

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

WESTBORO DISTRICT COURT
NO. 9467 CR 1900

COMMONWEALTH)

v.)

MICHAEL ELBERY)

RECEIVED

SEP 2 1994

DISTRICT COURT

MOTION TO SUPPRESS
(WARRANTLESS SEARCH)

Now comes the defendant Michael Elbery and respectfully moves this Honorable Court to order suppressed the fruits of a warrantless search of his storage container numbered C341 at EZ Mini Storage on 869 Boston Turnpike in Shrewsbury on August 4 and August 5, 1994 by firemen and police. The observations made as a result of the warrantless entries served as the sole basis for a warrant search that occurred subsequently.

In support thereof the defendant says that the entries on August 4th and 5th were without a warrant, probable cause, or other lawful justification; and, violated the defendant's federal constitutional rights under the Fourth and Fourteenth Amendments and his state constitutional rights under art. 14. The subsequent warrant search and the items seized pursuant to it are thus fruit of a poisonous tree.

Respectfully submitted,
By his attorney,



Robert L. Sheketoff
SHEKETOFF & HOMAN
84 State Street
Boston, MA 02109
(617) 367-3449

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

WESTBORO DISTRICT COURT
NO. 9467 CR 1900


COMMONWEALTH)
)
v.)
)
MICHAEL ELBERY)
)

AFFIDAVIT OF COUNSEL IN SUPPORT
OF MOTION TO SUPPRESS (WARRANTLESS SEARCH)

Robert L. Sheketoff being duly sworn deposes and says:

1. That I represent the defendant in the above-named case.
2. That attached hereto is a copy of the search warrant, return, application, and affidavit provided to me by the Clerk's Office concerning the search of the defendant's storage container on August 5, 1994.
3. That the affidavit of Lt. A. Wayne Sampon discloses a warrantless entry or opening of the defendant's storage container on August 4th and August 5th of 1994.
4. A reading of the Affidavit also discloses that the observations made during said warrantless entries provided the sole basis for applying for a warrant.
5. In my opinion the Commonwealth bears the burden of proving that the warrantless entries were lawful.

SIGNED AND SWORN UNDER THE PAINS AND PENALTIES OF PERJURY
THIS 19TH, DAY OF SEPTEMBER 1994.


Robert L. Sheketoff
SHEKETOFF & HOMAN
84 State Street
Boston, MA 02109
(617) 367-3449

SEARCH WARRANT

G.L. c. 276, §§ 1-7

District Court

COURT DEPARTMENT

Westboro

DIVISION

SEARCH WARRANT DOCKET NUMBER

9467-14

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is PROBABLE CAUSE to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
- ☐ is intended for use or has been used as the means of committing a crime.
- ☒ has been concealed to prevent a crime from being discovered.
- ☒ is unlawfully possessed or concealed for an unlawful purpose.
- ☐ is evidence of a crime or is evidence of criminal activity.
- ☐ other (specify) _____

YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

I am An illegally possessed firearm (to wit: long-barrel rifle located in Chevrolet
Corvette), illegally possessed ammunition for said rifle and any additional illegally
possessed firearms and ammunition.

☒ at:

The Lockup (a storage facility) located at 869 Boston Turnpike, Shrewsbury, MA.

(next to the Days Inn). Storage container #C341 which is located on the west side of the
building (known to this officer by sight). This facility is also known as E Z Mini Storage.
which is occupied by and/or in the possession of: Michael Elberry D.O.B. 2/8/52

☐ on the person or in the possession of:

You ☒ are ☐ are not also authorized to conduct the search at any time during the night.

You ☐ are ☒ are not also authorized to enter the premises without announcement.

You ☐ are ☒ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

YOU ARE FURTHER COMMANDED if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the

Westboro Division of the District Court Department.

ISSUED

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

OR ADMINISTRATIVE JUSTICE

PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

JESS: Mr. C. J. J.

Thomas K. Cotter

Search warrant must be executed as soon as reasonably possible after its issuance, and in any case may not be validly executed more than 7 days after issuance. The executing officer must file his or her return with the court named in the warrant within 7 days after the warrant is issued. G.L. c. 276, §3A.

A search warrant was issued on August 5, 1994, and I have executed it as follows:

The following is an inventory of the property taken pursuant to this search warrant:

- 1 Remington 870 12 gauge shotgun T590429V
- 1 AK 47 rifle by KFS Atlanta, GA. (386) CF11168
- 1 Wrapped box w/possible AK-47
- 1 Wrapped box w/possible AK-47
- 1 UZI (by Action Arms) UP53637
- 1 Extra UZI barrel
- 1 Extra UZI bolt
- 5 Extra magazines
- 1 UZI product material
- 1 UZI tool/key
- 1 Elberry, Michael G. 016424787 Lic.
- 1 1990 Corvette - Michael Elberry 1G1YZ23J6L58009560
- 1 Receipt - Michael Elberry
- 1 UZI Shipping box
- 1 .22 cal. Beretta semi-auto BAS26577U
- 1 Loaded magazine w/6 rounds
- 2 Spare magazines
- 1 Box addressed to Elberry/Ammo
- 1 Trap loads (12 gauge)

See attached Appendix A - Return of Officer Serving Search Warrant

And is part of this inventory (attach additional pages as necessary)

Inventory was made in the presence of: Sgt James Hurley

I swear that this inventory is a true and detailed account of all the property taken by me on this search warrant.

NAME OF PERSON MAKING SEARCH <u>Wayne Sampson</u>	DATE AND TIME OF SEARCH <u>8-5-94 5:00 PM</u>	SWORN AND SUBSCRIBED TO BEFORE <u>[Signature]</u> Signature of Justice, Clerk-Magistrate or Assistant Clerk
DATE NAME OF PERSON MAKING SEARCH <u>WAYNE SAMPSON</u>	TITLE OF PERSON MAKING SEARCH <u>Lieutenant</u>	DATE SWORN AND SUBSCRIBED TO <u>8-10-94</u>

RETURN OF OFFICER SERVING SEARCH WARRANT

APPENDIX A

20.	2	.223 Rounds
21.	1	5.56 mm. rounds
22.	1	9 mm. rounds
23.	1	.45 cal. auto rounds .
24.	1	9 mm. rounds
25.	3	Misc. gun pcs.
26.	1	Gun cleaning kit
27.	1	Plastic drum magazine
28.	1	Metal drum magazine
29.	1	Quick scrub
30.	1	Multi colored plastic bag
31.	1	Break free bottle
32.	1	Hops lubricating oil
33.	5	Gun cleaning brushes (various)
34.	1	Gun cleaning rod
35.	1	Rags
36.	4	Ammo magazines
37.	45	9 mm. rounds (45)
38.	1	Gun cleaning rod
39.	2	Rag holders for gun cleaning
40.	3	.357 rounds (3)
41.	1	Ammo can w/ammo
42.	1	Suitcase
43.	1	Glock accessories
44.	3	Glock magazines (3)
45.	1	Winchester 44 mag. rounds
46.	1	.22 cal. viper rounds
47.	1	.38 S&W blanks
48.	2	9 mm. rounds
49.	1	Reloads
50.	1	45 auto rounds
51.	1	Glock info.
52.	3	Winchester shells (red)
53.	1	Glock cleaning rod
54.	6	.38 cal. rounds
55.	2	.357 cal. rounds
56.	2	.22 cal. rounds
57.	1	Galco holster (black)
58.	1	.22 cal. high velocity rounds
59.	1	45 auto rounds
60.	1	AK-47 packaging
61.	6	AK-47 magazines
62.	1	Grn. plastic bottle
63.	1	Blk. AK-47 tool
64.	1	AK-47 mag. coverings
65.	6	Magazines
66.	1	Bag Beretta was in
67.	1	Chev. Corvette (Elberry's)
68.	1	Master lock w/keys (2)

A. Wayne Scampson

OF APPLICANT

Lt. A. Wayne Sampson

District Court

COURT DEPARTMENT

Westboro

DIVISION

ON OF APPLICANT

Lt., Shrewsbury Police Dept.

SEARCH WARRANT DOCKET NUMBER

9467-14

I, the undersigned **APPLICANT**, being duly sworn, depose and say that:

I have the following information based upon the attached affidavit(s), consisting of a total of 2 pages, which is (are) incorporated herein by reference.

Based upon this information, there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
☐ is intended for use or has been used as the means of committing a crime.
☒ has been concealed to prevent a crime from being discovered.
☒ is unlawfully possessed or concealed for an unlawful purpose.
☐ is evidence of a crime or is evidence of criminal activity.
☐ other (specify) _____

I am seeking the issuance of a warrant to search for the following property (describe the property to be searched for as particularly as possible):

An illegally possessed Firearm (to wit: long-barrel rifle located in Chevrolet
Corvette), illegally possessed ammunition for said rifle and any additional illegally
possessed firearms and ammunition.

Based upon this information, there is also probable cause to believe that the property may be found (check as many as apply):

- ☒ at (identify the exact location or description of the place(s) to be searched):

The Lockup (a storage facility) located at 869 Boston Turnpike, Shrewsbury, MA.

(next to the Days Inn). Storage container #C341 which is located on the west side of the
building (known to this officer by sight). This facility is also known as E Z Mini Storage.
which is occupied by and/or in the possession of: Michael Elberry D.O.B. 2/8/52

- ☐ on the person or in the possession of (identify any specific person(s) to be searched):

- ☐ on any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

WHEREFORE, I respectfully request that the court issue a Warrant and order of seizure, authorizing the search of the above described place(s) and person(s), if any, to be searched, and directing that such property or evidence or any part thereof, if found, be seized and brought before the court, together with such other and further relief that the court may deem proper.

- ☐ I have previously submitted the same application.
☒ I have not previously submitted the same application.

PRINTED NAME OF APPLICANT

Det. Lt. A. Wayne Sampson

SIGNED UNDER THE PENALTIES OF PERJURY

X LT. A. Wayne Sampson 8-5-74
 Signature of Applicant

SWORN AND SUBSCRIBED TO BEFORE

X

Signature of Justice, Clerk-Magistrate or Assistant Clerk

8-5-74
 DATE

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

APPENDIX A

I, Lieutenant A. Wayne Sampson, being duly sworn, depose and say; I have been a police officer in the Town of Shrewsbury for approximately the last eighteen years. During this time I have been assigned to both patrol and investigative functions. I am currently assign as the Detective Division Commander. I have received specialized investigative training from the Massachusetts Criminal Justice Training Council and the Federal Bureau of Investigations National Academy. I am also a licensed attorney in the Commonwealth of Massachusetts.

On August 4, 1994 there was a major fire at the E Z Mini Storage, located at 869 Boston Turnpike in Shrewsbury. During the course of the fire, fire fighters were required to open storage area in order to put out the blaze. At some point, fire fighters opened storage bin C-341 in order to fight the fire. They were able to extringuish the fire within this storage bin.

On August 5, 1994 officers of the Shrewsbury Police Department along with Fire officials worked continuously from the time of the original fire on an investigation to determine the cause and origin of the fire. During this examination of the building, Sgt. Chester Johnson of the Shrewsbury police Department had occasion to inspect Storage bin C-341 which was open to public view due to the fire.

Inside storage bin C-341 was a 1990 Chevorlet Corvette Vin number 1Glyz23j615800956 which is listed to Michael Elbery of 31B Chilmark St. Worcester, MA.

Inside the passenger compartment, in plain view was an item wrapped in plastic and tape. This item is consistent with the shape of a rifle. A portion of the plastic can be seen through and appears in fact to be a rifle. Next to this item on the floor is a box marked "UZI". Through this officers training and experience, "UZI" is known to be a type of firearm, commonly a machine gun.

Mr. Elbery has been at the E Z Mini Storage four to five times since early this morning attempting to reach his storage bin C-341 with the stated reason of trying to lock it. During this time he made the following statement to Sgt. James Hurley, "I can't do anything anymore, I'm a convicted felon". Mr. Elbery stated to Sgt. Hurley that the vehicle belonged to him.

LT. A Wayne Sampson

Mr. Elbery Rented storage bin C-341 on July 25, 1993 and as of 1600 hour on August 5, 1994, Mr. Elbery was standing outside the gate waiting for officers to allow citizens to enter the fire area.

This officer checked with the Worcester Police Department and determined that their records indicate that on January 28, 1991 they received a court memo confirming revocation of Mr. Elberys' right to possess firearms.

I respectfully request a search warrant for the purpose of searching bin number C-341 of the E Z Mini Storage located at 869 Boston Turnpike in Shrewsbury for the purpose of confiscating an illegally possessed firearm that is located in a 1990 Chevrolet Corvette owned and under the control of one Michael Elbery.

L.P. Wayne Sanyon

Page two of two