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COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

Westboro District Court
J. McCann

* * * * *
COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,
- vs. -
MICHAEL ELBERY,
Defendant.
* * * * *

Docket
No. 9467 CR 1900

MOTION TO SUPPRESS

John Revelli, Esquire, District Attorney's Office,
Worcester, MA 01608; on behalf of the Plaintiff.

Robert L. Sheketoff, Esquire, law offices of SHEKETOFF &
HOMAN, 84 State Street, Boston, Massachusetts, 02109; on behalf
of the Defendant.

Friday, October 21, 1994

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CHESTER JOHNSON	(DIRECT)	5
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CARL HANSEN	(DIRECT)	60
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P R O C E E D I N G S

THE COURT: Will counsel identify themselves, for the record.

MR. SHEKETOFF: Good morning, your Honor. Robert Sheketoff with the defendant, Michael Elbery, who is present in the courtroom.

MR. REVELLI: Good morning, your Honor. Assistant District Attorney John Revelli, representing the Commonwealth.

THE COURT: This is a Motion to Suppress?

MR. SHEKETOFF: Yes. It is, your Honor.

THE COURT: I have read the motion, counsel, and the affidavit. Do you have a memorandum that you are also going to be submitting?

MR. SHEKETOFF: I do not, your Honor, because I am not exactly sure what the evidence is going to be and I may beg the court's indulgence to file a memorandum after the hearing on the motion. Based on the discussions that I had this morning with the Commonwealth, I am going to be somewhat surprised by the testimony.

THE COURT: We will deal with the testimonial part first. Then you may address the

1 court after.

2 MR. SHEKETOFF: Your Honor, as a
3 preliminary matter, I did bring a stenographer and you
4 have allowed him to set up. Could this be the
5 official transcript for the court? In other words, I
6 will purchase it and file it with the court as the
7 official transcript.

8 THE COURT: My experience is that that has
9 been the case.

10 MR. REVELLI: No objection, your Honor.

11 MR. SHEKETOFF: And, your Honor, just as a
12 preliminary matter, the Commonwealth says it is a
13 warrantless search, at least initially, that bears the
14 burden and --

15 THE COURT: I am sorry.

16 MR. SHEKETOFF: Since it is, initially, a
17 warrantless search, and the Commonwealth bears the
18 burden, I would ask that their witnesses be
19 sequestered.

20 THE CLERK: All people to testify in this
21 Motion to Suppress, would you please stand and raise
22 your right hand.

23 (All witnesses are sworn in.)

24 THE COURT: A motion has been made to

1 sequester the witnesses, so I will ask the police
2 officers who are going to be testifying in this
3 matter, to wait outside the courtroom except for the
4 first one who will be testifying.

5 MR. REVELLI: The Commonwealth calls
6 Sergeant Johnson.

7 May I proceed, your Honor?

8 THE COURT: You may.

9 DIRECT EXAMINATION:

10 BY MR. REVELLI:

11 Q. Would you please state your name, for the
12 record, Sergeant.

13 A. My name's Chester Johnson. I'm a police officer
14 in the town of Shrewsbury.

15 Q. And for how long have you been so employed as a
16 police officer?

17 A. Approximately fourteen or fifteen years.

18 Q. Okay. And for how long with the town of
19 Shrewsbury?

20 A. All of it.

21 Q. And what rank are you now?

22 A. Sergeant.

23 Q. Were you so employed on August 4th of 1994?

24 A. Yes. I was.

1 Q. Okay. And within the department -- the
2 Shrewsbury Police Department -- what are your duties?

3 A. I'm Patrol Sergeant and also the Officer
4 Investigator.

5 Q. Okay. And on August 4th, 1994, did you
6 investigate the scene of a potential arson?

7 A. Yes. I did.

8 Q. And where was that location?

9 A. 869 Boston Turnpike. At the E-Z Mini Storage
10 facility.

11 Q. And how were you alerted to that scene?

12 A. Via the fire chief.

13 Q. And on what date and what time did you arrive on
14 that scene?

15 A. I arrived approximately between 10:00 and 11:00
16 a.m. the following day, after the fire.

17 Q. Okay. And to your recollection, what day did
18 the fire occur on?

19 A. I believe it was the 4th at -- the time of the
20 fire was around 10:00 p.m.

21 MR. SHEKETOFF: Move to strike. That "the
22 time of the fire was around 10:00 p.m." That would be
23 from hearsay, your Honor. He said he did not arrive
24 until the next morning.

1 MR. REVELLI: The purpose of the motion, I
2 would say, the basis -- his state of mind -- that
3 basis of knowledge is relevant. And given the fact
4 that this is a motion to suppress, I would say it is
5 admissible for these purposes.

6 MR. SHEKETOFF: All right. I have no
7 objection if it is offered for his state of mind, for
8 what he believed at the time that he arrived. But to
9 establish that there was a fire at 10:00 p.m. at night
10 -- I do not believe that he is the appropriate
11 officer. But for his state of mind I have no
12 objections.

13 THE COURT: The objection is overruled.

14 Go ahead.

15 BY MR. REVELLI:

16 Q. And, officer, again what time did you arrive?

17 A. I believe between 10:00 and 11:00 a.m.

18 Q. Okay. Were you in contact with any other
19 officers, with regard to this fire, before your time
20 of arrival?

21 A. No. I wasn't.

22 Q. Okay. Were you in contact with any other
23 departments?

24 A. Yes. I was.

1 Q. And what other department were you in contact
2 with?

3 A. The Worcester Fire Investigation.

4 Q. And for what reason?

5 A. To assist me at the scene of the origin and
6 cause.

7 Q. And is that the practice of your department?

8 A. It is at a fire of this multitude (sic.). That
9 we work together. There 's four or five towns that
10 work together as a team.

11 Q. Sergeant, how long have you, personally, been
12 conducting arson investigations?

13 A. Over twelve years.

14 Q. Sergeant, could you tell the court what your
15 training and experience is in regard to arson
16 investigations.

17 A. Well, I've conducted over a thousand fire
18 investigations. I've been to state police schools,
19 origin and cause schools. I've testified as an expert
20 witness on many occasions in Superior Court in
21 Worcester on origin and cause. I'm a member of the
22 Massachusetts Independent Arson Association. I have
23 monthly meetings, seminars, training updates.

24 Q. Okay, Sergeant. Via what mode of transportation

1 did you arrive at the scene of that fire?

2 A. My marked patrol cruiser.

3 Q. Okay, Sergeant. And how were you dressed?

4 A. At that time, I had just Dickies and a shirt and
5 a fire coat and fire boots on and a helmet.

6 Q. And the length of the fire coat?

7 A. Just about knee-level.

8 Q. And where did you park the cruiser when you
9 arrived on that scene?

10 A. On the west side of the building.

11 Q. Okay, Sergeant. And when you arrived on that
12 scene, who was the first person you had conversation
13 with?

14 A. Fire Chief Duhamel.

15 Q. Okay. And where is he from?

16 A. Shrewsbury.

17 Q. Okay, Officer. And where did you go after that
18 conversation?

19 (Pause.)

20 A. We proceeded over to the east side as Worcester
21 -- a lieutenant from Worcester Fire was arriving at
22 that time. Before we did any fire examination.

23 Q. Okay. Was the fire on-going at that time?

24 A. Yes. It was.

1 Q. And can you tell the court the observations you
2 made of the fire? Where it was located at the time of
3 your arrival.

4 A. The building is two-hundred and fifty feet long
5 by sixty feet wide. The fire had burned from the
6 north end all the way to the center of the building --
7 over halfway -- to where the entrance door was. They
8 were still extinguishing each bay. There's inside
9 storage facilities gained by a -- it's like a hallway
10 -- and there's outside, sort of, facilities that the
11 doors open out into the parking lot.

12 There was still two engines at the scene that
13 were extinguishing -- that they were renovating the --
14 each individual apartment -- so called apartment
15 storage -- or compartment -- that still had hot spots
16 and fires in them.

17 And it had -- the roof had been ventilated in
18 several places and there was -- I believe, there was
19 one gentleman still on the roof upon my arrival.

20 Q. Did you observe any flames, Sergeant?

21 A. Yes. I did. As they were renovating -- there
22 was still a lot of smoke, and what they were doing is
23 -- digging through the piles of burnt debris. As they
24 would pull that out -- yes, there were -- there were

1 small flames breaking out. They were putting them out
2 -- is it -- that's what they were still doing.

3 Q. If you recall, Sergeant, how many actual
4 buildings are located on that site?

5 A. I believe there's four.

6 Q. As to your understanding on that date, how many
7 of those four buildings were on fire -- actually, part
8 of that fire?

9 A. Just that -- just Building "C".

10 Q. And how many bins, if you recall, would be
11 located in Building "C"?

12 A. I'm not sure.

13 (Pause.)

14 Roughly a hundred. You know, because inside
15 it's two hundred and fifty feet long. There's bins
16 completely around the whole outside that are ten feet
17 wide, and then there's bins in the back of the ten-
18 foot wide bins -- smaller bins.

19 Q. Okay.

20 A. I'd have to refer to the diagram that I drew to
21 give you the exact number.

22 Q. Okay, Sergeant, I do show you that diagram. I
23 ask you if that refreshes your recollection?

24 A. Yes. This is the map that was given to us by

1 the owner. A copy of the map of Building "C" that was
2 given to us.

3 Q. And who was that given to you by?

4 A. By Alan Benoit, the property manager.

5 Q. Okay. And do you recall the -- as far as those
6 bins in Building "C" -- the numerical sequence?

7 A. Yes. They're numbered -- the bin -- each bin is
8 numbered.

9 Q. Okay. And -- the general numbers of Building
10 "C"?

11 A. Around three hundred. It's called "the three
12 hundred building". They're all three hundred. Three
13 hundred -- they go to a four-digit series -- "thirty-
14 one-oh-one" -- starting on the inside bins.

15 Q. Now, when you arrived on that scene, who was
16 present on the scene besides fire fighters?

17 (Pause.)

18 A. Alan Benoit, the property manager. He wasn't at
19 the fire scene. He was out front. He was at the
20 office -- the main office.

21 (Pause.)

22 When I first arrived, there was no fire person
23 out -- that was on the scene.

24 Q. Were there any other police officers besides

1 you?

2 A. Not at that time. No. Not that I can recall.
3 If there was a police officer there for the shift,
4 they would be doing traffic or something to that
5 effect.

6 Q. And besides that property manager, were there
7 any other people outside of the general fire scene?

8 A. Yes. The building property is secured by a six-
9 foot, chain link fence. And there was an individual
10 standing outside the chain link fence where I parked
11 the cruiser.

12 Q. Just one individual?

13 A. Yes, sir.

14 Q. Okay. Were you later able to identify that
15 individual?

16 A. Yes. I was.

17 Q. And who was that individual?

18 A. Michael Elbery.

19 Q. Were you familiar with Michael Elbery at that
20 time?

21 A. I didn't recognize him. I've known he lives in
22 town before. I didn't recognize him until he's -- he
23 gave us his name.

24 Q. Can you describe the weather conditions?

1 A. I believe it was cloudy. Maybe a little misty
2 at that point. It wasn't bright sun by no means. It
3 was an overcast day.

4 Q. Okay, Sergeant. Now, can you describe, for the
5 court, what you did after you arrived on the scene,
6 with regard to Building "C"?

7 A. Yes, sir. Your Honor, when I arrived, I had a
8 conversation with Chief Duhamel, and a short period of
9 time after that, Captain Gerald LaFlamme of the
10 Shrewsbury Fire Department, and Lieutenant Miller --
11 Robert Miller -- from the Worcester Fire Prevention.

12 We were talking outside -- on the west side of
13 the building where an engine was and my cruiser. We
14 were dressed in fire department apparel. We were
15 brainstorming as far as where we were going to start
16 the origin and cause of the building.

17 There was one individual outside the fence where
18 we were -- later to be identified as the defendant,
19 Michael Elbery -- and myself and Lieutenant Miller
20 went over to the fence at his request. Mr. Elbery
21 identified himself to Lieutenant Miller and Lieutenant
22 Miller actually copied his name and address down in
23 his black notebook that he was carrying on his person.

24 Q. And did you have a conversation with Mr. Elbery

1 at that time?

2 A. Yes. We did.

3 Q. Okay. Could you tell the court what that
4 conversation was?

5 A. Mr. Elbery stated that that was his Corvette.
6 Where he was -- he was outside the fence. He was
7 parallel to the bin approximately thirty feet away.
8 And he stated that that was his Corvette and he was
9 worried about the damage or any -- the type of damage
10 that was done to it from the fire.

11 Q. Okay. In the bin that he -- it was your
12 understanding that he was referring to at that time,
13 was that located in Building "C"?

14 A. Yes. It was.

15 Q. Did he tell you the number of that bin or did
16 you know the number of that bin at that time?

17 A. No. I didn't. The door -- that was the last
18 door -- south -- going south -- that was opened by the
19 fire department and suppression.

20 MR. SHEKETOFF: Move to strike that, your
21 Honor. I have no objection to "it was the last door
22 that was opened", but unless he saw it opened -- by
23 whom it was opened -- then it is just hearsay. And I
24 object to it.

1 THE COURT: Overruled.

2 BY MR. REVELLI:

3 Q. Okay, Sergeant. At any time, did you direct any
4 personnel of any fire department to open any of those
5 bins?

6 A. No. I did not.

7 Q. Did you actually observe any members of the fire
8 department opening any of the bins?

9 A. No. I did not.

10 Q. When you arrived on that scene, were some of
11 those bin doors open?

12 (Pause.)

13 A. Yes, sir.

14 Q. Was the bin that you previously referred to --
15 that contained the Corvette -- was that bin door open?

16 A. Yes. It was.

17 Q. Did Mr. Elbery -- I am sorry. Strike that.
18 Could you please tell the court about your
19 conversation between you and Mr. Elbery.

20 A. Lieutenant Miller, myself and Mr. Elbery talked
21 through the chain link fence. Mr. Elbery was
22 concerned as to the damage of his Corvette --

23 MR. SHEKETOFF: I object to what Mr.
24 Elbery was concerned about. If this is a

1 conversation, I have no objection to him recounting
2 the conversation. But --

3 THE COURT: Sustained.

4 BY MR. REVELLI:

5 Q. Just the conversation, Sergeant, please.

6 A. That was the conversation. Mr. Elbery was -- he
7 stated he was concerned to -- this is what Mr. Elbery
8 stated to us. Mr. Elbery stated, to us, that he was
9 concerned about the damage that was possibly done by
10 the fire to his Corvette that was in the bay -- the
11 storage facility.

12 Mr. Elbery asked us if we could go look at the
13 Corvette -- which we did. Myself and Lieutenant
14 Miller actually went up and walked around the
15 Corvette.

16 Q. And when he gestured to the bin and that
17 Corvette, was that within your sight?

18 A. It was approximately thirty feet. The driveway
19 was about -- approximately thirty to thirty-five feet
20 from where the chain link fence was to where the bin
21 was that was containing the car.

22 Q. What did you do, as a result of that
23 conversation?

24 A. We told him -- he wanted to come in. He also

1 stated that he wanted to come in to the facility. And
2 we told him that he couldn't come into the facility at
3 that point and when we got done with the investigation
4 he could.

5 We went over his request and walked around the
6 car and to view the damage of anything that was in the
7 bin or the -- and/or the car -- myself and the
8 Lieutenant.

9 Q. Sergeant, I am going to show you this picture.
10 Do you recognize that picture?

11 A. Yes, sir. This is the building that was on
12 fire.

13 Q. Okay. And is the bin that Mr. Elbery referred
14 to, is that depicted in that photograph?

15 A. It's the last bin with the door open in this
16 photograph.

17 Q. Okay. And is that a fair and accurate
18 representation of the scene of the fire when you
19 encountered it?

20 A. When I encountered it? No, sir.

21 Q. Okay. What -- when was that picture taken, if
22 you know?

23 A. During fire fighting efforts --

24 Q. Okay.

1 A. -- the night before.

2 Q. Okay.

3 MR. REVELLI: Your Honor, at this time the
4 Commonwealth would seek to introduce this photograph
5 into evidence.

6 THE COURT: Counsel?

7 MR. SHEKETOFF: I object, your Honor. It
8 is not a fair and accurate representation of what he,
9 personally, observed. It is his -- I respectfully
10 submit -- it is his guess that this is what it looked
11 like the night before. So, I would object to it.

12 If it is offered only to show where the bin is
13 -- it is a picture of the bin -- I have no objection
14 to it for that purpose.

15 MR. REVELLI: That is --

16 THE COURT: Well, he has testified that it
17 is a fair and accurate representation as to where the
18 bin is.

19 MR. SHEKETOFF: Yes. For that purpose --

20 THE COURT: The Commonwealth?

21 MR. SHEKETOFF: Just --

22 MR. REVELLI: That is the purpose it is
23 being --

24 MR. SHEKETOFF: Just --

1 MR. REVELLI: -- offered, your Honor.

2 MR. SHEKETOFF: I would just ask him to
3 mark it so that we know which bin he is talking about.
4 With some sort of marking on the photograph. Because
5 I could not see where the --

6 THE COURT: We are going to have it marked
7 as an exhibit, first.

8 MR. SHEKETOFF: Okay, your Honor.

9 (The document above-referred
10 to was marked Commonwealth
11 Exhibit No. 1 for Identifi-
12 cation.)

13 BY MR. REVELLI:

14 Q. If you could, Sergeant -- if you could mark,
15 with that red pen, the bin that it was your
16 understanding was referred to by Mr. Elbery.

17 (The witness did as requested.)

18 A. I circled the bin. As you can see, the door's
19 open. That's the last bin that was opened during fire
20 fighting suppression.

21 MR. SHEKETOFF: Well, move to strike that
22 last part, your Honor -- "that was the last bin that
23 was opened during fire fighting suppression". He was
24 not present. I mean, that is his conjection.

1 THE COURT: Stricken.

2 BY MR. REVELLI:

3 Q. Did you, in fact, enter the bin?

4 A. Yes. I did.

5 Q. Can you describe the dimensions of the bin?

6 A. Approximately -- maybe ten to fifteen feet wide.

7 There was -- there was three or four feet on either
8 side of the car. And we -- the car was in the bin.
9 There was approximately three to four feet in front of
10 it. And the back of it was maybe a -- you know, a
11 couple of feet from where the door -- the door ridge
12 would be.

13 Q. And who entered the bin?

14 A. Myself and Lieutenant Miller.

15 Q. And when you entered the bin, from what side of
16 the Corvette did you enter?

17 A. The driver's side.

18 Q. Was the Corvette backed in or driven in
19 forwards?

20 A. Forwards. It was driven in forwards.

21 Q. So, you would be on the left side -- your left
22 side of the Corvette?

23 A. Looking at the back of the car -- left side.

24 Yes, sir.

1 Q. And can you describe, for the court, at that
2 time, the observations you made of the items contained
3 in the bin.

4 A. Well, I didn't make any observations of the
5 external items. There was -- the only observation I
6 made to the external items would have been --
7 excluding the car -- was as we entered the bin, I
8 believe I had to step over some type of an alcohol
9 sign. Schlitz or Budwieser -- some type of a sign.

10 There was (sic.) boxes of debris around the bin,
11 but I didn't look at any of that because -- I mean, he
12 told me to just -- he was really concerned about the
13 car damage. And I went in looking at the car. I
14 didn't look at anything else. I couldn't tell you
15 what else was in the bin at that time.

16 Q. Okay. Can you describe the observations you
17 made of the motor vehicle.

18 A. The motor vehicle had heavy smoke damage. There
19 was soot on the hood. There was nothing burned or
20 melted. It had some water -- even though the water
21 spots had dried up. And the -- there was smoke damage
22 in the bin approximately three to four feet down --
23 ceiling level.

24 Also, at this time, I looked in the driver's

1 window of the Corvette. As I approached the driver's
2 window -- well, first I looked in the back -- I'm
3 sorry -- the back window. And I noticed a -- what
4 appeared to be a plastic type of bag, protruding in
5 between the seats to the front -- or the back of the
6 motor vehicle.

7 At that time, I walked up to the driver's side
8 of the motor vehicle. There was no exterior damage
9 excluding the soot and the water that was on the car.
10 And I came to the driver's window at that time, and I
11 looked in the driver's window.

12 Q. If I could stop you there, Sergeant. You said
13 that, at first, you looked into the back window of the
14 motor vehicle?

15 A. Yes, sir.

16 Q. I am going to show you a picture. Do you
17 recognize that photograph?

18 (Pause.)

19 A. It's a little fuzzy, but that's -- when I looked
20 through the back window and saw -- this is the item I
21 saw which we have with us today.

22 Q. Okay. And could you tell the court what that
23 photograph depicts?

24 A. This depicts a photograph that was taken from --

1 through -- it appears to be through the back window of
 2 the motor vehicle, depicting the plastic bag that was
 3 wrapped up and taped with duct tape. Because you can
 4 see the steering wheel up on the left-hand side of the
 5 car.

6 Q. I am going to show you another photograph,
 7 Sergeant. Could you tell the court what is depicted
 8 in that photograph?

9 (Pause.)

10 A. This is a closer photo of the item also taken --
 11 this appears to be taken from the passenger's side
 12 rear -- through the back window of the car.

13 Q. And are both those photos fair and accurate
 14 representations of the scene from the back window of
 15 the car as you saw them on that day?

16 A. That's identical, because there was -- that was
 17 identical, how it was. Yes.

18 MR. REVELLI: Your Honor, at this time --

19 THE COURT: Counsel?

20 MR. SHEKETOFF: I have no objections to
 21 these photographs, your Honor.

22 // // // // //
 23 // // // // //
 24 // // // // //

1 (The documents above-
2 referred to were marked
3 Commonwealth Exhibits No. 2
4 and No. 3 for Identifi-
5 cation.)

6 BY MR. REVELLI:

7 Q. After you moved from the back window, where did
8 you go, Sergeant?

9 A. Driver's side window of the door.

10 Q. And what did you observe as you peered into the
11 driver's side window?

12 A. Now, I got into focus better what the item was.
13 It was -- I have it with me. It was, possibly, three
14 or four feet long. It was wrapped up in a -- garbage
15 bags and it was taped with duct tape in two or three
16 places.

17 Also, on the driver's seat, at this time, there
18 was a cardboard box, which I also have. And the
19 cardboard box had the letters "U-Z-I" on it.

20 Q. And given your training and experience, Officer,
21 what did you understand the meaning of "U-Z-I" to be?

22 A. To be an uzi gun.

23 Q. And given your training and experience, what is
24 an uzi gun?

1 A. An uzi gun is a small type of -- it can be
2 automatic or semi-automatic -- weapon. It will hold a
3 large clip of -- usually -- 9-millimeter rounds. It's
4 used for -- the best way I can describe it is that
5 it's a small type of weapon that could be put under a
6 suit coat. The secret service carry them, you know,
7 for a description.

8 Q. I show you that photograph. Could you tell the
9 court what is depicted in that photograph?

10 A. This is the interior of the car as I saw it.
11 Identical. The box is in the place and the large
12 three- to four-foot item wrapped in the bag is in the
13 same place.

14 Q. And that is a fair and accurate representation
15 as to how you witnessed the inside of the motor
16 vehicle on --

17 A. Yes.

18 Q. -- that day?

19 A. Yes. It is, sir.

20 Q. Okay, Sergeant. I show you two other
21 photographs. What are depicted in those photographs?

22 A. This is looking through the -- I'm not sure if
23 this is through the driver's window or after the door
24 is opened -- but this is what I had saw that night

1 when I looked through -- that morning -- when I looked
2 through the driver's side window.

3 Q. And are those fair and accurate representations
4 of what you observed in the motor vehicle on that day?

5 A. Yes. They are. It's a little clearer. That's
6 the only difference. I believe the window must be
7 down at that point when the picture was taken.

8 MR. REVELLI: Judge, we are also offering
9 these three pictures into evidence at this time.

10 MR. SHEKETOFF: I have no objections, your
11 Honor.

12 (The documents above-
13 referred to were marked
14 Commonwealth Exhibits No. 4,
15 No. 5, and No. 6 for
16 Identification.)

17 BY MR. REVELLI:

18 Q. For how long, in total, were you inside that
19 bin?

20 (Pause.)

21 A. Two or three minutes.

22 Q. Did you make any other observations?

23 A. We -- after I made that observation, I walked
24 around the exterior of the motor vehicle and viewed

1 the rest of the car for damage. Like I say, there was
2 a walkway around it. There were items all around the
3 bin, but I couldn't tell you what they were.

4 Q. Okay, Sergeant. And at some point, you exited
5 the bin?

6 A. Yes. I did.

7 Q. And what did you do?

8 A. Myself and the Lieutenant walked over to Mr.
9 Elbery, who was at the fence, and we relayed to him
10 the information about the car damage. That it
11 appeared to be just water and soot. Nothing was
12 melted on the motor vehicle that we could see.

13 Q. Did he have a response?

14 A. Yes. He did. He said that he'd just like to
15 lock the bin up as soon as possible. Just to secure
16 it again as soon as possible.

17 Q. Okay. Was he the only person outside that chain
18 link fence at that time?

19 A. Yes. He was.

20 Q. Okay. At some point, did you recognize Mr.
21 Elbery?

22 (Pause.)

23 A. I recognized him just by seeing him in town. I
24 stopped him on a motor vehicle stop a long time ago,

1 but that's the only dealings I've had with Mr. Elbery.

2 Q. Okay, Sergeant. After that conversation, what
3 did you do in relation to the items that you observed
4 inside the bin?

5 A. I went back over to my cruiser and I beeped the
6 Lieutenant -- the Detective Lieutenant.

7 Q. And which detective lieutenant would that be?

8 A. Sampson.

9 Q. Okay. And at some point thereafter, did you get
10 in touch with Lieutenant Sampson?

11 A. Yes. He called me back but I'm not sure of the
12 length of time that transpired. But he did call me
13 back.

14 Q. And did you relay that information to him?

15 A. Yes. I did.

16 Q. Okay. Now, Sergeant, can you please tell the
17 court, when you are investigating an arson,
18 particularly this arson, what would be your normal
19 practice and procedure?

20 A. Well, the first thing, at any fire scene, you're
21 going to try to accomplish is talk to any witnesses.
22 You're going to look at -- walking the perimeter of
23 the building, and you're looking for damage from least
24 to worst.

1 This fire was -- as the color pictures I gave
2 you -- was extremely -- a large quantity of fire for
3 the building. That -- right off the top, when we were
4 discussing it, the amount of fire damage that was done
5 for a concrete building, we knew there was a problem
6 as far as the fire load in each bin.

7 What we did at that point, is (sic.) -- before
8 we could talk to any of the fire fighters that were
9 actually there, because the ones that were there was a
10 new crew at this point, because they change after
11 working all night. We started to go -- myself and the
12 Lieutenant and Captain LaFlamme started -- we walked
13 the perimeter of the building, and then we started to
14 look for where the fire extended to -- where was the
15 last point of extension for the fire.

16 And at that point, we started in the bin with
17 the Corvette again. That's where we started our --

18 Q. And for what reason did you start in that bin?

19 A. Captain LaFlamme was there when that bin door
20 was opened. That's all I know -- the fire department.

21 MR. SHEKETOFF: Well, move to strike.

22 THE COURT: Stricken.

23 BY MR. REVELLI:

24 Q. What was your understanding of why you entered

1 that bin?

2 A. I was going in that bin to see where the fire
3 extended down. How far the smoke had come down into
4 the bin. If there was any fire extended, at all, into
5 that bin.

6 Q. And is that a regular part of an investigation
7 of an arson?

8 A. Yes, sir.

9 Q. Okay. And what were you attempting to determine
10 at that point?

11 A. We're trying to find what is -- ultimately, the
12 origin of the fire. And you find -- you go always
13 from least to worst.

14 Q. And when you went into that bin, was that after
15 you had, previously, entered the bin -- after your
16 conversation with Mr. Elbery?

17 A. Oh, it was a good hour or two hours after the
18 conversation.

19 Q. So, was your purpose for entering that bin
20 unrelated to the observations you had made inside Mr.
21 Elbery's Corvette?

22 A. That -- I don't even -- I don't even believe I
23 looked in the car again when I was...

24 Q. So, it was unrelated to that observation --

1 A. Yes. It was. Yes.

2 Q. -- previous observations? Okay. And at some point,
3 did you reach Lieutenant Sampson with regard to the
4 observations that you had made?

5 A. Yes. I did.

6 Q. And did you relay that information to him?

7 A. Yes. I did.

8 Q. And via what meeting did you relay that
9 information to him?

10 A. I believe it was on my cruiser's car phone. I
11 believe.

12 Q. And did you have discussion with any other
13 police personnel, with regard to the observations you
14 had made, besides Lieutenant Sampson?

15 A. No. I did not.

16 MR. REVELLI: I have nothing further of
17 the Sergeant at this time.

18 THE COURT: Counsel?

19 MR. SHEKETOFF: Thank you, your Honor.

20 CROSS EXAMINATION:

21 BY MR. SHEKETOFF:

22 Q. Sergeant, showing you this chart that was shown
23 to you earlier by the prosecutor, that is the same
24 chart, correct?

1 A. Yes, sir. I believe so.

2 Q. And the bin that you saw the Corvette in was Bin

3 341?

4 A. (No response.)

5 Q. Do you --

6 A. Like I say, I don't know the bin number but,

7 yes. The Corvette was in the bin, the door was open,

8 and the numbers were on the door. So, the number

9 itself, I couldn't tell you, sir.

10 Q. Is there anything that could refresh your memory

11 as to the number of the bin?

12 (Pause.)

13 A. A copy of the search warrant.

14 Q. Okay. Let me show you this document --

15 actually, just read it to yourself and see if it

16 refreshes your memory as to the bin number that the

17 Corvette was in.

18 (The witness did as requested.)

19 A. Yes, sir. "C 341".

20 Q. Okay.

21 MR. SHEKETOFF: Your Honor, I would offer

22 this diagram of the building.

23 MR. REVELLI: No objection, your Honor.

24 // // // // //

1 (The document above-referred
2 to was marked Defendant
3 Exhibit No. 1 for Identifi-
4 cation.)

5 BY MR. SHEKETOFF:

6 Q. And, sir, could you just mark, for the court,
7 where Bin 341 was.

8 (The witness did as requested.)

9 Q. And could you show us, approximately, where the
10 chain link fence and Mr. Elbery was in relation to
11 that.

12 A. Well, not to scale, but...

13 Q. Not to scale.

14 A. It's a -- the chain -- goes all over -- the
15 fence goes all the ways. I'd say there's about thirty
16 or thirty-five feet here, roughly, between the fence.
17 Mr. Elbery's right here.

18 Q. So, Mr. Elbery is where you put the "X"?

19 A. Um-hum.

20 Q. Next to the line?

21 A. Um-hum.

22 Q. Directly across from Bin 341?

23 A. Yes, sir.

24 (Pause.)

1 If I may?

2 Q. Yes.

3 A. This is where I first observed Mr. Elbery. Our
4 conversation took place back here. This is where we
5 parked the engine and the cruiser. We didn't talk
6 right directly in front of the bin. We talked back --
7 at this location.

8 Q. And when you say "this location", towards -- is
9 the top the north end of the building?

10 A. This is north, here, sir.

11 (Pause.)

12 This is kind of -- you've got to remember this
13 -- the whole thing is squared. This is on an angle in
14 the -- you know, in the thing here, but these
15 buildings are on the lot square. So, it's perfectly
16 square. There's another building over here.

17 Q. Okay. And the fire was most intense at the
18 north end of the building?

19 A. No. I could mark the origin, if you'd like.
20 The origin of the fire was in between "317" and "324".
21 In this center hallway. And the fire extended -- this
22 is where they made their initial entry into the -- to
23 stop the fire -- were these bins.

24 This one burned and this one burned. There was

1 fire in these two bins. This one -- there was no --
2 it was -- it was -- it rolled right over these bins.
3 This whole thing was involved.

4 Q. Right. And when you say the "whole thing", you
5 are talking about the inside corridor bins?

6 A. Both in and out. Completely. Both.

7 Q. All right. That first photograph that showed
8 the fire -- and you marked Bin 341 on that -- what is
9 there on this photograph that makes you able to
10 recognize that last one as being "341"?

11 A. Even as of today, that was the last bin that was
12 opened. The next bins after that -- there was
13 approximately four or five bins -- give the map and
14 I'll tell you exactly -- what -- there was no -- we
15 waited for the owners to come the next day with keys
16 to open them.

17 Q. Right. But can you tell, from this photograph,
18 whether this is the last bin open or the one next to
19 it is the last bin open?

20 A. Well, you can see the door on the next one. If
21 you look real close, you can see the door on the next
22 one's still down.

23 Q. All right. So, that is what tells you that this
24 was the -- was "341" -- is that the door is open?

1 A. Right.

2 Q. And when you were there the next morning, "341"
3 was the last one in the row that had the door open?

4 A. Yes.

5 Q. And the others had padlocks on them and the
6 doors --

7 A. Everyone of them did. I don't know how they
8 violated that door. You know, whether they broke the
9 lock or whatever, but all exterior bins excluding two
10 had padlocks on them.

11 Q. All right. These were doors that would roll up
12 like a garage door?

13 A. Yes, sir.

14 THE COURT: If I may -- are you testifying
15 that "341" was the last one in the row on the
16 building, or the last one with the door open?

17 THE WITNESS: The last one where the door
18 was open.

19 BY MR. SHEKETOFF:

20 Q. And let me show you these two photographs, and
21 ask you if you recognize what is depicted in these two
22 photographs.

23 (Pause.)

24 A. This is the -- this is after the car's removed.

1 This is the sign I was talking about, that I had to
2 step over when I moved in. The only reason I could
3 say that it is the inside of it is because that box
4 right there is what I stepped on when I was viewing
5 the smoke damage. Okay? I remember that.

6 What's here, I don't know. In this one, I'm not
7 sure. I don't remember the -- seeing this picture. I
8 don't remember seeing that -- them items.

9 Q. All right.

10 A. I don't know.

11 Q. But is this the Corvette -- or does it appear to
12 be the Corvette?

13 (Pause.)

14 A. Yeah. This would be the back of it. It says
15 "Corvette" on it right there. Unless this was the
16 pile that was behind the car. Like I say, I'm not
17 sure. I didn't -- like I say, I don't remember
18 exactly what was, you know, in there per say.

19 Q. All right. This is what -- this photograph --
20 the one I am holding in my hand right now -- you do
21 recognize this as being a photograph of the inside of
22 the bin after the car was removed?

23 A. Right.

24 Q. Could I --

1 A. Because I stepped on that box when I was looking
2 for damage.

3 Q. And you are pointing to the box --

4 A. Right.

5 Q. -- a cardboard box to the back of the bin to the left
6 of the -- in the photograph, correct?

7 A. Yes, sir.

8 Q. And this open area in the front of the
9 photograph is where the car would have been?

10 A. Yes, sir.

11 MR. SHEKETOFF: I would offer this, your
12 Honor.

13 THE COURT: All right.

14 MR. REVELLI: No objection. No objection.

15 (The document above-referred
16 to was marked Defendant
17 Exhibit No. 2 for Identifi-
18 cation.)

19 BY MR. SHEKETOFF:

20 Q. Now, sir, it is fair to say that there is no
21 fire -- there was no burning fire in that bin,
22 correct?

23 A. It is fair to say there was nothing in the bin
24 that was consumed by fire.

1 Q. The damage that you are talking about is damage
2 from the ceiling down three or four feet towards the
3 floor -- that you say there was smoke damage there?

4 A. Yes, sir.

5 Q. So, some smoke got into that bin?

6 A. Yes, sir.

7 Q. All right. And you can see, by standing outside
8 of the bin with the door open, that there was -- that
9 nothing in the bin had been consumed by fire, correct?

10 A. On the floor? Yes, sir.

11 Q. Right. The damage that you could see standing
12 outside of the bin, was the damage around the ceiling?

13 A. You couldn't really see that from outside. No.
14 Because the ceiling's so high in that bin. You'd have
15 to step -- because the door's only, like, a seven or
16 eight foot -- you'd have to step inside the door to
17 take a good look around.

18 Q. And if you stepped inside the door and took a
19 good look around, you would have seen that the only
20 damage was smoke damage near the ceiling?

21 A. No. Not without getting close to it. If -- I
22 -- that's why I stepped on that box. I had to get up
23 there to see exactly -- because the fire was actually
24 rolling above that bin at time of suppression. It

1 didn't get into the bin, yet, but that's where they --
2 you know, that center hallway is where they stopped
3 the actual flames.

4 Q. All right. You could see, if you stood outside
5 the bin, that there was no fire -- no flames had
6 touched that Corvette car, correct?

7 A. The back of it. Yes, sir.

8 Q. Well, you could see the other items in the bin
9 had not been touched by flame either?

10 A. Right. Like -- I stated that the floor level
11 wasn't touched by fire.

12 Q. All right. So, you --

13 A. There was nothing high in the bin.

14 Q. So, you could say that nothing had been fire
15 damaged by actual flame, as you stood outside the bin,
16 correct?

17 A. Nothing on the floor level or the back of the
18 Corvette. Yes, sir.

19 Q. Now, it is your testimony that after going into
20 the bin for the first time, with a fire lieutenant,
21 you then called your lieutenant to report your
22 observations?

23 A. Yes, sir.

24 Q. And what did you tell your lieutenant, when you

1 called him after that first entry into the bin?

2 A. I told him exactly what I saw.

3 Q. What did -- what did you tell him?

λ 4 A. X I told him I saw what appeared to be a rifle
5 wrapped up in a plastic bag -- or a couple of rifles
6 wrapped up in a bag, three or four feet long, with
7 duct tape wrapped around them in several locations.
8 And I told him that I'd -- I appeared -- to see a
9 cardboard box that had similar duct tape on it, with
10 the word "uzi" on it.

11 Q. Now, when -- this is the box you saw?

12 A. Yes, sir.

13 Q. And was the plastic completely around the box?

14 A. Yes. It was.

15 Q. And you could actually read the letters that
16 were on that?

17 A. Yes.

18 Q. From the outside of the car?

19 A. Yes. I could.

20 Q. All right.

21 A. This is -- right now, you've got to bear in mind
22 that this -- the picture gives a better representation
23 than this because now it's all black fingerprint dust.
24 That's why -- and plus, the plastic was nice and tight

1 as the picture depicts. It shows that the letters are
2 nice and clear.

3 Q. Now, what could you tell about this box, other
4 than it had the word "uzi" on it?

5 (Pause.)

6 A. I don't understand.

7 Q. Well, what else could you tell about the box?
8 Did it appeared to be full or empty? Did it appear to
9 be an old box or a new box?

* 10 A. No. It was completely wrapped. It was -- it
11 was wrapped completely in plastic with the same duct
12 tape. It was identical to the item that was laying
13 next to it.

14 MR. SHEKETOFF: I would offer this, your
15 Honor.

16 (The box above-referred
17 to was marked Defendant
18 Exhibit No. 3 for Identifi-
19 cation.)

20 BY MR. SHEKETOFF:

21 Q. Sir, I am showing you this item. Do you
22 recognize this item?

23 A. This is the item that I saw in the car.

24 Q. Right. Has it been unwrapped and re-wrapped

1 since you saw it in the car?

2 A. I don't know. I never -- this is the first time
3 I've touched this. Either one.

4 Q. Does it appear any different today, then it did
5 when you saw it in the car?

6 (Pause.)

7 A. If this rip was closed up tight like that, it
8 could have been like that in the car. Like I say --
9 but it's open. Like I say, this is the first time I
10 physically touched these two, so, I don't know.

11 Q. All right.

12 A. But this is very similar to what I saw in the
13 car. Yes, sir.

14 Q. Okay. Well, was some part of it unwrapped in
15 the car, that --

16 A. Not that I could see. Like I -- there's a rip,
17 here. Like I said, you could -- I just checked -- if
18 you could make this like that so you wouldn't see the
19 rip, it could have been like that. I don't know.

20 Q. Well, in fact, there is a case of some kind
21 inside the paper, correct?

22 A. Yes, sir.

23 Q. Did you see that case when you were looking at
24 it through the car?

1 A. No. I did not.

2 Q. So, you could not tell that there was a case in
3 there?

4 A. No, sir.

5 MR. SHEKETOFF: I would offer this, your
6 Honor.

7 (The item above-referred
8 to was marked Defendant
9 Exhibit No. 4 for Identifi-
10 cation.)

11 BY MR. SHEKETOFF:

12 Q. Now, did you know what was inside Exhibit No. 4
13 when you looked at it through the car?

14 A. Did I know?

15 Q. Yes.

16 A. No, sir.

17 Q. Did you have a guess?

18 A. Yes, sir.

19 Q. And what was your guess?

20 A. I guessed it was some type of a rifle.

21 Q. And why was that your guess?

22 A. Because if you look at the way that it's
23 wrapped, you can see where the stock's heavier at one
24 end and it gets narrow at one end and it's got a place

1 -- a bump -- right where the sticker is which would be
2 the trigger area.

3 Q. So, based on its shape, you thought it might be
4 a rifle?

5 A. Yes, sir.

6 Q. And how sure were you that it was a rifle?

7 A. How sure?

8 Q. Yes. I mean, did you think it was likely that
9 it was a rifle, or did you think that it could be a
10 rifle?

11 A. No. I was pretty sure it was a rifle.

12 Q. And --

13 A. Especially when I saw the box that said the word
14 "uzi". That added to them.

15 Q. Okay. Was it two things together -- a box that
16 said "uzi" -- that made you believe that it was a
17 rifle in there?

18 A. No. When I first saw it through the back
19 window, I thought it was a rifle. Just the way it was
20 wrapped, the way it was between the seats, the way
21 it's wrapped with duct tape, and the plastic bag --
22 it's not consistent with any type of wrapping
23 whatsoever.

24 And when I got to the driver's window and looked

1 in and saw the same duct tape, the same type of bag,
2 wrapped with a box that said "U-Z-I", I had a pretty
3 good inclination that there was weapons in the car.

4 Q. Well -- but based on the word "uzi"? You mean
5 because there was a box that had the word "uzi" on it?

6 A. Yes, sir.

7 Q. And it was your supposition that if there was a
8 box with the word "uzi" on it, that there was a gun
9 inside that box that was an uzi weapon?

10 A. Yes, sir.

11 Q. Was there, in fact, a gun inside that box?

12 A. I believe there was, sir. Yes.

13 Q. And what kind of weapon was it?

14 A. I never even saw the weapon. I can't tell -- I
15 see the box today.

16 Q. And do you know what is inside that Exhibit No.
17 9 (sic.), now -- Defendant's Exhibit No. 9 (sic.)?

18 A. It's a rifle, but what -- I don't know.

19 Q. All right. You have never seen it?

20 A. No. I haven't.

21 Q. All right. Is it usual that people wrap rifles
22 with plastic bags and duct tape?

23 A. No, sir.

24 Q. All right. So, it was just the shape of the --

1 of the item, plus the fact that you saw a box with the
2 word "uzi" on it?

3 A. No. It was the shape of the item and the way it
4 was wrapped. There's nothing consistent with the way
5 them two items were wrapped, that I know of, that
6 would be wrapped that way. And then, with the word on
7 top of it -- "U-Z-I" -- there's nothing that I've
8 encountered in my years as having that or depicting
9 that. You know, "U-Z-I" on the box.

10 Q. So, then it was a combination of everything?

11 A. Yes.

12 Q. All right. Well, the way it was wrapped? You
13 mean because both items were wrapped in the same way,
14 you thought they went together?

15 A. No. As I testified, if you look at the way this
16 -- if I could pick it up.

17 Q. Sure. With the court's permission.

18 A. This was laying in the car this way, here. But
19 excluding this -- like I say, I didn't see -- I
20 couldn't see the end. If you take the shape of that
21 -- of what I could see -- it's very similar to what
22 appears to be a rifle.

23 The wide end, here, going to a trigger area,
24 going to a small barrel, and wrapped with duct tape,

1 like this, in a plastic bag -- in a trash bag --
2 there's nothing that I've seen consistent with this
3 wrapping.

4 Once I put that, coupled with the box that was
5 wrapped with the same plastic bag, the same type of
6 duct tape, with the letters "U-Z-I", that's when I had
7 a pretty good suspicion that they were weapons.

8 Q. Right. So, is it your testimony that the only
9 thing you can conceive of that you could wrap like
10 that would be a rifle?

11 A. No, sir.

12 Q. Okay. That really could have been anything in
13 there, correct?

14 A. Well, not anything, but it could have been
15 something else. Yes, sir.

16 Q. All right. It could have -- and certainly the
17 rifle does not have the shape -- the actual rifle,
18 itself, that is in there -- does not have the shape
19 that this wrapped up item has. It does not have a
20 trigger that is, you know, this thick? It does not
21 have a stock that is, you know, that wide?

22 A. I've never seen the -- I can't say that. I've
23 never seen the weapon.

24 Q. And it does not have a barrel that is that wide,

1 at the other end, either, does it?

2 A. I'd have to take it out to examine it. I've
3 never seen the inside of this.

4 Q. Do you know if anyone has ever seen the inside
5 of that? Has it been taken apart?

6 A. Oh, I'm sure it would -- after they did the
7 search -- I'm sure it...

8 Q. All right. Now, what started me on this line
9 was the question: what, exactly, did you tell your
10 lieutenant? What did you tell him, after you went in
11 there that first time?

12 A. Well, to the best of my recollection -- I can't
13 give you a verbatim -- but I told him that I believed
14 that there was a rifle that was wrapped in a plastic
15 bag, what appeared to be very similar to a rifle. And
16 there was a box on the seat that had the similar
17 wrappings, and had the letters -- what I could make
18 out -- were "U-Z-I" on it. You know, on the box.

19 Q. All right. Did you tell him that you could see
20 through the plastic, and that it appeared to be a
21 rifle in there?

22 A. No, sir.

23 Q. Did you tell him that the box was on the
24 driver's seat?

1 A. Yes. I did.

2 Q. And was it on the driver's seat or was it on the
3 floor?

4 A. Now, when I saw it, it was on the driver's seat.

5 Q. Okay. And that is what you told him?

6 A. I would have to say yes, sir.

7 Q. Okay. Did you ever tell your lieutenant that
8 there was actually a fire inside that storage bin?

9 A. (No response.)

10 Q. And I am talking about during this first phone
11 call when you called in?

12 (Pause.)

13 A. If I remember the conversation correctly, I
14 believe the lieutenant asked me what I -- how I saw
15 what I saw. How did I get into the bin. If I
16 remember correctly.

17 Q. Okay.

18 A. And I'd have to check with them to be certain.

19 Q. All right. In other words, your lieutenant
20 wanted to know what you were doing in there, correct?

21 A. No. Because he didn't even know I was at the
22 fire scene at this point. He didn't even know -- at
23 this point, when I first beeped him, it was a "cold
24 turkey" call. He didn't even know where I was.

1 Q. All right.

2 A. I had just --

3 Q. So --

4 A. I had just come home two hours earlier from the
5 Cape. So he didn't even think I was in town.

6 Q. All right. Did you tell him that there had been
7 a fire inside the bin?

8 (Pause.)

9 A. I can't remember -- I can't remember that -- I
10 don't think he asked that specific question, to be
11 honest with you.

12 Q. What else did you tell him, besides what you
13 have told us already? That you saw the uzi box on the
14 seat and you saw what appeared, to you, to be a rifle
15 all wrapped up in plastic. What else did you tell
16 him?

17 A. I think he asked me if there was anything else
18 in the bin, and I told him I went in there and walked
19 around the car. I didn't look around. I just didn't
20 look around so -- because he said, "was there anything
21 else in there?" I says, "not that I can recall. I
22 don't remember. There's items in there, but what they
23 are I have no idea."

24 And then, he asked me what I was doing and I

1 told him -- that's when I filled him in as far as
2 where I was and the fire investigation.

3 Q. All right. What did you tell him -- what did
4 you tell him was your reason for being inside that
5 bin?

6 A. Well, when I first beeped him, I was in the bin
7 only once. At Mr. Elbery's request.

8 Q. So, you told them, "I am in there because the
9 owner of the bin told me I could go in and look and
10 see if the Corvette was all right"?

11 A. Well, he asked me to. I wasn't looking for
12 myself, I was looking for him.

13 Q. That is --

14 THE COURT: The question was whether or
15 not you told that to the lieutenant.

16 THE WITNESS: I'm going to have to say
17 yes. I did. I'm going to have to say I did. Yes.

18 BY MR. SHEKETOFF:

19 Q. And did he tell you that he was going to get a
20 warrant to search that bin?

21 A. I think at that time, he told he was going to
22 take a ride down. If I remember, he was coming down
23 to the scene. If I -- if I remember the conversation.

24 Q. And did he, in fact, come down to the scene?

1 (Pause.)

2 A. I think the first time I saw him, was when he
3 had the warrant. That was hours later.

4 Q. So, had you talked to him, after this first
5 conversation, when he indicated that he might be
6 coming down to the scene? Had you talked to him
7 between that and the time that you actually saw him
8 with the warrant?

9 A. I don't believe so. I'm not sure.

10 Q. Okay. So, you did not talk to him after you
11 went in there a second time, looking -- and standing
12 on that cardboard box to look at the smoke damage
13 around the ceiling?

14 A. No, sir.

15 Q. Okay. What time did he show up with the
16 warrant?

17 (Pause.)

18 A. I'm going to say, roughly, four or five o'clock.
19 Supper time. It was a long time because we had -- I
20 had worked my way into -- towards the cause of the
21 fire. And that took quite a long time.

22 Q. All right. Did you participate in the search
23 that took place after the warrant arrived?

24 A. I didn't participate in it. I was -- I was

1 present, but I didn't participate in it. I didn't go
2 through any boxes or take any pictures like that.

3 Q. Did you see the car being opened while it was in
4 the bin?

5 A. They couldn't open the car in the bin.

6 Q. Didn't someone come with a "slim jim" and open
7 it up in the bin?

8 A. No. The car was opened by a locksmith a couple
9 of days later -- or two weeks later.

10 Q. So, the car was never opened in the bin?

11 A. Nope. Not to my knowledge. No, sir. Not while
12 I was there. I never saw it opened.

13 Q. Well, let me show you this photograph, and ask
14 you if that fairly depicts the item -- Defendant's
15 Exhibit No. 4 -- that has been marked as an exhibit?

16 A. It fairly does, but this seat wasn't -- this
17 seat was back. This was taken from -- as you can see,
18 this is the door jamb. The door was open, at this
19 point, where that picture was taken from. And this
20 seat's forward.

21 Q. Was this picture taken in the bin or was it
22 taken somewhere else?

23 A. It couldn't have been taken in the bin. The car
24 wasn't opened in the bin.

1 Q. All right. And so, the other items that had
2 been introduced as exhibits -- the other photographs
3 -- they were also -- of the car and this item -- they
4 were also not taken in the bin? They were taken at
5 some other location?

6 A. No. I think the one of the back window depicts
7 the boxes next to it, if I remember right. I'd have
8 to look at the picture again, but I think that first
9 picture might have been taken in the bin. I'd have to
10 look at it to be sure.

11 MR. SHEKETOFF: Your Honor, can I see the
12 exhibits?

13 BY MR. SHEKETOFF:

14 Q. So, what has been marked Exhibits No. 4, No. 5,
15 and No. 6 -- you can see in No. 6 that there is
16 someone standing outside. The door is obviously
17 opened and there is some sort of tool on the ground.
18 Is that the bin or is that the police station or
19 wherever the car was towed to?

20 A. I'd have to look at it.

21 (Pause.)

22 Well, going on a couple of facts, I can -- I
23 can't -- I can't answer -- I could answer it to you,
24 but --

1 Q. All right.

2 A. -- it's going to come out --

3 Q. What do you think is depicted in that --

4 A. It has to be at the police station, and my
5 reasoning for that is: one, the car was never opened
6 in the bin because -- conversation with the defendant
7 -- there was no keys. Two, the gentleman's leg that's
8 standing there has no pants on, and there was nobody
9 at the fire scene dressed like that because we were
10 still going over all the fire. And three, as I
11 testified before, this is a clear picture and it
12 couldn't have been taken through either window that I
13 looked through. This is a lot clearer. The picture
14 depicts clearer than what I saw.

15 Q. Now, sir, did you make any police report in
16 connection with this fire or your conversation with
17 Mr. Elbery or your observations in the car?

18 A. No. I don't have a finished report as of yet.
19 No, sir.

20 Q. Is there any report of any kind that indicates
21 your conversation with -- that you had a conversation
22 with Mr. Elbery that, as a result of that
23 conversation, that you went into the bin?

24 A. No. The only report I would have to that, would

1 be Lieutenant Miller's notebook. Bobby Miller -- the
2 lieutenant was there -- actually took his notebook out
3 when we were talking to him through the fence, and he
4 asked -- because he said that it was his car -- so he
5 took his name down and, I believe, his address.

6 There was conversation that he had moved because
7 I had talked to him and I said, "you used to live on
8 Oak Street". And that's how -- that's when I
9 recognized him. He said, "yeah. I used to live
10 there, but now I'm out of there." And he moved
11 somewhere else. Bobby took that down.

12 Where he said he moved to or anything, I don't
13 remember it. Bobby was writing that down. I was just
14 standing there.

15 Q. Okay. To the best of your memory, what is it
16 that Mr. Elbery said to you that you believed gave you
17 permission from him to go inside his bin?

18 A. He asked us to go look at the car for damage and
19 tell him what was --

20 Q. Well --

21 A. -- damaged because --

22 Q. -- what did he say? What were his words?

23 (Pause.)

24 A. He was -- he said, "I'm real concerned about my

1 car. There's no insurance on it. It's worth a lot of
2 money." He says, "can I go in and take a look at it?"
3 And I says, "jeez," -- I says, "you can't -- I can't
4 let you in here right now." I said, "we don't know
5 what we had for a fire." He said, "I'd like to secure
6 it as soon as I can." I says, "as soon as we get done
7 -- our investigation -- you can secure it. No
8 problem." I says, "you can come lock it up."

9 He says, "would you guys mind -- would you guys
10 mind go taking a look and telling me if you -- if
11 there's any damage to -- or what's been damaged?" And
12 I says, "no. No problem at all."

13 And that's when Bobby took his information.
14 That's when we walked up a little and over to the bin.

15 That's where -- the conversation didn't take --
16 right outside this bin, it took place back where the
17 -- where the engine was. And that's when we went over
18 and went in and looked at the car.

19 Q. And asked you to describe it?

20 A. (No verbal response.)

21 Q. Thank you, sir.

22 MR. REVELLI: I have nothing further of
23 this sergeant.

24 THE COURT: Okay. You may get off the

1 stand.

2 MR. REVELLI: The Commonwealth --

3 THE COURT: Do you wish to have this
4 witness continued to be sequestered, now that he has
5 testified?

6 MR. REVELLI: It would be up to the
7 defendant. Judge, I do not plan on recalling him.

8 THE COURT: Whatever you wish.

9 MR. SHEKETOFF: I do not plan on recalling
10 him either, your Honor.

11 THE COURT: You may remain in the
12 courtroom, if you wish.

13 Who do you wish to call, now?

14 MR. REVELLI: Sergeant Carl Hansen.

15 THE COURT: Sergeant Hansen, please.

16 DIRECT EXAMINATION:

17 BY MR. REVELLI:

18 Q. Please state your name, for the record,
19 Sergeant.

20 A. My name is Carl Hansen. I'm a police officer
21 for the town of Shrewsbury.

22 Q. Okay. For how long have you been employed as a
23 police officer?

24 A. Since 1982.

1 Q. For how long have you been employed by the town
2 of Shrewsbury?

3 A. Since 1982.

4 Q. And, Sergeant, what rank have you obtained up to
5 this point?

6 A. The rank of sergeant.

7 Q. Where you on duty with the Shrewsbury Police
8 Force on August 4th, 1994?

9 A. On August 4th? Yes. I was.

10 Q. And on August 5th, were you also employed --
11 were you also on duty?

12 A. Yes. I was.

13 Q. Okay. And at some point, were you on Boston
14 Turnpike Road at the place of E-Z Mini Storage?

15 A. Yes. I was.

16 Q. And on what date were you there?

17 A. I was working a midnight to 8:00 a.m. shift, so
18 I was there on August 4th, during the fire. And then,
19 I also worked a special paid detail there that started
20 at noon on August 5th.

21 Q. Okay, Sergeant. What time did you arrive there
22 on August 4th?

23 A. On August 4th, when I came into work at
24 approximately eleven-thirty, they stated that there

1 was a fire going on, and I went to the scene to help
2 assist with traffic.

3 Q. Were you in uniform at that day?

4 A. Yes. I was.

5 Q. Were you operating a marked cruiser?

6 A. Yes. I was.

7 Q. And, Sergeant, when you arrived on that scene,
8 can you tell the court the observations you made of
9 the fire.

10 A. I stationed myself out on Route 9, in front of
11 E-Z Mini Storage. I observed the -- as you would look
12 at the complex -- the left, rear building was in
13 flames.

14 Q. Okay. Sergeant, I have a number of pictures.
15 Do you recognize those pictures?

16 A. Yes. I do.

17 Q. Do you recognize the scenes depicted in those
18 photographs?

19 A. Yes. I do.

20 Q. And what are they photographs of?

21 A. They're the photographs of the left, rear
22 building of the E-Z Mini Storage that was on fire that
23 evening.

24 Q. And are those fair and accurate representations

1 of the scene as you observed it on that night?

2 A. Yes.

3 MR. REVELLI: At this time, the
4 Commonwealth will be seeking to offer two photographs
5 of the fire into evidence.

6 (The documents above-
7 referred to were marked
8 Commonwealth Exhibits No. 7
9 and No. 8 for Identifi-
10 cation.)

11 BY MR. REVELLI:

12 Q. And for how long, on August 5th, were you at the
13 scene of that fire? August 4th, I am sorry.

14 A. I believe until approximately three-thirty.
15 It's when some of the fire companies had gotten their
16 equipment out of the road and we were able to re-open
17 the road to traffic.

18 Q. And do you have a recollection as to how many
19 buildings are located on that site?

20 A. There are four buildings within the fenced area.

21 Q. Do you recall how many buildings were on fire?

22 A. One of the four buildings.

23 Q. And can you tell the court which building that
24 was.

1 A. If you were to look at the complex from Route 9,
2 facing the complex, it would be the left-hand, rear
3 building.

4 Q. And is that building commonly referred to as the
5 "C" Building or the "300" Building?

6 A. I know that the sheds, there, were in the 300's
7 -- the numbers were. I don't recall it being called
8 the "C" Building.

9 Q. Okay, Sergeant. What time did you arrive the
10 next day?

11 A. Around noon.

12 Q. And for what purpose?

13 A. The people -- the Benois -- running the E-Z
14 Mini Storage -- or somebody from E-Z Mini Storage had
15 called requesting a detail officer to be there to
16 assist with the people that were coming up to look at
17 the fire damage. And, also, in regards to their
18 property.

19 Q. Okay. And were you in a marked cruiser on that
20 day?

21 A. No. I was not.

22 Q. Okay. Were you in full uniform?

23 A. Yes. I was.

24 Q. And where did you station yourself?

- 1 A. At the front gate.
- 2 Q. And what time did you arrive at the scene?
- 3 A. Around noon.
- 4 Q. Okay, sir. When you arrived at the scene, was
5 there anyone outside that gate?
- 6 A. There were several people in the -- in the area
7 that were talking to the owners and -- yes.
- 8 Q. Okay. At some point, did you encounter the
9 defendant seated before the court -- Mr. Elbery?
- 10 A. Yes. The gentleman that's seated there.
- 11 Q. Okay. And at approximately what time did you
12 see Mr. Elbery?
- 13 A. Sometime between, I would say, twelve-thirty and
14 one o'clock.
- 15 Q. Previous to one o'clock, had you seen Sergeant
16 Johnson or the Shrewsbury Police Department?
- 17 A. No. I had not.
- 18 Q. Okay. Had you had any conversation with
19 Sergeant Johnson, between the hours of 10:00 a.m. and
20 1:00 p.m.?
- 21 A. Directly between those times? Not that I
22 recall.
- 23 Q. And for how long were you on the scene before
24 you had some interaction with Mr. Elbery?

1 (Pause.)

2 A. I would say, probably forty minutes -- forty-
3 five minutes.

4 Q. And where was Mr. Elbery positioned?

5 A. He was in the parking lot area of the E-Z Mini
6 Storage.

7 Q. Was he able to gain access inside the Mini
8 Storage?

9 A. No. He was not.

10 Q. And what prohibited him from doing that?

11 A. There's a gated (sic.) door and there's a
12 sliding gate. And those were closed at that
13 particular time.

14 Q. Prior to this time, were you familiar with Mr.
15 Elbery?

16 A. Yes.

17 Q. And how were you familiar with him?

18 A. I had met Mr. Elbery before with prior incidents
19 with the department.

20 Q. And did you have some conversation with Mr.
21 Elbery, on that day?

22 A. Yes. I did.

23 Q. And what was your conversation with Mr. Elbery?

24 A. He stated that he was looking to lock his

1 storage compartment and that he had a motor vehicle in
2 the storage compartment that he was concerned with.
3 To see if it had been damaged or not from the fire.

4 Q. And what was your response?

5 A. He asked if he could go in on several different
6 occasions. I told him that they weren't letting
7 anyone in because it was still a crime scene. And he
8 seemed to express great concern over the motor vehicle
9 in the -- in the storage shed.

10 At one point, I asked him if he wanted me to go
11 down and take a look at the vehicle. To check it to
12 see if it was all right.

13 Q. And what was his response?

14 A. He asked me if I would go down to take a look at
15 the vehicle.

16 Q. Did he indicate -- did he indicate what type of
17 vehicle it was?

18 A. He said it was a red Corvette.

19 Q. And did he direct you to that specific bin?

20 A. I don't recall.

21 Q. And after that conversation, did you go to Bin
22 C341 -- or Bin 341C?

23 A. Yes.

24 Q. Okay. And how long after that conversation did

1 you do that?

2 A. When he asked me to go down and take a look at
3 the vehicle, I went through the office to get back
4 into the yard, walked down to take a look at the
5 vehicle.

6 Q. And do you know how far away he was from that
7 scene where his bin was located?

8 (Pause.)

9 A. From the building?

10 Q. Yes.

11 A. It was part of the building that was on fire.

12 Q. Mr. Elbery, himself, though. How far --

13 A. Oh. He --

14 Q. -- away was he from "341"?

15 A. There's a gate that runs around the perimeter of
16 the E-Z Mini Storage, and he was on the property over
17 by B & B Printing, which is an adjacent business, and
18 I would say probably about twenty feet.

19 Q. When you arrived at "341C", was that bin door
20 open or closed?

21 A. That was open.

22 Q. And was "341C" visible from the position that
23 Mr. Elbery was standing in?

24 A. From the other side of the fence? Yes.

1 Q. And did you, in fact, enter "341C"?

2 A. Yes. I did.

3 Q. Okay. Can you describe, for the court, the
4 observations you made when you entered?

5 A. When I entered the bin, there were boxes located
6 on the left-hand side of the bin as you walked in.
7 There was a bunch of neon bar signs. There was a red
8 Corvette -- there was the -- in the center of the bin.

9 Q. I will show you that picture, Officer. Do you
10 recognize that picture?

11 A. Yes. I do.

12 Q. Can you tell the court what that photograph
13 depicts?

14 A. Those were the boxes. These boxes, here,
15 happened to be right behind the -- right behind the
16 car.

17 Q. And is that a fair and accurate representation
18 of the way the bin looked, in that area, when you
19 observed it?

20 A. Yes.

21 MR. REVELLI: The Commonwealth would offer
22 the next picture of the inside of the bin, itself.

23 THE COURT: Any objection?

24 MR. SHEKETOFF: No objection, your Honor.

1 (The document above-referred
2 to was marked Commonwealth
3 Exhibit No. 9 for Identifi-
4 cation.)

5 BY MR. REVELLI:

6 Q. Did you survey the motor vehicle when you went
7 inside?

8 A. Yes. I did.

9 Q. What were you looking for, Sergeant?

10 A. Mr. Elbery had asked me to look to see if there
11 was any damage. If the vehicle had been melted or if
12 anything had fallen onto the vehicle and damaging it.

13 Q. Okay. And what, exactly, did you do when you
14 entered that bin?

15 A. I entered the bin, looked at both the front and
16 sides -- tops of the vehicle.

17 Q. And did you make any observations of that -- of
18 the inside of that motor vehicle?

19 A. Yes. I did.

20 Q. What did you observe in the inside of the motor
21 vehicle?

22 A. I observed a -- between the seats, there was a
23 long plastic bag -- item that was wrapped up in a
24 plastic bag. And on the driver's side seat, there was

1 a cardboard box that was -- had a piece of tape across
2 it that had the letters "uzi" visible. Facing up.

3 Q. What did you understand the letters "U-Z-I" to
4 mean?

5 A. To be some type of a firearm.

6 Q. What was your opinion of the other item wrapped
7 in the plastic bag?

8 A. It appeared to be some type of a rifle.

9 Q. And the bag that is now before you on the
10 witness stand, is that the bag that you saw?

11 A. Yes. It is.

12 Q. For how long were you in the bin?

13 A. I would say, probably not more than a minute,
14 two minutes.

15 Q. And are those the only observations you made?

16 A. Yes.

17 Q. Okay. And what did you do after you exited the
18 bin?

19 A. After that, I left. I told Mr. Elbery that his
20 car was fine. I then went and spoke to Sergeant
21 Johnson and spoke to Lieutenant Sampson.

22 Q. Okay. How were you able to contact Lieutenant
23 Sampson?

24 A. I contacted him by phone.

1 Q. Please tell the court the conversation -- what
2 the conversation was that you had with Sergeant
3 Johnson.

4 A. When I -- when I found Sergeant Johnson at the
5 fire scene, I told him that I'd looked inside the
6 Corvette when I was checking it for the damage, and I
7 saw in the Corvette, what I believed to be two
8 firearms. One wrapped up, one inside a box.

9 Q. Do you recall what his response was?

10 A. He directed me to contact Lieutenant Sampson in
11 regards to trying to obtain a search warrant to go
12 into the container.

13 Q. Did you have any knowledge, at that time,
14 whether or not that contact had already been attempted
15 by Sergeant Johnson?

16 A. No. I did not.

17 Q. Did you, in fact, contact Lieutenant Sampson?

18 A. Yes. I did.

19 Q. And via what medium did you do that?

20 A. I did it by the phone in the office of the E-Z
21 Mini Storage.

22 Q. And were you able, in fact, to contact him?

23 A. Yes. I was.

24 Q. And what did you tell Lieutenant Sampson?

1 A. I told him that I had checked a Corvette that
2 was in a storage locker that belonged to Mr. Elbery,
3 and that when I was checking the vehicle, I looked
4 inside and saw what I believed to be some type of a
5 rifle and also a box that contained -- that had the
6 letters "uzi" on it -- or the word "uzi" on it -- that
7 I believed also contained a firearm.

8 Q. During your conversation with Mr. Elbery, please
9 describe his demeanor.

10 A. He was very nervous at the time and had made
11 several attempts, in asking the people there at the
12 storage place, to go in to place a lock to lock up his
13 storage container.

14 Q. And for how long was Mr. Elbery there, while you
15 were there?

16 A. He was there almost continually for the whole
17 time that I was there.

18 Q. At some point, did Lieutenant Sampson arrive at
19 that scene?

20 A. Yes. Later on in the afternoon.

21 Q. And did he have, in his possession, a search
22 warrant?

23 A. Yes. He did.

24 Q. Did you contribute in the execution of that

1 search warrant?

2 A. I was there when the search warrant was
3 executed. Yes.

4 Q. Can you tell the court what was found?

5 A. They found the Corvette, they found in some
6 boxes located inside the storage area, they found
7 some, I believe, three or four AK47's, several clips
8 for the different weapons.

9 Q. Were you able to enter the Corvette at that
10 time?

11 A. The car was locked at that time.

12 Q. What did you do with the motor vehicle?

13 A. Just prior to me leaving the area, luggers had
14 arrived to tow the Corvette back to the police
15 station.

16 Q. Can you describe the weather on that day, for
17 the court?

18 A. It was a gray, overcast day. Later on in the
19 afternoon, it started raining quite heavily.

20 Q. What were you -- what were you wearing besides
21 your uniform?

22 A. Later on in the day when it started to rain
23 heavily, I put on an orange, full-length raincoat with
24 a badge.

1 Q. Was your badge displayed on the outside of that
2 raincoat?

3 A. Yes. It was.

4 MR. REVELLI: I have nothing further of
5 the Sergeant at this time.

6 THE COURT: Counsel?

7 MR. SHEKETOFF: Thank you, your Honor.

8 CROSS EXAMINATION:

9 BY MR. SHEKETOFF:

10 Q. Sir, is it Sergeant Hansen or Officer Hansen?

11 A. Sergeant.

12 Q. Sergeant Hansen? Okay. Sergeant, when you had
13 this conversation, that you have recounted with Mr.
14 Elbery, approximately what time in the day was it?

15 A. I would say it was between twenty minutes of one
16 and one o'clock.

17 Q. And were you present when photographs were taken
18 of the -- of the bin area during or just after the
19 execution of the search warrant?

20 A. I was there while they took some photographs.
21 Yes.

22 Q. All right. So some photographs of the Corvette
23 were taken right in the bin area?

24 A. That's correct. I was there when those were

1 taken.

2 Q. Okay. And it is your testimony that the car was

3 unopened at that time?

4 A. We did not open the car. That's correct.

5 Q. And, in fact, it is your testimony that the car

6 was never opened while it was in the bin area?

7 A. Not while I was there. No.

8 Q. Well, were you there until the car was taken

9 away?

10 A. I saw it get loaded up onto the flatbed. After

11 that, my tour of duty on the detail was done and I

12 headed home for the evening.

13 Q. Now, you had this conversation with Mr. Elbery.

14 Have you recounted that conversation in any written

15 report of any kind?

16 A. No. I have not.

17 Q. And is there some reason why it does not appear

18 in any written report?

19 A. (No response.)

20 Q. Did you do any report about this incident, at

21 all?

22 A. No. I did not.

23 Q. Now, you say that after you spoke with Mr.

24 Elbery, you went and checked the bin area where the

1 Corvette was located, correct?

2 A. That's correct.

3 Q. What did you see -- what first drew your
4 attention about that Corvette? Was it clean? Was it
5 dirty? Was it full of soot? Was it --

6 A. It was -- could you re-phrase that?

7 Q. Yes. What did you notice about the outside of
8 the Corvette?

9 A. It was dirty.

10 Q. Did it appear to have smoke damage or soot from
11 the fire?

12 A. There was water on the Corvette from putting the
13 fire out and dirt and the associated soot that comes
14 along with any fire.

15 Q. Now, how -- did you notice that the windows were
16 tinted?

17 (Pause.)

18 A. They come with a factory tint.

19 Q. Did you notice that the Corvette a -- windows
20 had a factory tint on them?

21 (Pause.)

22 A. They did -- they were tinted windows.

23 THE CLERK: Excuse me, counsel.

24 THE COURT: Can I interrupt? Just stand

1 by.

2 (A brief recess was taken.)

3 THE COURT: We will break for lunch and be
4 back at two-thirty.

5 (Whereupon, the luncheon recess was
6 taken.)

A F T E R N O O N S E S S I O N

MR. REVELLI: Judge, when last we recessed, I think Sergeant Hansen was on the stand and under cross examination.

THE COURT: Yes. You may continue, counsel.

MR. SHEKETOFF: Thank you, your Honor.

BY MR. SHEKETOFF:

Q. Sergeant, right before we recessed, I asked you if the windows to the automobile were tinted and it was your testimony that it was your memory that there was a factory tint, correct?

A. Correct.

Q. Let me show you this photograph and ask you if you recognize what is depicted in the photograph.

A. Yes. I do.

Q. Is what's depicted in the photograph what you observed when you walked around inside the storage bin -- that red Corvette?

A. Yes. It was.

Q. And is that a fair and accurate representation of what you saw in the front seat?

A. Yes. It is.

1 MR. SHEKETOFF: I would just offer this,
2 your Honor.

3 THE COURT: That is not a picture which
4 has been previously marked?

5 MR. SHEKETOFF: It is not.

6 THE COURT: All right. It will be the
7 Defendant's Exhibit No. 5.

8 (The document above-referred
9 to was marked Defendant
10 Exhibit No. 5 for Identifi-
11 cation.)

12 BY MR. SHEKETOFF:

13 Q. Sir, is that -- does that photograph illustrate
14 the type of view you had inside the vehicle at the
15 time you walked by it?

16 A. Yes.

17 Q. Now, sir, after you walked through the bin and
18 made the observations that you have told us you made,
19 you said you had an opportunity to speak with Sergeant
20 Johnson?

21 A. Yes.

22 Q. And what did you tell Sergeant Johnson?

23 A. I told him that inside the red Corvette, there
24 was a box that said "uzi" on it and what appeared, to

1 me, to be a -- some type of rifle in between the two
2 front seats.

3 Q. And what did he say to you?

4 A. He told me to speak to Lieutenant Sampson. I
5 then called Lieutenant Sampson on the phone.

6 Q. All right. Did Sergeant Johnson tell you that
7 he had seen the exact same items in that car?

8 A. No. He was busy at the time with his
9 investigation and we just spoke very briefly.

10 Q. Well, did he mention to you that he had made
11 similar observations?

12 A. No.

13 Q. All right. Did you know at that time, that he
14 had made similar observations?

15 A. No.

16 Q. All right. And you, after speaking with him --
17 and this would have been some time after 1:00 p.m. and
18 before 2:00 p.m.?

19 (Pause.)

20 A. After one -- it could have been shortly after
21 two.

22 Q. Okay. Then you called Lieutenant Sampson?

23 A. Correct.

24 Q. And what did you tell Lieutenant Sampson?

1 A. I told him that I had spoke to Mr. Elbery and he
2 had asked me to look at his Corvette inside his
3 storage locker, which I did, and in the process of
4 checking the car, saw the box with -- the box labeled
5 "uzi" on the front seat and what appeared to be a
6 rifle wrapped up in a green plastic bag in between the
7 two seats.

8 Q. All right. Did you tell him that you could see
9 through a portion of the plastic and it -- there could
10 be a rifle in the area that you would see through the
11 plastic?

12 (Pause.)

13 A. Not that I recall. I stated the wrapped up
14 plastic appeared to be a rifle.

15 Q. You couldn't see through the plastic, could you?

16 A. That the rifle was wrapped up in?

17 Q. Yes.

18 A. No.

19 Q. And have you seen the exhibit since it was
20 removed from the car?

21 A. Yes.

22 Q. And inside the plastic is a black carrying case
23 of some kind, correct?

24 A. I haven't -- I've only seen it as it was

1 presented today -- wrapped up in plastic.

2 Q. And have you seen -- did you see when it was
3 presented, today, that there is a black carrying case
4 inside the plastic?

5 A. (No response.)

6 Q. Did you notice that?

7 A. Now, I can see that -- yes. There is a case in
8 it.

9 Q. And it is fair to say that there was -- when you
10 looked through the window, there was no portion of the
11 plastic that you could actually see through?

12 A. No. It was all wrapped up as a -- as a unit.

13 Q. Okay. What about that exhibit made you think it
14 was a rifle?

15 A. The general shape of the package with the -- you
16 know, the way it was shaped and its length.

17 Q. Okay. So it was consistent with what you would
18 imagine a rifle to look like if it was wrapped up in
19 plastic?

20 A. Correct.

21 Q. But it could have been a lot of other things,
22 too, correct?

23 (Pause.)

24 A. It could have been.

1 Q. I mean, for instance, this part that gives the
2 appearance of being wide in the middle, is, in fact --

3 THE COURT: I am not sure, counsel, if --
4 I am not sure if anybody has inspected that, so I am
5 just going to ask you to be careful with your hand
6 because -- first of all, I do not know if there is a
7 gun in there, second of all, I do not know if it is
8 loaded, and third, I do not know if there is a safety
9 on. So just for purposes of being more cautious, I
10 would ask you to be careful.

11 MR. SHEKETOFF: It is my understanding,
12 your Honor -- just for the record -- that since the
13 return does list what is inside of this, that it must
14 have been opened at some point in time. But I do not
15 know what is inside it right now. Unless --

16 THE COURT: Well, neither do I, but I am
17 -- I mean, you are handling the trigger area.

18 BY MR. SHEKETOFF:

19 Q. In fact, this is not a trigger, though, right?
20 This is some part of a carrying case. The part in the
21 middle that bulges out. That is a handle for a
22 carrying case, correct?

23 A. It would seem to be.

24 Q. In any event, do you remember what else you told

1 Lieutenant Sampson?

2 A. That there was a box on the front seat that was
3 labeled "uzi" on it and it was taped up.

4 Q. Well, didn't the tape itself cover some of the
5 letters on the box?

6 A. Yes. It did.

7 Q. So, you could not see some of the letters -- or
8 all of the letters, correct?

9 A. But I know from previous experience, that that's
10 what they'd be -- come -- that's the way those are --
11 uzi's are packaged.

12 Q. You mean you have seen a box just like that
13 before?

14 A. I own several uzi's and that's the way they're
15 boxed.

16 Q. Now, what kind of guns are these, that you own?

17 A. I own a full-sized uzi and an uzi pistol.

18 Q. And the uzi pistol came in a box like that?

19 A. It comes in a -- they're -- depending on how you
20 order them -- it depends on the way they're boxed.
21 That box there, could have either been an uzi carbine
22 or an uzi pistol.

23 Q. And it is big enough to hold a carbine?

24 A. The boxes are, depending on what configuration

1 you wanted.

2 Q. All right. Would the carbine be broken down
3 into more than one piece?

4 A. It can be. It depends, like I say, what options
5 you want it with.

6 Q. Did you tell him that you saw that box on the
7 floor of the vehicle?

8 A. No. On the front seat of the vehicle.

9 Q. And the word "uzi" was pointing up?

10 A. Pointed up.

11 Q. The word "uzi" was pointed up?

12 A. (No verbal response.)

13 Q. All right. Now, did Lieutenant Sampson tell you
14 that he had gotten a similar report from Sergeant
15 Johnson?

16 A. No. He did not.

17 Q. Thank you, sir.

18 MR. REVELLI: No further questions of the
19 Sergeant.

20 THE COURT: Your next witness?

21 MR. REVELLI: Your Honor --

22 THE COURT: You may remain in the
23 courtroom, if you wish.

24 Who are you calling?

1 MR. REVELLI: The Commonwealth would rest
2 the purposes of the motion at this time, your Honor.

3 THE COURT: Counsel?

4 MR. SHEKETOFF: I would call Lieutenant
5 Sampson.

6 DIRECT EXAMINATION:

7 BY MR. SHEKETOFF:

8 Q. Lieutenant, for the record, would you please
9 state your name.

10 A. My name is Wayne Sampson. I am a lieutenant
11 with the Shrewsbury Police Department.

12 Q. And, sir, how long have you been so employed?

13 A. Approximately twenty years.

14 Q. And were you so employed on August 4th of 1994
15 and August 5th of 1994?

16 A. Yes. I was.

17 Q. And at some point on August 4th, did you become
18 aware that there had been a fire -- or there was a
19 fire -- at E-Z Mini Storage in Shrewsbury?

20 A. On August 4th?

21 Q. Yes.

22 A. I -- no, sir. I don't -- I don't believe so.

23 Q. Okay. Did you become involved on August 5th?

24 A. Yes.

1 Q. All right. How did you first become involved?

2 A. Sometime during that morning, I became aware
3 that there was a major fire at that location.

4 Q. All right. And how did you become aware of
5 that?

6 A. Through roll call in the morning -- conversation
7 within the station.

8 Q. Okay. And sometime subsequent to becoming aware
9 of that, did you have some conversation about a
10 specific bin at that storage facility?

11 A. Yes. I did.

12 Q. And when was that, sir?

13 A. Sometime during early afternoon.

14 Q. Approximately what time would you estimate?

15 (Pause.)

16 A. This is a guess. I'm going to say maybe around
17 two o'clock.

18 Q. Okay. It could have been as much as an hour
19 earlier?

20 (Pause.)

21 A. I really don't know.

22 Q. Okay. Now, where were you when you had this
23 conversation?

24 A. I was in the station.

1 Q. And what occurred? Who called you?

2 (Pause.)

3 A. I received a telephone call -- I don't know the
4 exact sequence of the phone calls.

5 Q. All right. Is there any report that could
6 refresh your memory as to the sequence?

7 A. I do have a report and I have the affidavit, but
8 I don't believe that that would pinpoint for me the
9 sequence of the phone calls.

10 Q. Okay. In any event, sir, to the best of your
11 memory, what was the first phone call you received?

12 A. I believe that the first one was -- it was
13 either a radio message or a phone call or a beep --
14 from Sergeant Johnson.

15 Q. And did you actually speak with Sergeant
16 Johnson?

17 A. Yes. I did.

18 Q. And what, if anything, did Sergeant Johnson tell
19 you?

20 A. He explained to me that they were at that
21 location of the fire, that they had some guns in a
22 motor vehicle, and he believed that the person was not
23 licensed to possess them and wanted to know if they
24 should confiscate them. And I said, "wait. I think

1 we should -- need a warrant." And that's -- we went
2 from there.

3 Q. Okay. What happened after that initial
4 conversation?

5 A. I stayed at the station. I started to get some
6 information. I verified with Worcester that the
7 person that we believed to be the owner of the
8 vehicle, had his license to possess guns revoked.

9 Q. All right. So, as a result -- Sergeant Johnson
10 called you and told you that there were some guns in
11 the vehicle and he wanted to know if he could
12 confiscate them. Did he give you the name of the
13 person -- did he give you other information at that
14 time?

15 A. He said that he could see the guns from the
16 outside of the vehicle. And he said -- stated that
17 there was -- he stated that there was a weapon visible
18 right on the interior of the motor vehicle.

19 Q. Okay. And did he give you the name of Michael
20 Elbery at that point in time?

21 (Pause.)

22 A. I believe he did.

23 Q. Okay. Now, as a result of that information, you
24 told him to wait and you made some inquiries,

1 including an inquiry of Worcester Police Department,
2 as to whether or not Michael Elbery had a license to
3 carry?

4 A. Yes. I did.

5 Q. What else did you do?

6 A. At that point, I believe that I radioed back to
7 the scene -- or beeped them or whatever -- so that I
8 could get more information.

9 Q. And who did you speak to on that occasion?

10 A. It was either Sergeant Hansen or Sergeant
11 Hurley. I didn't speak to Sergeant Johnson again. It
12 was one of the other two officers.

13 Q. All right. And you are not sure if it was
14 Sergeant Hansen or Sergeant Hurley?

15 A. I'm not sure of the sequence. No.

16 Q. Well, before you actually went to the clerk's
17 office and filled out an affidavit, had you spoken to
18 both Sergeant Hansen and Sergeant Hurley?

19 A. Yes. I did.

20 Q. All right. You are just not sure of which one
21 you spoke to first?

22 A. No.

23 Q. To the best of your memory, what did Sergeant
24 Hansen or -- is it Sergeant Hurley, also?

1 A. Yes.

2 Q. What did Sergeant Hansen say to you when you
3 spoke to him?

4 A. I asked him, specifically, what type of weapons
5 -- you know -- did they think they (sic.) was. I was
6 trying to get more information so that I could write
7 an affidavit.

8 He told me that one appeared to be a long-
9 barreled type of rifle -- something like that -- it
10 was wrapped in plastic. And that there was a box that
11 was clearly marked "uzi" that they could see from the
12 outside of the window.

13 Q. Okay. What else did he tell you?

14 A. That Mr. Elbery was right opposite the fence on
15 the outside. That he had been there for quite a
16 while.

17 (Pause.)

18 That Sergeant Johnson was some place on the
19 property. I don't -- I think I asked where he was, or
20 something, and he wasn't right where the Sergeant was
21 because I was looking for him, originally. I didn't
22 even know that Sergeant Hansen was there.

23 Q. Did you have any further conversation with
24 Sergeant Hansen? Did he provide you with any more

1 information?

2 A. I believe it was Sergeant Hansen that gave me
3 the VIN number off of the motor vehicle.

4 Q. Okay. Anything further with Sergeant Hansen?

5 A. Not that I can recall.

6 Q. All right. And you had a second conversation --
7 whether it was the second one in time or not -- with
8 Sergeant Hurley?

9 A. Yes.

10 Q. And what did Sergeant Hurley tell you?

11 (Pause.)

12 A. Well, the specific statement that I remember
13 Sergeant Hurley telling me was that Mr. Elbery was on
14 the scene and that he had made a statement to Sergeant
15 Hurley to the effect that he can't do anything because
16 he is a convicted felon.

17 Q. Okay. Can you recall anything else that
18 Sergeant Hurley may have told you?

19 A. No. Not specifically.

20 Q. All right. Now, were there any conversations
21 with other officers, other than one that you have
22 recounted to this point, prior to your seeking a
23 warrant?

24 A. Not that I'm aware of.

1 Q. Do you have any notes from any of these
2 conversations?

3 A. Just what's in the affidavit.

4 Q. And as a result of these conversations, and
5 before you sought the warrant, did you actually go
6 down to E-Z Mini Storage to take a look for yourself?

7 A. No. I did not.

8 Q. As a result of these conversations, then, you
9 then went to the clerk's office and swore out an
10 affidavit?

11 A. Yes, sir.

12 Q. And let me show you this copy of a Motion to
13 Suppress that I filed and the court papers that are
14 attached to it, and on the back of it is something
15 that says "Affidavit in Support of Application for
16 Search Warrant, Appendix A, page 1 of 2." And then
17 the second page. Is that the affidavit that you
18 filled out?

19 A. Yes, sir.

20 Q. And is that your signature at the bottom of page
21 one and page two?

22 A. Yes. It is.

23 Q. Now, sir, who told you on -- from the officers
24 that you spoke with -- that at some point, fire

1 fighters opened the storage bin at "C341" in order to
2 fight the fire?

3 A. That would have been Sergeant Johnson.

4 Q. All right. Sergeant Johnson told you that?

5 A. Yes.

6 Q. Did you ask him where he got that information?

7 A. No.

8 MR. REVELLI: I am going to object at this
9 point, Judge.

10 THE COURT: Overruled.

11 MR. REVELLI: Judge, I would just like to
12 be heard briefly.

13 THE COURT: I will hear you.

14 MR. REVELLI: The motion before the court
15 is the warrantless entry inside the storage bin
16 itself. There is no motion before the court on attack
17 -- on the warrant or the affidavit or anything to do
18 with the four corners of either document. So, I would
19 say that the relevance, as to the questioning on the
20 affidavit, is minimal.

21 MR. SHEKETOFF: Well, my position at this
22 point, your Honor, is that there are things in the
23 affidavit that contradict the testimony about what
24 occurred at the warrantless search. And that is why I

1 am asking him who gave him this information, because
2 it is -- things that we have heard on the witness
3 stand are contradicted by things that are said in this
4 affidavit.

5 THE COURT: Overruled.

6 BY MR. SHEKETOFF:

7 Q. All right. Sergeant Johnson told you that at
8 some point, the fire fighters opened storage bin
9 "C341" in order to fight the fire?

10 (Pause.)

11 A. Not in that exact language.

12 Q. Well, what did he tell you?

13 A. He stated that he was at the fire scene
14 investigating the fire, and that the bin was open and
15 that he had observed these items.

16 Q. Sergeant Johnson told you this, too? That he
17 had observed the items?

18 A. (No response.)

19 Q. Did he --

20 A. Yes. When he -- yes. That's...

21 Q. He told you that he had actually observed
22 weapons?

23 A. Yes.

24 Q. All right. Who told you that the fire fighters

1 were able to extinguish the fire within this storage
2 bin?

3 A. No one made that statement. That would have
4 been the circumstances that -- I mean, the fire was
5 out at that point. There would -- to -- in my
6 opinion, from what they were telling me, that if the
7 bin was open, it had to be part of the fire.

8 Q. Okay. So that was an assumption that you made
9 based on the knowledge that you had from Sergeant
10 Johnson?

11 A. That he was in -- he was in -- it was my
12 understanding that he was in the bin investigating the
13 fire.

14 Q. He told you that the reason he had been in the
15 bin was to investigate the fire?

16 A. No. That did not come up in the initial
17 conversation.

18 Q. All right. Did anyone tell you that Sergeant
19 Johnson had been in the bin to investigate the fire?

20 A. No.

21 Q. Did Sergeant Johnson ever tell you that he was
22 in the bin because Michael Elbery told him to go in
23 the bin and check his car for him?

24 A. No.

1 Q. Now, did somebody tell you a portion of the
2 plastic could be seen through, and it appears, in
3 fact, to be a rifle?

4 (Pause.)

5 A. They told me clearly that it -- that they
6 believed it to be a rifle. That they could see
7 through some plastic.

8 Q. Who told you they could see through the plastic
9 and it appeared to be a rifle?

10 A. I'm not -- I'm not specifically sure.

11 Q. And did someone tell you that next to this item
12 on the floor, is a box marked "uzi"?

13 (Pause.)

14 A. Yes.

15 Q. All right. Who told you that they saw the box
16 on the floor?

17 A. The terminology that they said to me was:
18 "down, next to the rifle, was an uzi." And I assumed
19 that to be on the floor -- "down, next to."

20 Q. And who was it that told you that?

21 A. Sergeant Johnson.

22 Q. Now, after you got the warrant -- by the way,
23 did Sergeant Hansen ever tell you that he had been
24 inside the bin because Mr. Elbery had given him

1 permission to go inside the bin to look and see if
2 there was any damage to the car?

3 A. He told me that he had been inside the bin. He
4 did not state the reason why.

5 Q. And this is before you sought the warrant?

6 A. This is while I was trying to write the
7 affidavit. Sergeant Hansen knows weapons very well,
8 and so I relied on his information -- his knowledge
9 and training experience on the information.

10 Q. Okay. Now, sir, then you went to court, you
11 swore out the affidavit -- swore to the affidavit --
12 and you got a warrant, correct?

13 A. That's correct.

14 Q. And you went back to E-Z Mini Storage with the
15 warrant?

16 A. No, sir. That's the first time that I was
17 there.

18 Q. Okay. But you went to E-Z Mini Storage with the
19 warrant?

20 A. Yes. I did.

21 Q. And did you -- you entered the bin with the
22 warrant?

23 A. At that point, I stayed right on the outside,
24 and Mr. Elbery was still standing on the outside of

1 the fence.

2 Q. All right. Was the car opened while it was in
3 the bin?

4 A. No. Couldn't get into it.

5 Q. Did you, at some point in time, either open --
6 and I called it Exhibit No. 9 at one point, but I see
7 now that it is Defendant Exhibit No. 4 -- did you
8 either see this open or open it yourself?

9 MR. REVELLI: Again, I am going to object.
10 I think we have gone beyond the scope of the motion,
11 at this point. We have -- now we have the Detective
12 with a warrant that he is attempting to execute, in
13 there.

14 The basis of the motion is whether, during this
15 warrantless invasion -- initially, when they were on
16 the scene -- whether they had permission to be there.

17 THE COURT: Overruled.

18 BY MR. SHEKETOFF:

19 Q. Did you ever see that open?

20 A. Yes, sir.

21 Q. Okay. What was inside of the black plastic?

22 A. Some type of a rifle. A rifle.

23 Q. Okay. But you see as you look at this exhibit,
24 now, there is a black -- I would call it leather but

1 it is more like a plastic bag of some kind, a carrying
2 bag, correct?

3 A. Yes, sir.

4 Q. Was that inside it at the time that it was
5 seized from the car?

6 A. I can't say, sir.

7 Q. You do not know?

8 A. I had Sergeant Hurley there. Sergeant Hurley is
9 the Property and Evidence Officer for the Shrewsbury
10 Police Department, and I -- it was his responsibility,
11 assigned by me, to handle all evidence and record all
12 evidence.

13 Q. And was there something in the box that had
14 "uzi" on it?

15 A. Yes, sir.

16 Q. What was in there?

17 A. There was an uzi gun inside.

18 MR. SHEKETOFF: I have no further
19 questions for this witness.

20 THE COURT: Commonwealth? Do you have
21 anything?

22 MR. REVELLI: Judge, I have nothing
23 further.

24 THE COURT: You may get down off the

1 stand. You may remain in the courtroom, if you wish.

2 MR. SHEKETOFF: I beg the court's
3 indulgence for one moment.

4 MR. SHEKETOFF: The defence rests.

5 THE COURT: Did you say that you rest,
6 counsel?

7 MR. SHEKETOFF: Yes, your Honor --
8 actually, I would like to make one motion before I
9 rest.

10 THE COURT: I will hear you. Go ahead.

11 MR. SHEKETOFF: The motion I would like to
12 make, your Honor, is that we arrange for a physical
13 view. We put the car back into the storage bin and
14 that the court actually look at the car with the
15 tinted windows from inside the storage bin to see if
16 one can see through the windows to the areas that the
17 police officers testified you could see from the
18 position they were in.

19 THE COURT: Mr. Revelli?

20 MR. REVELLI: If the court deems that
21 necessary. We have some very good pictures of the
22 motor vehicle that the officer has testified that are
23 a fair and accurate representation of how he saw the
24 scene and viewed certain objects through the windows

1 themselves.

2 Officer Hansen -- Sergeant Hansen also testified
3 that it was a factory tint. There was nothing special
4 about those windows -- as if they were blacked out.
5 And as far as that particular motor vehicle is
6 concerned, your Honor, we do not know if it has been
7 preserved in the same state as it was that day.

8 That motor vehicle has been returned, has not
9 been held for evidence, and was in Mr. Elbery's
10 possession. And it is our understanding, returned to
11 his ex-wife.

12 MR. SHEKETOFF: The tint on the windows
13 has not changed and if it has, the police officers
14 could testify that it has been changed. It is clear
15 that it has not changed. It is a factory issue, your
16 Honor.

17 I do not know how else to show the court, in
18 that enclosed area with only daylight from the door if
19 possible, with tinted windows, what you could really
20 see without the aid of a flashlight in that car -- but
21 to stick the car back in there and to take a look at
22 it.

23 And that is the only additional evidence that I
24 would seek to introduce, your Honor.

1 The defence rests.

2 And, your Honor, could I be heard briefly, and
3 could -- would your Honor give me the opportunity to
4 supplement my verbal closing, here, with a written
5 submission?

6 THE COURT: Yes.

7 MR. SHEKETOFF: Thank you, your Honor.

8 THE COURT: In seven days.

9 MR. SHEKETOFF: Seven Days? And could we
10 come back and argue it in seven days and -- do you
11 want me to argue it right now?

12 THE COURT: I do not think that is
13 necessary.

14 MR. SHEKETOFF: Okay. This would be my
15 main argument, your Honor --

16 THE COURT: If it is -- after I have read
17 your brief -- If I think it is appropriate to do so, I
18 will allow you to do that.

19 MR. SHEKETOFF: Thank you, your Honor.

20 THE COURT: At the present time, I will
21 let it go.

22 MR. SHEKETOFF: I see the case this way,
23 your Honor: First you have to make the credibility
24 decision as to whether or not there was consent to

1 enter the premises. By "the premises" I mean the
2 defendant's individual bin -- to cross the threshold
3 and go in.

4 Now, if you had two police officers say that
5 they were both given permission by the defendant to do
6 it, it does not -- it seems to me that it does not
7 make very much sense that they would both be given
8 permission.

9 If the first one was told that he had permission
10 to do it, why would -- and he came -- and he says he
11 came back and told the defendant that the vehicle was
12 fine -- why would the defendant ask a second officer
13 to do the same thing?

14 That is the first issue you have to decide.
15 Whether there is credibility there. And it does not
16 appear in the affidavit at all. Now, if there was
17 consent to walk into that storage bin, you would
18 expect it to be in the affidavit. Instead, we have a
19 different story in the affidavit as to why the
20 officers went into the bin. And that is, conducting a
21 fire investigation.

22 The second issue, if your Honor decides in favor
23 of the Commonwealth on that issue, that there was
24 consent to enter the bin -- because that seems to be

1 the only justification the Commonwealth has offered --
2 the second issue becomes whether or not they could
3 make the observations they claim they made of this
4 weapon in plastic and this gun in a box. And it seems
5 to me that you have to decide whether or not they
6 could make that observation. That is why I asked for
7 the view.

8 If you decide that it is possible that they saw
9 what they say they saw on the witness stand, there is
10 another issue which is: is that probable cause to
11 believe that there are weapons in the car?

12 You have a box with the letters "U-Z-I" with
13 some piece of tape blocking a portion -- and you have
14 a photograph of it -- so it is not one hundred percent
15 clear that the box even says "U-Z-I". But even if it
16 did say "U-Z-I", this is a storage bin.

17 You have got two photographs of all the kinds of
18 things that are in there. There are all kinds of
19 boxes in there with stuff in them. There is no way to
20 look at that box and say there is a gun inside of that
21 box. Or even that it is more probable than not.

22 This is not a box that, you know, looks brand
23 new or is -- you know, does not look like it has been
24 disturbed, that it has come directly from the factory

1 or some gun dealership. There is no way to take the
2 letters "U-Z-I" on the outside of a box and say more
3 probably than not, there is a gun inside of that box.

4 And the same with the rifle. That may have the
5 general shape of a rifle, but it has the general shape
6 of a lot of other things, too. And I do not think
7 that either standing alone or either together adds up
8 to probable cause. And therefore, the search that
9 follows fails.

10 Now, if your Honor rejects that position, it
11 seems to me my final position is -- and this is not
12 within the four corners of the Motion to Suppress that
13 I filed, but I think it is fairly raised by the
14 evidence and I do not think I could have been expected
15 to have raised it in my written motion -- and that is
16 whether or not the affidavit in support of the search
17 warrant is a truthful affidavit.

18 Because the single most important piece of
19 information in this affidavit, which was given to the
20 magistrate in order for the magistrate to determine
21 whether or not there was probable cause, is this
22 sentence: "a portion of the plastic can be seen
23 through and it appears, in fact, to be a rifle."

24 Now, no officer testified that a portion of this

1 plastic can be seen through. And, in fact, introduces
2 an exhibit without objection -- is this -- Exhibit No.
3 4. And underneath the plastic is another --
4 underneath the plastic -- what amounts to, like, a
5 garbage bag kind of plastic -- is a plastic carrying
6 case, black in color, with a zipper.

7 And it is clear from the visible exhibit, it is
8 clear from the photographs that are in evidence, and
9 it is clear from the testimony of the police officers
10 that no portion of that plastic can be seen through in
11 order to see that there is, in fact, a rifle there.
12 That is the single most important allegation in the
13 affidavit. And that is the allegation that gives the
14 Commonwealth probable cause on the face of this
15 affidavit.

16 And under *Franks v. Delaware* and the similar
17 considerations under Article 14 of the Massachusetts
18 Declaration of Rights, when there is a critical
19 misstatement in an affidavit, it should be excised
20 from the affidavit. With that excised, this affidavit
21 does not justify a search.

22 There are other serious misstatements in this
23 affidavit. The reason Sergeant Johnson was in the
24 bin, is totally wrong in this affidavit. I mean,

1 Sergeant Johnson says that he was in the bin because
2 Mr. Elbery gave him consent to be in the bin, but it
3 is represented in this affidavit that Sergeant Chester
4 Johnson was in the bin to inspect -- during the course
5 of his fire investigation. To determine the cause and
6 origin of the fire.

7 He testified that when he later went in the bin
8 for that purpose, he did not even look in the car.
9 That was his testimony. He did not even look in the
10 car. And we had some fire damage around the ceiling.

11 In addition, your Honor, this affidavit says
12 that next to this item "on the floor" is a box marked
13 "uzi". Well, it appears to be marked "uzi", but you
14 cannot read it completely because there is tape on it.
15 That is not explained to the magistrate. And it was
16 not on the floor, according to the officer's own
17 testimony.

18 So, it seems to me that when you excise the
19 portions of this affidavit that do not comport with
20 the truth, you do not have an affidavit on which a
21 legal search can be based. And therefore, the fruits
22 of that search must be suppressed.

23 And I will file a memorandum within seven days,
24 your Honor.

1 THE COURT: Is it correct that your motion
2 simply goes to the search at four o'clock?

3 MR. SHEKETOFF: The motion as drafted,
4 your Honor. But now we have had an evidentiary
5 hearing and I must confess, I am surprised by the
6 testimony that I heard at the evidentiary hearing,
7 because I assumed that the facts in the affidavit were
8 accurate.

9 My client was not present when these events took
10 place. So, he cannot tell me, "no. They did not go
11 in there because they were doing a fire investigation.
12 They went in there because I said they could go in
13 there."

14 He cannot tell me that there was no piece of the
15 plastic showing -- you know, showing through. He did
16 not see this until he was confronted with it in the
17 courtroom, here.

18 So, I assumed that this affidavit would be the
19 story that I would hear from the police. That they
20 were conducting a fire investigation for cause and
21 origin. That is what made them go in there. That you
22 could see through a portion of the plastic. That is
23 why they put it in the affidavit.

24 This consent that we heard about, today --

1 consent to search -- the prosecutor told me that for
2 the first time this morning. He mentioned to me --
3 because it is not in any police report either, as I
4 brought out in the evidence -- he mentioned to me that
5 they had a new theory for the lawfulness of this
6 search which was that he had consented to the initial
7 entry. That was a surprise to me this morning when I
8 arrived.

9 So, it is not in my motion, I grant that. But I
10 do not think it could have been in my motion. I argue
11 to you, your Honor, that it should be in my motion
12 now, because we have heard the evidence.

13 THE COURT: Are you going to request the
14 court to file a supplemental motion?

15 MR. SHEKETOFF: Can I do that, your Honor?

16 THE COURT: I am going to -- I think it
17 should be done. I do not know if the Commonwealth has
18 any objections, but we have had the evidentiary
19 hearing. I am certainly going to allow counsel if he
20 requests an opportunity to file a supplemental motion.

21 MR. REVELLI: Based on the new evidence, I
22 would have no objection, your Honor.

23 THE COURT: It makes sense to do it.

24 MR. SHEKETOFF: Then I will do that, your

1 Honor. And I will file my memorandum with it.

2 THE COURT: I would like you to address
3 one point, though.

4 MR. SHEKETOFF: Yes, your Honor?

5 THE COURT: I would like you to address
6 the question as to whether or not a warrant was even
7 necessary.

8 MR. SHEKETOFF: Well, I will do that, your
9 Honor. I think it will --

10 THE COURT: That is a different question.

11 MR. SHEKETOFF: It is. And I think that
12 if the police officer had testified that when he went
13 back to do his -- what is the term that they use for
14 it -- origins examination -- if he had looked in the
15 car at that point in time, maybe they did not need a
16 warrant. My argument would be that at that point in
17 time, that is a criminal investigation. They would
18 need a warrant.

19 Maybe the Commonwealth can take the position
20 that if they looked in the car because it is a car,
21 and they have probable cause, they do not need a
22 warrant. It seems to me that this is not just a car.
23 It is a car in a storage bin where there has been a
24 fire. It is more like the inside of a house, at that

1 point in time, and that you do need a warrant.

2 But I will address that if you like.

3 THE COURT: Well, certainly it is a
4 question that would be a serious question in my mind.
5 As to whether or not they even needed a warrant. Then
6 the issue arises that if they issue a warrant and it
7 were defective, would it matter if they did not need
8 one in the first place?

9 MR. SHEKETOFF: That would be an issue.

10 THE COURT: Commonwealth?

11 MR. REVELLI: If I could address that
12 issue first.

13 THE COURT: Whether or not a warrant was
14 even necessary?

15 MR. REVELLI: Yes, Judge. If I could
16 address that first.

17 If we take away consent -- and we certainly will
18 not, that is the theory the Commonwealth is in
19 opposition to this motion on --

20 MR. SHEKETOFF: Your Honor, could I be
21 rude enough to interrupt? The court officer handed me
22 a message that a judge in Superior Court in Boston is
23 on the phone and wants to talk to me right now. Can I
24 have a two-minute recess?

1 THE COURT: Well, we are going to have to
2 tell the judge to be on hold for a minute.

3 MR. SHEKETOFF: Okay. Fine.

4 THE COURT: Because you are in the middle
5 of an argument.

6 So, tell him he is on his feet arguing a motion.
7 He will call as soon as he is done.

8 MR. SHEKETOFF: Thank you, your Honor.

9 MR. REVELLI: If I would address that,
10 briefly. If Sergeant Johnson is there -- and my
11 brother raises the issue -- that at some point when he
12 is investigating nature and origin, he is in the
13 storage bin and he does not look back in the motor
14 vehicle and he does not see "uzi" at that time and he
15 does not see anything that is shaped and looks like a
16 rifle at that time -- but I would say, your Honor, by
17 way of argument, that in fact he had been in there
18 previously, your Honor. He had seen what was inside
19 the motor vehicle. There was no need for him to look
20 inside that motor vehicle.

21 On that second point of entry, he is certainly
22 there for a valid reason. The big door is up at that
23 point. He is there not on an investigation of Mr.
24 Elbery or an investigation for firearms, but an

1 investigation on the fire itself in a possible -- at a
2 possible arson nature.

3 If he is there for that particular reason, your
4 Honor, divorced from any reason with regard to the
5 criminal statutes that it is alleged that Mr. Elbery
6 has violated, and he comes across those items -- they
7 are validly there, he is validly there, and they are
8 validly subject to seizure the Commonwealth would
9 argue.

10 And he would not need a warrant in that
11 particular case. In this case, they took great pains
12 to safeguard that and to get a warrant, your Honor.

13 With regard to the purpose we are here this
14 morning, your Honor, is if on that warrantless entry
15 into that bin -- if that was a valid legal intrusion.

16 Well, if you talk about the question of
17 credibility, you have two officers with some thirty
18 years experience between them, and the reason the two
19 officers were both in there is because -- they are not
20 there for the same reason. And they are not in
21 communication with each other at that time.

22 In fact, the Lieutenant does not know why either
23 one of them was there. Sergeant Johnson testifies he
24 was out of state -- came back in -- he is the arson

1 investigator -- had to go right to the scene. The
2 owner of the storage facility called the Shrewsbury
3 Police Department -- needed a private detail officer
4 for the lay people that were coming up there and
5 inquiring about their possessions. They do not know.

6 The testimony is that Mr. Elbery was there.
7 Sergeant Hansen testified and -- made observations of
8 his demeanor to be of a very nervous nature. He came
9 up, he wanted that storage bin closed, and he wanted
10 it locked. Made inquiry as to both of them on two
11 separate occasions -- "hey, my Corvette is in there.
12 Can you go check it out? Can you go check it out?"

13 He has the authority to give them consent. And
14 that is valid consent, at that point. Whether it is
15 apparent or -- apparent consent or actual consent,
16 they have the belief that there is consent to walk in
17 there at that time.

18 While they are in there -- and they are validly
19 in there, your Honor -- they discover what is clearly
20 marked "uzi". There is some masking tape -- some duct
21 tape -- that goes through the letter "Z", but if you
22 would review the pictures, your Honor, there is no
23 doubt in my mind that --

24 THE COURT: I have reviewed them and I can

1 read "uzi" even with the tape on it.

2 MR. REVELLI: And you can read "uzi".

3 Sergeant Hansen testifies that he owns a number of
4 uzi's and he testified that that is consistent with
5 the packaging of the firearm, itself, when it is
6 delivered -- depending on the type of uzi you order
7 and the shape you order it in.

8 Other than that, the shape of a rifle -- is that
9 probable cause? Your Honor, if you look at that,
10 there is not many other -- could it possibly be
11 something? We could engage in supposition, your
12 Honor, and say, "I guess it could be a number of
13 things." But is it more likely than not that that is
14 a rifle? Coupled with the fact that, on the seat with
15 a similar type of plastic wrapping and similar type of
16 tape, there is a box that says "uzi"?

17 These officers -- it was more likely than not,
18 to them at that point, that there were weapons in that
19 motor vehicle, your Honor. There was valid consent,
20 at that time, by this gentleman.

21 As far as the affidavit is concerned, your
22 Honor, I would say that the affidavit is consistent.
23 You have to understand, your Honor, that there was a
24 raging fire going on at this time -- or some twelve to

1 fourteen hours previous to this incident. That was
2 not the main reason that they were on that premises.
3 There were a lot of other reasons they were on that
4 premises.

5 While engaged in the performance of their duty,
6 they uncover this. But they still have a number of
7 other duties to take care of at that time. They call
8 the Lieutenant, they tell the Lieutenant, "there is an
9 uzi on the floor" -- in the affidavit he puts "the
10 floor." It seems to be the floor of the bin and not
11 the floor of the motor vehicle.

12 That, in and by itself, Judge, does not go to
13 his credibility or -- even if you were to review it
14 and say that it should be expunged as far as -- "as
15 seen through the plastic what appears to be a rifle."
16 It does appear to be a rifle. He does not mention any
17 wood grain or the butt of a rifle or any of that.

18 The language is important, your Honor, but in
19 reading into the language, there -- I think it is
20 clear that the stories that each officer tells, are
21 consistent with the affidavit on how it is put down.

22 But most importantly, your Honor, with regard to
23 the warrantless entry, itself, they were there because
24 Mr. Elbery asked them to go in on not one occasion but

1 two separate occasions.

2 THE COURT: You may wish to address that
3 point, counsel, because you have talked about whether
4 or not there is a consent to a search. And this may
5 even be something that precedes the question of a
6 consent to a search. Because the officer's testimony
7 is to be believed. There wasn't even a search.

8 MR. SHEKETOFF: All right.

9 THE COURT: They were walking through at
10 the request of someone who owned a car.

11 MR. SHEKETOFF: Right.

12 THE COURT: So, that is -- I do not even
13 know if it reaches the level of a search.

14 MR. SHEKETOFF: Well, they --

15 THE COURT: They were actually doing a
16 "walk through" through there.

17 MR. SHEKETOFF: Right. It is an entering
18 into a private area. So, the question is: were they
19 authorized to make that entry? They claim Mr. Elbery
20 authorized them not to search his car, but to look at
21 his car, so that, if believed, that would be apparent
22 authority to make an entry, if believed. But not to
23 do a search.

24 So, the -- it seems to me, the question is: can

1 they really see through those tinted windows, on an
2 overcast day, in this storage bin, to something
3 wrapped in dark plastic and see these things. And
4 that is why I asked the court to take a view.

5 MR. REVELLI: Judge, I would just say one
6 final thing that -- when you bring up that point of
7 whether or not it is a search -- I would just remind
8 the court that that burden shifts to my brother at
9 that point. Whether or not it is a search under the
10 Fourth Amendment, the burden does switch.

11 THE COURT: I am going to let you both
12 address that in the form of a Supplemental Motion to
13 Suppress, counsel -- a memorandum. And I am going to
14 give the Commonwealth seven days to respond.

15 MR. SHEKETOFF: And I have seven days to
16 file mine, your Honor?

17 THE COURT: Yes.

18 MR. SHEKETOFF: Thank you, your Honor.

19 THE COURT: And the Commonwealth will have
20 seven days to file. You should send them to this
21 court and they will get them to me.

22 MR. SHEKETOFF: Thank you, your Honor.

23 THE COURT: And you need a next date? Are
24 you going to waive the ten-day period, in view of

1 that?

2 MR. SHEKETOFF: Yes. We will waive the
3 ten-day period. I guess, depending on your decision
4 on the motion, your Honor, the next event would occur.
5 So, if your Honor --

6 THE COURT: I suggest a Status Review, at
7 some point.

8 MR. SHEKETOFF: Okay. What date would you
9 think, your Honor.

10 THE COURT: I would think I could get it
11 done within the week after you both file.

12 MR. SHEKETOFF: So that would be three
13 weeks from today. Could it be a day other than a
14 Friday, your Honor? This is my worst day of the week.

15 THE COURT: Any day is fine. Wednesday
16 would probably be the best day.

17 MR. SHEKETOFF: November 16th? Status,
18 Wednesday, November 16th?

19 THE CLERK: Okay. This case is continued
20 until November 16th for status.

21 MR. SHEKETOFF: Thank you.

22 THE COURT: Counsel will waive the ten-day
23 wait --

24 MR. SHEKETOFF: Yes. I am waiving it.

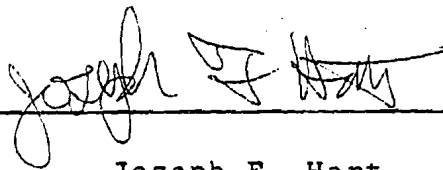
1 THE COURT: -- I mean the defendant.

2 MR. SHEKETOFF: Thank you.

3 (Whereupon, the hearing in the above-
4 entitled matter was concluded at 3:35 p.m.)

C E R T I F I C A T E

I, Joseph F. Hart, do hereby certify
that the foregoing record, pages 1 through 122,
is a complete, accurate and true recording of my
stenomask notes taken in the aforesaid matter to
the best of my skill and ability.



Joseph F. Hart