COMMONWEALTH vs. ABDIRAHAMAN YUSUF.

Suffolk. February 3, 2021. - September 10, 2021.

Present: Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Firearms. Constitutional Law, Search and seizure, Privacy. Privacy. Consent. Search and Seizure, Consent, Plain view, Expectation of privacy, Warrant, Fruits of illegal search.

Indictments found and returned in the Superior Court Department on June 28, 2017.

A pretrial motion to suppress evidence was heard by Michael D. Ricciuti, J., and the cases were heard by Robert N. Tochka, J.

The Supreme Judicial Court granted an application for direct appellate review.

Patrick Levin, Committee for Public Counsel Services, for the defendant.
Elisabeth Martino, Assistant District Attorney, for the Commonwealth.

WENDLANDT, J. Responding to a call about a domestic disturbance at the defendant's home, a Boston police department

(BPD) officer, who was equipped with a body-worn camera, created a digital recording of the encounter; the recording captured the intimate details of the parts of the home through which the officer traveled as he provided the requested assistance. The resulting video footage was stored by the BPD and then retrieved and reviewed, without a search warrant, in connection with an independent investigation to confirm a suspicion that the defendant was engaged in criminal activity.

On the basis of that review, a BPD detective obtained a search warrant to search the defendant's home; the subsequent search yielded, inter alia, a firearm and ammunition. The defendant's motion to suppress the fruits of the search was denied by a Superior Court judge (motion judge). Following a jury-waived trial before a different Superior Court judge (trial judge), the defendant was convicted of unlawful possession of a firearm and possession of ammunition without a firearm identification card.

This case presents two issues of first impression in Massachusetts: first, whether the warrantless use of the body-worn camera that recorded the interior of the home, the most sacred, constitutionally protected area, comprised a violation of the Fourth Amendment to the United States Constitution or art. 14 of the Massachusetts Declaration of Rights; and, second, whether the subsequent review of the footage obtained, for

investigative purposes unrelated to the incident giving rise to its creation, constituted a warrantless search.

We conclude that the use of the body-worn camera within the home was not a search in the constitutional sense, because it documented the officer's plain view observations during his lawful presence in the home. The later, warrantless, investigatory review of the video footage, however, unrelated to the domestic disturbance call, was unconstitutional. That review resulted in an additional invasion of privacy, untethered to the original authorized intrusion into the defendant's home; absent a warrant, it violated the defendant's right to be protected from unreasonable searches guaranteed by the Fourth Amendment and art. 14.

The record is insufficient to determine whether the Commonwealth met its burden to establish that the decision to seek the search warrant was not prompted by the unlawful review of the video footage. See Commonwealth v. Pearson, 486 Mass. 809, 813-814 (2021). Therefore, the order denying the motion to suppress must be vacated and set aside, and the matter remanded to the Superior Court for further proceedings.

1. Background. a. Facts. We recite the facts found by the motion judge, supplemented by our independent review of the

video footage from the body-worn camera.[1] See Commonwealth v. Ramos, 470 Mass. 740, 742 (2015); Commonwealth v. Clarke, 461 Mass. 336, 341 (2012) ("we are in the same position as the [motion] judge in viewing the videotape" [citation omitted]).

On February 10, 2017, BPD officers responded to a dispatch call regarding a domestic disturbance request for "removal" of an individual at the defendant's residence. Specifically, the defendant's sister requested police assistance in removing the defendant's girlfriend from the home. The sister told the responding officers that the defendant and his girlfriend were "doing too much arguing" and were "punching walls" and that she wanted the girlfriend to leave.

After the first responding officers had entered the apartment, another officer arrived who was equipped with a body-worn camera, which recorded the areas of the home through which he moved, as well as his interactions with the defendant, his sister, and others in the apartment, including a number of police officers. The video footage obtained shows that when the officer arrived at the home, the door was ajar; he entered the living room, where at least two other officers were present; later, it appears from the footage, at least seven officers were

[1] In addition to the video recording, the digital footage includes the incorporated audio recording that also was active throughout the officer's time in the defendant's home.

present in the small space. Some of those officers spoke to the defendant's sister and another woman. The women were standing at the base of a stairwell, in a narrow hallway on the ground floor.

The sister yelled at the defendant and his girlfriend, who were upstairs. The officer wearing the camera walked past the defendant's sister and ascended the stairs. Standing at the top of the staircase, he spoke with the defendant, who was standing at the threshold of a bedroom. Through the open bedroom door, the camera captured a woman in the background. The woman was zipping her coat. Floral-printed curtains adorned the bedroom window just behind the area where the woman was dressing.

The sister shouted from downstairs, and the defendant yelled "shut up." He explained to the officer with the camera that the girlfriend could not be rushed, as she was getting dressed, but that they would leave shortly. Once dressed, the girlfriend and the defendant moved toward the stairs; they were stopped by the officer. The officer directed the sister, who had remained at the bottom of the stairwell, to step aside. Other officers escorted the defendant's sister and the other woman into the living room, thus clearing the landing at the bottom of the stairs. The defendant and his girlfriend descended the stairs and left the house. Other officers

remained inside to take a report;[2] the officer who was wearing the camera walked outside and turned it off. Thereafter, the footage from the body-worn camera was uploaded to a BPD-owned and -managed computer system where the data were available to other officers.[3]

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[2] The video footage shows another officer holding a cellular telephone on which the camera appears to be active. The defendant made no claim with respect this conduct, and we do not address it.

[3] The record before us does not include the BPD's policy on body-worn cameras that was applicable at the time of the domestic disturbance call. Accordingly, the record is devoid of any terms that might have restricted or otherwise governed the body-worn camera video footage's collection, storage, or use of technological enhancements, or internal or external access to it. At the hearing on the motion to suppress, a detective testified that his understanding, from speaking with other officers and having read the policy, was that video footage is uploaded at the end of a shift and then is viewable through a computer program.

The footage itself shows that the officer turned the camera on at the beginning of the dispatch call and turned it off once he left the premises. The Commonwealth informs us that this procedure was consistent with the then-applicable policy, and the defendant does not suggest that the use of the camera during the call was arbitrary or targeted at him for reasons other than to document the response to the dispatch call.

The Commonwealth submitted a copy of a BPD body-worn camera policy in an appendix filed in this court. That policy purportedly was adopted in 2019, after the events in this case. See Boston Police Department Rule 405, Body Worn Camera Policy § 4.2(4) (June 3, 2019) (2019 body-worn camera policy). Even if that policy had been in place during the relevant time frame, however, we would not consider it, as it was not included in the record before the judge who decided the motion to suppress. See Lynch v. Crawford, 483 Mass. 631, 641 (2019); Commonwealth v. Eagleton, 402 Mass. 199, 201 n.3 (1988). In addition, we are unable to take judicial notice of the policy as presently

After the BPD's response to the domestic disturbance call, an officer downloaded a copy of the body-worn camera footage onto a digital video disc (DVD) and placed it in one of his desk drawers.[4] The officer notified a detective who was assigned to the BPD's youth violence strike force (gang unit) that the officer was in possession of a copy of the video footage, in the event that it should prove useful. The gang unit had been conducting an ongoing, six-month investigation of the defendant for firearms offenses, and the detective had been tasked with discovering a basis for obtaining a search warrant of the defendant's home in connection with the investigation.

The detective and other members of the gang unit had been following one of the defendant's social media accounts over the course of their investigation.[5] Two weeks after the domestic

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submitted. See Mass. G. Evid. § 202(c) (2021) (taking judicial notice is not permitted for municipal ordinances, town bylaws, special acts of Legislature, or regulations that are not published in Code of Massachusetts Regulations).

[4] The record is unclear as to what, if any, process was followed to access the footage, and whether saving it onto a DVD was permitted by the then-applicable policy. See note 3, supra. The 2019 body-worn camera policy states that BPD "personnel shall not copy or otherwise reproduce any [body-worn camera] recordings/footage (including using an iPhone, iPad, or other electronic or other device)."

[5] One social media application through which the detective followed the defendant allows users to share video recordings and photographs, either live or previously recorded, with their "friends." Recordings may be shared with one "friend," a group of "friends," or all "friends." An icon on the posting

disturbance call, the detective noticed that the defendant had posted what the officer believed to be a recently created video recording[6] of the defendant holding a firearm in a bedroom, with floral-printed curtains visible in the background. After he saw the posted recording,[7] the detective retrieved the DVD containing the body-worn camera footage from his colleague and reviewed it. Peering into the defendant's home caught on the body-worn camera footage, the detective saw the defendant's girlfriend zipping her coat in the defendant's bedroom, while standing next to what the detective believed were the same distinctive curtains visible in the posted video recording. This was significant to

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indicates whether the images came from an archive or were "live." Video recordings posted in this application generally are deleted automatically twenty-four hours after they are posted, although one type of post is not deleted until a user does so manually or limits access to it.

The detective had sent a "friend" request to the defendant's social media account, using a BPD account with a fabricated name and profile. The defendant accepted the request, thus enabling the detective to view the defendant's posts; the detective saw multiple posts apparently depicting the defendant while he was displaying firearms.

[6] The posted video recording indicated that it had been sent "yesterday," and lacked the icon to indicate that it had come from an archive. This suggested to the detective that the recording had been created and posted simultaneously, and within twenty-four hours of the detective having viewed the post.

[7] Because postings generally would be automatically removed every twenty-four hours, when the detective watched video recordings he believed were of potential investigative value, he played them on one cellular telephone and recorded the footage being played using another cellular telephone.

the detective because it established the location of the posted video recording that had showed the defendant apparently holding a firearm.

Thereafter, the detective sought and obtained a search warrant to search the defendant's residence and to seize, inter alia, weapons, weapons-associated objects, and identifying documents. The warrant affidavit stated that the detective had probable cause to believe weapons would be found at the residence, which was known to be the defendant's address. The affidavit asserted that there had been numerous social media posts showing the defendant with firearms. The affidavit further explained that the curtains visible in a recent post matched those in the bedroom seen in the body-worn camera footage of the defendant's home.

After executing the search warrant, officers found narcotics and a firearm in the house, and ammunition and marijuana in what they believed to be the defendant's brother's bedroom. The defendant and his brother were arrested at that time.

b. Prior proceedings. The defendant was indicted on charges of unlawful possession of a firearm, G. L. c. 269, § 10 (h), as an armed career criminal, G. L. c. 269, § 10G (a); unlawful possession of a large capacity feeding device, G. L. c. 269, § 10 (m); and possession of ammunition without a firearm

identification card, G. L. c. 269, § 10 (h). He moved to suppress the video recording that had been posted on his social media account, the video recording from the body-worn camera, the fruits of the search warrant, and statements he made during booking.[8] After an evidentiary hearing, the motion judge denied the motion.

Following a jury-waived trial, the defendant was found guilty of unlawful possession of a firearm and unlawful possession of ammunition; the Commonwealth entered a nolle prosequi on the element that charged the defendant with being an armed career criminal. The defendant was acquitted of unlawful possession of a large capacity feeding device.

The defendant appealed to the Appeals Court from the decision denying his motion to suppress. He argued that the motion should have been allowed because the use of the body-worn camera in his home during the police response to the domestic disturbance call, as well as the subsequent investigatory review of the video footage, violated his rights under the Fourth Amendment and art. 14 to be free from unreasonable warrantless searches. We allowed the defendant's petition for direct appellate review.

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[8] At booking, the defendant told officers not to charge his brother with possession of the ammunition because "it was mine," and also said that he was glad he "got that sh-t out of there."

2. Discussion. a. Standard of review. "When reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (quotation and citation omitted). Commonwealth v. Almonor, 482 Mass. 35, 40 (2019). We review de novo the "application of constitutional principles to the facts as found," Commonwealth v. Peters, 453 Mass. 818, 822-823 (2009), quoting Commonwealth v. Stoute, 422 Mass. 782, 783 n.1 (1996). We "leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing." Commonwealth v. Balicki, 436 Mass. 1, 4 n.4 (2002), quoting Commonwealth v. Eckert, 431 Mass. 591, 592–593 (2000), but review de novo any findings based entirely on a video recording, see Commonwealth v. Tremblay, 480 Mass. 645, 656 (2018) (video recording constitutes documentary evidence for which reviewing court is in same position as motion judge).

The defendant maintains that the use of the body-worn camera during the response to the domestic disturbance call, as well as the subsequent review of the footage in connection with an unrelated investigation, violated the protections of the Fourth Amendment and art. 14 against unreasonable searches. To establish a violation of these constitutional guarantees, the defendant bears the initial burden of showing that the officer's

use of the body-worn camera in his residence, the later warrantless review of the footage, or both, constituted a search in the constitutional sense. See Almonor, 482 Mass. at 40; Commonwealth v. Leslie, 477 Mass. 48, 53, 58 (2017).

b. Use of body-worn camera in defendant's home. "In its most traditional form, a search occurs when 'the [g]overnment obtains information by physically intruding on a constitutionally protected area.'" Commonwealth v. Johnson, 481 Mass. 710, 715, cert. denied, 140 S. Ct. 247 (2019), quoting Grady v. North Carolina, 575 U.S. 306, 309 (2015) (per curiam). See Florida v. Jardines, 569 U.S. 1, 5 (2013). Accord Leslie, 477 Mass. at 49 ("analytical framework set out in Jardines" applies to art. 14). Alternatively, a search occurs when the government invades a reasonable expectation of privacy. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Commonwealth v. McCarthy, 484 Mass. 493, 497 (2020), quoting Johnson, supra ("An individual has a reasonable expectation of privacy where [i] the individual has manifested a subjective expectation of privacy in the object of the search, and [ii] society is willing to recognize that expectation as reasonable").

A person's home is among the areas expressly protected under both the Fourth Amendment ("right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated") and art. 14 ("Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions"). Specifically enumerated in these constitutional texts, "the home is first among equals." Jardines, 569 U.S. at 6. "The very core of [the constitutional] guarantee is the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" (quotations and citation omitted). Caniglia v. Strom, 141 S. Ct. 1596, 1599 (2021). See Silverman v. United States, 365 U.S. 505, 511 (1961). "In view of the 'sanctity of the home,' 'all details [within it] are intimate details, because the entire area is held safe from prying government eyes.'" Commonwealth v. Porter P., 456 Mass. 254, 260 (2010), quoting Kyllo v. United States, 533 U.S. 27, 37 (2001).

The defendant contends that a search in the constitutional sense occurred in this case because the police used the body-worn camera to gather information during the domestic disturbance call at the defendant's home, physically intruding on a constitutionally protected area. See Silverman, 365 U.S. at 506-507, 509-512 ("spike mike" inserted through neighboring wall that made contact with heating duct of home, conveying conversations, constituted physical intrusion of home that triggered Fourth Amendment protection). See also United States

v. Jones, 565 U.S. 400, 404, 409-410 (2012) (physical installation of global positioning system device on vehicle triggered Fourth Amendment protection). Alternatively, the defendant contends that the use of a body worn camera in his home comprised a search because it invaded the reasonable expectation of privacy he had in his residence. See United States v. Karo, 468 U.S. 705, 715 (1984) (search occurred where "the Government surreptitiously employ[ed] an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house"); Porter P., 456 Mass. at 260 ("the juvenile has a reasonable expectation of privacy, because the Fourth Amendment and art. 14 expressly provide that every person has the right to be secure against unreasonable searches and seizures in his home"). In the specific circumstances of this case, we disagree that a search occurred.

By contrast with the cases on which the defendant relies, here the officer who was equipped with the body-worn camera entered the defendant's home, at the defendant's sister's request, to render assistance in response to the call to police about a domestic disturbance. Thus, the officer was present lawfully in the home, upon an express invitation to enter. See Commonwealth v. Gray, 465 Mass. 330, 343, cert. denied, 571 U.S. 1014 (2013) (resident who answered door consented to entry of

home). The sister, as a family member who lived in the home, had authority to give such consent. See Georgia v. Randolph, 547 U.S. 103, 109 (2006); Commonwealth v. Podgurski, 44 Mass. App. Ct. 929, 930 (1998), citing Commonwealth v. Ortiz, 422 Mass. 64, 70 (1996) ("Family members who live in a home together may validly consent to a search of that home").

Being lawfully present in the home, the officer's observations of the items and locations in his path as he effected the purpose of his visit were permissible plain view observations. See Commonwealth v. Blevines, 438 Mass. 604, 609 (2003) ("police are not required to blind themselves to information . . . that declares its nature to anyone at sight" [citation omitted]). See also Commonwealth v. Entwistle, 463 Mass. 205, 217 (2012), cert. denied, 568 U.S. 1129 (2013) (plain view observation of open bill that lay on kitchen table fell within scope of lawful search of defendant's home). So long as the officer confined his actions and stayed within the locations of the home that were required to perform his duties, such plain view observations did not constitute an "independent search" in a constitutional sense, because they produced "no additional invasion of [the defendant's] privacy interest" beyond that resulting from the officer's initial, justified entry into the home. See Arizona v. Hicks, 480 U.S. 321, 325 (1987) (merely inspecting parts of turntable in plain view was not independent

search because it produced no additional invasion of privacy and came into view during lawful search for shooter, but turning over equipment to look for serial number was additional invasion of privacy). See also Illinois v. Andreas, 463 U.S. 765, 771 (1983) ("once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost"); Texas v. Brown, 460 U.S. 730, 738 n.4 (1983) ("mere observation of an item left in plain view . . . generally involves no Fourth Amendment search"). Cf. Commonwealth v. Sergienko, 399 Mass. 291, 294 (1987) (plain view observation "does not rise to the level of a search, and Fourth Amendment limitations are not triggered").

Moreover, where similar plain view observations are made in connection with a crime scene, this court has recognized that taking photographs of areas of a home to record an officer's plain view observations of evidence raises no Fourth Amendment or art. 14 concerns, so long as the officer was lawfully present in the home. See, e.g., Commonwealth v. Freiberg, 405 Mass. 282, 299, cert. denied, 493 U.S. 940 (1989) (where police were "legally on the premises [pursuant to a warrant], it was permissible for them to take . . . photographs" of areas of home where blood was found); Commonwealth v. Young, 382 Mass. 448, 458-460 (1981) (where police were lawfully in apartment pursuant to exigent circumstances, taking photographs of plain view

observations of bloodstained areas was not unconstitutional). The same rationale applies to video recordings. See United States v. McCourt, 468 F.3d 1088, 1092 (8th Cir. 2006), cert. denied, 549 U.S. 1301 (2007) (video recordings are "a series of still [photographic] images shown in rapid succession").

Some other State courts similarly have permitted photographs and video recordings to document and preserve the plain view observations of officers who are lawfully present at a crime scene. See, e.g., State v. Spears, 560 So. 2d 1145, 1150-1151 (Ala. Crim. App. 1989) (officer who arrived shortly after shooting was permitted to photograph, film, and diagram premises consistent with police department policy to memorialize plain view observations and to preserve scene of homicide); People v. Macioce, 197 Cal. App. 3d 262, 268, 276 (1987), cert. denied, 488 U.S. 908 (1988) (following emergency entry at scene of homicide, seventeen photographs taken of bloodstained apartment where body was found "constituted no more than a memorialization of what the officers observed"); People v. Reynolds, 672 P.2d 529, 532 (Colo. 1983) (following emergency response to report of shooting in defendant's apartment and discovery of body in bedroom, photographs and measurements documenting and preserving scene were permissible); State v. Magnano, 204 Conn. 259, 266-267 (1987) (photographs taken of plain view observations at scene of homicide following police

entry in response to defendant's call that intruder was in home were permissible); Davis v. State, 217 So. 3d 1006, 1014-1015 (Fla. 2017) (photographs and video recording of items in defendant's home did not constitute additional invasion into defendant's privacy beyond that occasioned by scope of search warrant). See also 2 W.R. LaFave, Search and Seizure § 4.10(d) (6th ed. 2020).

These courts have reasoned that such photographic preservation, like the plain view observations themselves, involves neither an additional intrusion nor an additional invasion of privacy beyond that incident to the officer's lawful entry into the home. See Spears, 560 So. 2d at 1148; Magnano, 204 Conn. at 271 n.6; People v. Spencer, 272 A.D.2d 682, 683 (N.Y. 2000). Accordingly, such recording is not a search. See Hicks, 480 U.S. at 324, 329 (neither "mere recording" of stereo's serial number nor "mere inspection" of portions of stereo that were in plain view in apartment where officers entered pursuant to exigent circumstances violated Fourth Amendment).

We turn to consider whether the use of body-worn cameras to document police-civilian interactions, where, as here, the officers are lawfully present in the home, constitutes a search in the constitutional sense. The court's decision in Balicki, 436 Mass. at 11-13, is instructive. There, police officers

obtained a warrant to search the defendants' home and to seize specific items thought to have been obtained by fraud. Rather than limiting their search to the places where those items might be found, however, the officers effectively conducted an inventory search of every room in the house. Id. at 5-7, 11. They also recorded their search using photographs and a video recording. Id. at 5-7. We affirmed a Superior Court judge's decision ordering suppression of, inter alia, the photographs and video recording, on the ground that the search went beyond the bounds of the warrant and, thus, the subsequent seizure of items could not be justified under the plain view doctrine. Id. at 11-13. We stated, however, that "the limited photographic preservation of the condition of a search scene (to protect the police from allegations of damage), or the photographic preservation of evidence, in situ, that the police otherwise have the right to seize pursuant to a warrant or any exception thereto," are "not offensive to the privacy interests protected by art. 14." Id. at 12-13.

The United States Supreme Court's decision in Wilson v. Layne, 526 U.S. 603, 613 (1999), provides further guidance. In that case, the Court concluded that officers who invited members of the media to photograph and record the execution of an arrest warrant in a home violated the Fourth Amendment rights of the homeowners. Id. at 614. Contrasting the "media ride-along" at

issue in that case, the Court noted that "it might be reasonable for police officers to themselves videotape home entries as part of a 'quality control' effort to ensure that the rights of homeowners are being respected, or even to preserve evidence." Id. at 613.

We conclude that, where, as here, the officer was lawfully present in the home and the body-worn camera captured only the areas and items in the plain view of the officer as he or she traversed the home, in a manner consistent with the reasons for the officer's lawful presence, the recording is not a search in the constitutional sense and does not violate the Fourth Amendment or art. 14. This conclusion follows from our jurisprudence regarding the photographic preservation of a crime scene. See Freiberg, 405 Mass. at 299; Young, 382 Mass. at 458-460. As with such photographic preservation, the limited recording of police-civilian encounters may serve to protect police officers from allegations of damage, to memorialize and preserve the events as they transpire, and to advance interest in police accountability. See Balicki, 436 Mass. at 11-12; Matter of Patrolmen's Benevolent Ass'n of N.Y. v. de Blasio, 171 A.D.3d 636, 637 (N.Y. 2019). As is the case in photographing a crime scene, the privacy interest of the resident in whose home police are lawfully present is diminished with respect to the areas and objects in plain view.

This is not to say that police officers can record without limit every area of a home when they are called to assist a resident, or otherwise are lawfully present inside a home. See Balicki, 436 Mass. at 11 (photography and videography of entire house including "everything of potential evidentiary value" constituted general search in violation of art. 14). Plain view observation cannot be used as a pretext for a general exploratory search of the home. See Hicks, 480 U.S. at 328, quoting Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) ("the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges"). "[T]he purposes justifying a police search strictly limit the permissible extent of the search." Maryland v. Garrison, 480 U.S. 79, 87 (1987). Compare Balicki, supra at 5-7, 11-13 (discussing impermissibility of video recording and photography of spaces in home unrelated to that authorized by search warrant). The body-worn camera (like the police officer) may intrude only on the places necessary to effect the lawful purposes for the officer's presence. See Peters, 453 Mass. at 823 (scope of police conduct upon entry justified by emergency must be limited to purpose of entry); Commonwealth v. Gaynor, 443 Mass. 245, 255 (2005) (scope of warrantless consent search is limited to consent given); Balicki, supra at 9, citing Horton v. California, 496 U.S. 128,

140 (1990) (scope of warrantless search is limited to exigency justifying search).

Here, based on our review of the footage, the officer confined his presence to the places he needed to enter to effect the response to the domestic disturbance call. The camera physically intruded only to the extent that the officer himself already lawfully had intruded, and the field of view of the camera, which was worn on the officer's chest, went no further than the officer's own unaided view. At least as appears on the submitted copy of the recording, the footage involved no technological enhancements. Otherwise put, the camera captured only the officer's plain view observations of the areas of the home where, due to the officer's lawful presence, the defendant's expectations of privacy already were diminished. Thus, the recording was not a search in the constitutional sense.

c. Subsequent review of recorded footage. Having determined that the use of the body-worn camera in the home was not a search, we next address the constitutionality of the BPD's subsequent act of reviewing the video footage for unrelated, investigatory purposes. That subsequent review "requires a separate constitutional inquiry." See Johnson, 481 Mass. at 720. See also Entwistle, 463 Mass. at 215-219 (considering separately lawfulness of officers' actions in each warrantless

search of defendant's home). The defendant contends that the subsequent review constituted a search because it invaded his reasonable expectation of privacy. See Johnson, supra at 715, 720. See also Katz, 389 U.S. at 360-361 (Harlan, J., concurring). We conclude that it did.

"At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable." Karo, 468 U.S. at 714. The interior of a home can reveal "a highly detailed profile . . . of our associations -- political, religious, amicable and amorous, to name only a few -- and of the pattern of our professional and avocational pursuits." Commonwealth v. Mora, 485 Mass. 360, 372-373 (2020), quoting Commonwealth v. Connolly, 454 Mass. 808, 834 (2009) (Gants, J., concurring).

Unlike the recording of the plain view observations attendant to the initial and lawful entry into the defendant's home, this subsequent review for investigatory and unrelated reasons cannot be justified as a limited extension of the officer's plain view observations. The home is not a place to which the public has access, or where an individual might expect a recording made during a lawful police visit would be preserved indefinitely, accessed without restriction, and reviewed at will

for reasons unrelated to the purposes of the police visit. See Mora, 485 Mass. at 368, citing Almonor, 482 Mass. at 42 n.10. As the court remarked in Balicki, it is one thing to be present in a home to assist its resident and "of necessity being in a position to cursorily notice many of its contents"; it is quite another "to create a permanent record of [the contents of the home traversed by the responding officers] for review by police, prosecutors, expert witnesses, and others at any time in the future." Balicki, 436 Mass. at 12. Such a "record can be played and replayed as many times as necessary or desired, and the images can be focused or enlarged to show each detail of every item in that citizen's home." Id.

While video recording technology is hardly new, equipping officers with body-worn cameras is relatively recent. The use of body-worn cameras to record police-civilian encounters has increased in the past decade. See Chapman, National Institute of Justice, Body-Worn Cameras: What the Evidence Tells Us, NIJ Journal, no. 280, Jan. 2019, at 1 ("In 2013, approximately one-third of U.S. municipal police departments had implemented the use of body-worn cameras"); Hyland, United States Department of Justice, Bureau of Justice Statistics, Body-Worn Cameras in Law Enforcement Agencies, 2016, at 1 (Nov. 2018) (in 2016, forty-seven percent of general-purpose law enforcement agencies in United States acquired body-worn cameras).

Proponents of body-worn cameras tout the utility of these devices in protecting the police from false allegations of damage, promoting police accountability, and serving as a record of police-civilian interactions. See Blitz, American Constitution Society for Law and Policy, Police Body-Worn Cameras: Evidentiary Benefits and Privacy Threats, at 1 (May 2015) (Blitz) (body-worn cameras support more accurate fact finding for police misconduct cases and deter wrongdoing); Thomas, The Privacy Case for Body Cameras: The Need for a Privacy-Centric Approach to Body Camera Policymaking, 50 Colum. J.L. & Soc. Probs. 192, 200-201 (2017) (Thomas) (benefits of body-worn cameras involve, inter alia, deterring police misconduct, including illegal searches; increasing public trust in law enforcement; and facilitating prosecution for privacy-infringing crimes).

Indeed, the motion judge here found that "[o]ne of the purposes of the body-worn camera is to ensure that the police act in accordance with the law in tense circumstances like" those encountered when responding to a situation such as the dispatch call at issue. See, e.g., United States v. Fautz, 812 F. Supp. 2d 570, 616 (D.N.J. 2011) (videotaping defendant's apartment during execution of search warrant to protect officers from potential claims of liability for damage or disruption of personal property was reasonable); Matter of Patrolmen's

Benevolent Ass'n of N.Y., 171 A.D.3d at 637 ("The purpose of body-worn camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building").

Despite these perceived benefits, others wisely caution that the unregulated use of such cameras has the potential to invade privacy in a manner inconsistent with society's reasonable expectations. See Stanley, American Civil Liberties Union, Police Body-Mounted Cameras: With Right Polices in Place, a Win for All, at 2 (updated Mar. 2015) (noting tension between potential that body-worn cameras invade privacy and "strong benefit in promoting police accountability"). See, e.g., Blitz, supra at 1 ("Police body-worn cameras, critics point out, threaten privacy in much the same way the [S]tate threatens citizens' privacy anytime it records their activities. Such a threat is especially worrisome where police cameras record details from inside people's homes or other private areas"); Thomas, 50 Colum. J.L. & Soc. Probs. at 207 ("With the ability to review footage at will comes the power to comb through the background for . . . details, noticing or reexamining even innocent activity . . . allow[ing] those viewing the footage to create intimate and detailed profiles of people beyond the level possible by mere real-time observation"). See also Freund, When Cameras are Rolling:

Privacy Implications of Body-Mounted Cameras on Police, 49 Colum. J.L. & Soc. Probs. 91, 130-131 (2015) (If "body-worn cameras become a systematic tool for evidence collection, this will lead to more distrust of police interactions, hampering efforts to build better relationships between police departments and citizens" [footnote omitted]); Thomas, supra at 194 ("absent the right policies, the technology may be used to tailor narratives or gather evidence of routine criminal activity instead of ensuring police accountability, thus introducing privacy concerns while failing to assure the public that body cameras will help to curb abuse" [footnote omitted]).

In response to these concerns, a number of State legislatures have enacted statutes governing the creation, retention, and access to body-worn camera footage.[9] As noted, the record here does not include the policy governing body-worn cameras applicable at the time of the domestic disturbance call.

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[9] See, e.g., Cal. Penal Code § 832.18 (establishing body-worn camera policy best practices regarding storage of and access to video footage); N.J. Stat. Ann. § 40A:14-118.5 (setting forth when body-worn cameras will be activated or deactivated, notice requirements, and storage protocols); Wash. Rev. Code § 10.109.010 (requiring law enforcement agencies that deploy body-worn cameras to establish policies that address when cameras are activated and deactivated, discretion of officers to choose when to record, notice of recording, and data storage). The Legislature has established a task force to make recommendations of regulations for law enforcement agencies regarding body-worn cameras by July 31, 2022. See St. 2020, c. 253, § 104.

See note 3, supra. Whatever its terms, the practice followed apparently permitted law enforcement officers unlimited access to review, download, share, and use the footage in connection with unrelated, investigatory purposes.

"[B]oth this court and the United States Supreme Court have been careful to guard against the 'power of technology to shrink the realm of guaranteed privacy' by emphasizing that privacy rights 'cannot be left at the mercy of advancing technology but rather must be preserved and protected as new technologies are adopted and applied by law enforcement.'" Almonor, 482 Mass. at 41, quoting Johnson, 481 Mass. at 716. See McCarthy, 484 Mass. at 499 ("advancing technology undercuts traditional checks on an overly pervasive police presence because it [1] is not limited by the same practical constraints that heretofore effectively have limited long-running surveillance, [2] proceeds surreptitiously, and [3] gives police access to categories of information previously unknowable"). "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon" (citation omitted). Coolidge, 403 U.S. at 454.

Consistent with these principles, we conclude that while the plain view observation doctrine extended to the officer's recording of his interactions in the defendant's home in response to the domestic disturbance call, that doctrine cannot

be stretched to sanction the subsequent review of the footage for reasons unrelated to the call. The Fourth Amendment and art. 14 were enacted, in large part, in "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." Mora, 485 Mass. at 370, quoting Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018). The ability of police officers, at any later point, to trawl through video footage to look for evidence of crimes unrelated to the officers' lawful presence in the home when they were responding to a call for assistance is the virtual equivalent of a general warrant. See, e.g., Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 345-347 (4th Cir. 2021) (noting prohibition against general warrants, and holding that subsequent warrantless review of photographic and location data from aerial camera surveillance was search). A database of body-worn camera footage of the places where officers are called upon to assist residents, reviewable at will and without a warrant, for unrelated investigations, renders "technologically feasible the Orwellian Big Brother." See United States v. White, 401 U.S. 745, 770 (1971) (Harlan, J., dissenting).

Moreover, the subsequent review of the footage in connection with the unrelated investigation of the defendant

falls outside the rationale justifying the recording in the first instance. Such a review is divorced from protecting police officers from false accusations of misconduct, ensuring police accountability, or preserving a record of police-civilian interaction. Instead, the use of body-worn camera footage in this manner, after the fact, for investigatory purposes unrelated to the domestic disturbance call, had the effect of allowing the gang unit detective to peer into the defendant's home for evidence to support an unrelated criminal investigation. See Florida v. Wells, 495 U.S. 1, 4 (1990), quoting Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring) (policy governing inventory search may not permit search to be turned into "a purposeful and general means of discovering evidence of crime"). Cf. Commonwealth v. Buccella, 434 Mass. 473, 485 (2001), cert. denied, 534 U.S. 1079 (2002) ("It would appear reasonable to expect that a government agency, to which a citizen is required to submit certain materials, will use those materials solely for the purposes intended and not disclose them to others in ways that are unconnected with those intended purposes").

"The 'basic purpose of [the Fourth] Amendment' . . . 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" Carpenter, 138 S. Ct. at 2213, quoting Camara v. Municipal Court of San

Francisco, 387 U.S. 523, 528 (1967). The Fourth Amendment and art. 14 would afford little protection if they permitted officers to return to the police station following a call for assistance that was video recorded, store the resulting video footage of a home's interior, and then retrieve it in connection with an unrelated investigation, "trawl[ing] for evidence with impunity" through the recording of the inside of a home. See Leslie, 477 Mass. at 54, quoting Jardines, 569 U.S. at 6. As the United States Supreme Court repeatedly has stressed, the home is a "constitutional[ly] differen[t]" location (citation omitted). Caniglia, 141 S. Ct. at 1599. See id. at 1600, quoting Collins v. Virginia, 138 U.S. 1663, 1672 (2018) ("this Court has repeatedly 'declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home'"). Cf. Wilson, 526 U.S. at 611-612 (media ride-along was unconstitutional despite search warrant, which did not strip residents of home of all Fourth Amendment privacy interests in areas of home that were exposed to view). "[E]ven the most law-abiding citizen," as well as an individual merely suspected of criminal behavior, "has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious

threat to personal and family security." Camara, supra at 530-531.

Because "[p]rotecting the home from [such] arbitrary government invasion always has been a central aim of both [Constitutions]," Mora, 485 Mass. at 370, we decline to extend the plain view observation doctrine to the subsequent, unrelated review of body-worn camera footage of the defendant's home. The review was a search in the constitutional sense and was "presumptively unreasonable" under the Fourth Amendment and art. 14 (citation omitted). See Commonwealth v. Arias, 481 Mass. 604, 609 (2019). See also Katz, 389 U.S. at 357; Commonwealth v. Dame, 473 Mass. 524, 536, cert. denied, 137 S. Ct. 132 (2016) ("Under both the Fourth Amendment . . . and art. 14 . . . , warrantless searches 'are per se unreasonable'" [citation omitted]).[10]

[10] Moreover, the review of the body-worn camera footage was not limited by the same practical constraints as are human sight and memory. See Commonwealth v. Gomes, 470 Mass. 352, 369 (2015), S.C., 478 Mass. 1025 (2018) ("Human memory does not function like a video recording"). See, e.g., Kyllo v. United States, 533 U.S. 27, 34-35 (2001) (thermal imaging of home constituted "search" because it gathered information on interior of home that was not otherwise obtainable without physical intrusion); Arizona v. Hicks, 480 U.S. 321, 325 (1987) (action unrelated to objectives of authorized intrusion into home, and which exposed concealed portions of home, produced new invasion of respondent's privacy); United States v. Karo, 468 U.S. 705, 715 (1984) (subsequent review of video footage "reveal[ed] a critical fact about the interior of [the defendant's home] that the Government [was] extremely interested in knowing and that it could not have otherwise obtained without a warrant").

d. De minimis search. The Commonwealth does not argue that the subsequent review of the body-worn camera footage was permissible under one of the "carefully delineated exceptions" to the warrant requirement. See Entwistle, 463 Mass. at 213. See also Caniglia, 141 S. Ct. at 1599; Commonwealth v. Rogers, 444 Mass. 234, 236-237 (2005) (discussing exceptions to warrant requirement, including probable cause, exigent circumstances, and consent). Rather, the Commonwealth contends that the BPD review of the body-camera footage was not extensive, and that the review was targeted at one specific detail, the floral-printed curtains in the defendant's bedroom. But the constitutional protection against unreasonable, warrantless searches is no less applicable to a targeted search than it is to a more extensive one. See Hicks, 480 U.S. at 325 ("A search is a search, even if it happens to disclose nothing but the bottom of a turntable").

Thus, the portions of the search warrant affidavit drawn from the body-worn camera video footage, therefore, should have been excised,[11] and the motion judge should have allowed the motion to suppress the evidence seized from the defendant's

[11] As we have stated repeatedly, "[t]he Massachusetts Constitution affords greater protections to a person in certain circumstances than those provided by Federal decisions interpreting the Fourth Amendment." See Commonwealth v. Balicki, 436 Mass. 1, 11 n.11 (2002), citing Commonwealth v. Upton, 394 Mass. 363, 372–373 (1985).

home. See Commonwealth v. Barillas, 484 Mass. 250, 257-259 (2020) (suppression was proper where evidence was seized as part of inventory search, but then was searched for investigatory purposes); Commonwealth v. Vuthy Seng, 436 Mass. 537, 554-555, cert. denied, 537 U.S. 942 (2002) (exclusion of evidence at retrial was required where it was fruit of improper investigatory search during inventory search).

e. Independent source exception. "The general rule is that evidence is to be excluded if it is found to be the 'fruit' of a police officer's unlawful actions." Balicki, 436 Mass. at 15, citing Wong Sun v. United States, 371 U.S. 471, 484 (1963). There are a number of exceptions to that rule, including, as relevant here, the so-called "independent source" exception. See Pearson, 486 Mass. at 812-813, quoting Murray v. United States, 487 U.S. 533, 539 (1988).

To satisfy the independent source exception, the Commonwealth must establish by a preponderance of the evidence that (1) the decision to seek the search warrant was not prompted by what police observed during the unlawful viewing of the body-worn camera footage, and (2) the affidavit submitted in support of the application for a search warrant contained sufficient information, apart from that gleaned from the unlawful viewing, to establish probable cause. See Pearson, 486

Mass. at 813, citing Commonwealth v. DeJesus, 439 Mass. 616, 627 n.11 (2003), and Murray, 487 U.S. at 541-543.

The Commonwealth argues that, absent the ill-gotten information, the search warrant affidavit nonetheless established probable cause. As we recently made clear in Pearson, 486 Mass. at 813-814, decided after the briefing in this case, the Commonwealth must also establish that the decision to seek the search warrant was not prompted by the unlawful review of the video footage. The record before us is insufficient to determine whether the Commonwealth can meet its burden on this issue. Therefore, the order denying the motion to suppress must be vacated and set aside, and the matter remanded to the Superior Court for an evidentiary hearing and a determination as to whether the Commonwealth can satisfy its burden under Pearson. See id.

3. Conclusion. The order denying the motion to suppress is vacated and set aside, and the matter is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.