

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

WESTBOROUGH DIST. CT.

NO 9467 CR 1900

COMMONWEALTH)

v.)

MICHAEL ELBERY)

POST HEARING MEMORANDUM IN SUPPORT OF
AMENDED MOTION TO SUPPRESS

At the hearing on the motion to suppress the police witnesses claimed that they entered the defendant's storage container on two occasions at the defendant's invitation after the container's door had been opened by the firemen during the course of fighting a fire the night before. They claimed that they could see inside the car in the container, and observed an object covered by a garbage bag that had the general shape of a rifle; and a box that had the letters UZI printed on it also covered by a garbage bag. The police then obtained a warrant based primarily on the observations made during these entries.

I. THE WARRANTLESS ENTRIES

A. Estoppel

As a preliminary matter, the defendant argues that the Commonwealth should be estopped from arguing consent to the entries as a justification for them. The police swore out an affidavit immediately following the entries in which they detailed their justification for the entry in order to obtain a warrant. No mention of consent was ever made. In such circumstances, in order

to protect the integrity of the warrant process, public policy should impose estoppel on any attempt to rewrite the affidavit.

B. Opening the Storage Unit

It is the defendant's position that the Commonwealth failed to prove by admissible evidence that the storage unit was opened by the fire department based on emergency circumstances, or that some emergency required that the unit remain open up to the time the first entry was made.

C. Consent

If there was no consent, the entries that form the basis for the warrant in this case were unlawful. The defendant had a reasonable expectation of privacy in his storage bin which was equivalent to a private storage area in a rented home or apartment. See Commonwealth v. Hamilton, 24 Mass. App. Ct. 290, 292 n.5 (1987)(motel room). The police had no right to enter that bin, granted by statute or otherwise, without a warrant; the observations allegedly made here required an entry.

C. Plain View

Assuming arguendo that the police had consent to enter and examine the car for fire damage, the guns later found in the car were not in plain view. The guns were packaged, and whether or not one could predict what was in the package (i.e. one had probable cause to believe a gun was inside), additional search activity was necessary to determine the contents of the packages.¹ Thus the

¹It was also necessary to conduct a further investigation to determine whether or not the defendant had the right to possess rifles or firearms.

containers could not be seized without a warrant. But even assuming arguendo that the guns were in plain view, at least under art. 14, a warrant was still required to seize them. See Commonwealth v. Sergienko, 399 Mass. 291, 295-297 (1987) (marihuana in plain view in an automobile).

The defendant further argues that the view he requested would demonstrate that the packages containing the guns were not observable given the dark container bin and the tinted glass of the automobile.

II. THE WARRANT SEARCH

A. Illegal Fruit

The defendant's first argument is that the warrant search was the illegal fruit of the initial unlawful entries, and therefore must be suppressed. See Wong Sun v. United States, 371 U.S. 471 (1963).

B. Fraudulent Affidavit

In order to prevail on this claim the defendant must demonstrate the affidavit contains misrepresentations, made with knowledge of their falsity or reckless disregard, and which were material to the showing of probable cause. See Franks v. Delaware, 438 U.S. 154 (1978). Materiality is determined by excising the misrepresentations. The defendant would argue that a finding of deliberate misrepresentation under art. 14 should vitiate the warrant whether or not probable cause remains after excision. See Commonwealth v. Ramos, 402 Mass. 209, 215 n.4 (1988).

In the case at bar the sole source for the affiant's

assertions in the affidavit was information from police officers. Thus it does not matter whether it was the affiant who demonstrated reckless disregard for the truth or the officers who supplied the information to him. A police affiant cannot become a "bona fide purchaser" of a false statement made to him by another police officer. Commonwealth v. Nine Hundred and Ninety-Two Dollars, 383 Mass. 764, 772-73 n.8 (1981).

The affiant here made several key false allegations at the very least recklessly. The allegation that Sgt. Johnson inspected the storage bin during a cause an origin fire investigation and saw certain items in plain view during that inspection is false - at least if Sgt. Johnson's testimony is to be believed. With this assertion excised from the Affidavit, the Affidavit fails to give the Magistrate any grounds on which to believe that the police lawfully made the observations relied on for probable cause.

The probable cause allegations are also severely flawed. The key claim "a portion of the plastic can be seen through and appears in fact to be a rifle" is contradicted not only by the testimony at the hearing but also by the item itself. The plastic covered a carrying case which could not be seen through and which does not really have the "shape of a rifle" because it is too large.

In addition, the affiant admitted on cross-examination that the records indicated it was the defendant's right to carry firearms that was revoked. The difference between carrying and possessing weapons is well formulated in this Commonwealth. The defendant had a firearms identification card issued by the Westboro

police. Thus the allegation that his right to posses was revoked was also a critical misrepresentation. The warrant was issued for a long barrellled rifle as "illegally" possessed based on this false allegation. It must be pointed out that the testimony at the hearing was that the brand name UZI applies to many weapons, including rifles, and the box was shaped in a manner also consistent with a rifle. Thus after the excision of the false probable cause allegations, no probable cause remains. But even if probable cause remained, the false assertions here so taint the affidavit that art. 14 would require suppression.

Respectfully submitted,
By his attorney,



Robert L. Sheketoff
BBO# 457340
SHEKETOFF & HOMAN
84 State Street
Boston, MA 02109
(617) 367-3449