

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY,)
Plaintiff)
v.) CIVIL ACTION NO.
ROBERT SHEKETOFF,) 98-CV-10163-MLW
KIMBERLY HOMAN and)
SHEKETOFF & HOMAN,)
Defendants)

and

MICHAEL ELBERY,)
Plaintiff)
v.) CIVIL ACTION NO.
DANIEL SKLUT, JAMES CARLIN,) 97-CV-11743-MLW
STEPHEN FAUCHER, CARL HANSON,)
CHESTER JOHNSON, JAMES HURLEY,)
WAYNE SAMPSON, ROBERT McGINLEY,)
and THE TOWN OF SHREWSBURY)
Defendants)

AFFIDAVIT OF ROBERT SHEKETOFF

I, Robert Sheketoff, do hereby depose and state under oath:

1. I am an attorney in good standing and duly authorized to practice law in the Commonwealth of Massachusetts. I am a defendant in this case. I make the following statements based upon personal knowledge. If called as a witness at a trial of this matter, I could and would competently testify to the facts herein.

2. I was admitted to the Massachusetts bar in 1976. Since then, I have concentrated my practice almost exclusively in criminal defense. I have represented criminal defendants for

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over 24 years. During that time, I have represented hundreds of defendants in connection with criminal charges in state and federal courts.

3. I have represented numerous defendants who were charged with firearms violations under G.L. c. 269, the Massachusetts statute governing firearms. I am familiar with the standard of care generally applicable to criminal defense attorneys in Massachusetts. I am also familiar with the standard of care applicable to criminal defense attorneys when they represent defendants in connection with firearms charges under G.L. c. 269.

4. In or about March 1994, Michael Elbery, the plaintiff in this matter, requested that I represent him on an appeal of previous convictions for disorderly person, assault, and assault with intent to maim. Elbery had received one year of probation for the disorderly person and assault convictions, and a 10-year sentence at MCI Concord on the assault with intent to maim conviction. I agreed to represent Elbery in connection with the appeal.

5. Subsequently, in August 1994, Elbery requested that I represent him in connection with new charges filed against him for alleged violations of Massachusetts firearms statutes, G.L. c. 269, §10(h) and G.L. c. 269, §10(a). I agreed to represent Elbery in connection with the firearms charges. The terms of our agreement were that Elbery would pay me a \$5,000.00, fee and that I would defend Elbery against the firearms charges.

6. On or about August 8, 1994, I attended Elbery's arraignment at Westborough District Court on the firearms charges. During the arraignment, bail was set at \$5,000. Elbery did not make bail, and he remained in custody.

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7. On August 10, 1994, I attended a hearing in Worcester Superior Court on a motion by the Commonwealth to vacate the stay of the 10-year sentence on Elbery's intent to maim conviction.

8. Prior to the hearing, I met with Elbery's wife outside the Courthouse. Elbery's wife showed me Elbery's FID card. I asked her if I could take the FID card; however, she refused to give it to me.

9. On September 9, 1994, I attended a pre-trial conference on Elbery's firearms charges at Westborough District Court. Assistant District Attorney John Revelli appeared on behalf of the Commonwealth at the pre-trial conference.

10. During the pre-trial conference, I advised Assistant District Attorney Revelli that Elbery intended to defend the firearms charges, in part, based upon a claim of license. I requested that the Commonwealth provide its file on Elbery's firearms licenses and any alleged revocations. Assistant District Attorney Revelli agreed to produce those documents.

11. On or about September 19, 1994, I filed a motion to suppress evidence of the firearms allegedly seized from Elbery's storage unit by the Shrewsbury Police Department. The motion was based upon arguments that the searches of Elbery's storage container by the Shrewsbury Police Department were without a warrant, probable cause, or other justification, in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article Fourteen of the Massachusetts Constitution.

12. On October 21, 1994, there was an evidentiary hearing on the motion to suppress at Westborough District Court. Assistant District Attorney Revelli again appeared for the

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Commonwealth. At the end of the hearing, the Court requested that the parties submit post-hearing briefs.

13. On October 26, 1994, I filed a post-hearing memorandum on behalf of Elbery. I also filed an amended motion to suppress. As part of the amended motion, I submitted an affidavit stating that I had seen Elbery's FID card and that the Commonwealth had failed to produce any evidence that it had been revoked.

14. At various times during the period that I represented Elbery in connection with the firearms charges, he requested that I pursue a motion to dismiss the firearms charges on the grounds that he had a valid FID card at the time of his arrest. Elbery had been charged with five counts of illegally possessing a firearm, rifle, or shotgun under G.L. c. 269, §10(h) and one count of illegally "carrying" a firearm under G.L. c. 269, §10(a). I considered Elbery's request and whether it would enable him to obtain a dismissal of all of the firearms charges in light of a relatively recent change in the "carrying" statute, G.L. c. 269, § 10(a).

15. Previously, that statute had expressly prohibited a person from "carrying" firearms on his person or "carrying" firearms on his person or under his control in a car without a license to do so (i.e., a license to carry).

16. I was aware that decisions interpreting the prior version of the statute had held that the term "carrying" implied movement on the part of the defendant.

17. In 1990, the Massachusetts Legislature amended the statute. Elbery was charged under the new version of the statute, which did not expressly reference an individual "carrying" a firearm on his person. Instead, it prohibited a person from knowingly having a firearm in his

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possession away from his residence or place of business, or under his control in a vehicle away from his residence or business, unless he had a license to carry.

18. In 1994, there were very few cases interpreting the amended statute, and no cases I could find applying it in circumstances similar to the charges against Elbery.

19. I advised Elbery that a valid FID card was a defense to the charges under G.L. c. 269, §10(h). I also advised Elbery that because the amended statute expressly required a license to carry, his FID card would not be a defense to the charge under G.L. c. 269, § 10(a).

20. Elbery insisted that he could not be guilty of a violation of G.L. c. 269, § 10(a) because he did not have a handgun on him or in a car he was driving.

21. I acknowledged the prior decisions equating “carrying” with movement; however, I told him that the 1990 amendments to the statute had removed all reference to the term “carrying” in defining the prohibited conduct.

22. I advised Elbery that the plain language of the amended statute did not require a defendant to be “carrying,” or that the defendant have the firearm on his person. Under the plain language of the amended statute, the Commonwealth had only to prove that Elbery had a firearm in his possession away from his residence or business, or a firearm under his control in an automobile away from his residence or business. Possession in Massachusetts includes constructive as well as actual possession.

23. I advised Elbery that the Commonwealth could argue that Elbery had violated the statute because he had a firearm in his possession or under his control in an automobile at the storage facility, which was not his business or home. I also advised Elbery that because all

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reference to a defendant “carrying” a firearm on his person had been removed from the statute. the Commonwealth had a real argument that his conduct violated G.L. c. 269, § 10(a).

24. I was concerned that if I filed a formal motion to dismiss, it might prompt the Worcester County District Attorney’s office to refer Elbery for federal prosecution. Under 18 U.S.C., § 922, it would be a violation for a convicted felon such as Elbery to possess a firearm or to receive a firearm that was in or affected interstate commerce.

25. I had a prior experience where the Worcester County District Attorney’s office worked with the Bureau of Alcohol, Tobacco & Firearms. In that case, the Worcester County District Attorney’s office offered what appeared to be an attractive plea bargain on state firearms charges, which the defendant accepted (I did not represent him at that time).

26. Subsequently, I represented the defendant on federal firearms charges which were instituted by the ATF after the state prosecution. The federal prosecution was based, in part, upon the defendant’s plea in the state prosecution. While defending the federal prosecution, I learned that the Assistant District Attorney who offered the plea bargain had knowledge of the ATF’s involvement at the time that he made the offer.

27. It has been my experience that the Assistant District Attorneys who represent the Commonwealth in jury of six trials in the District Court are generally less experienced and legally sophisticated than other Assistant District Attorneys, such as those who represent the Commonwealth in the Superior Court or on appeals.

28. I was concerned that if I filed a formal motion to dismiss based upon the FID card, it would highlight the legal issues with respect to a license to carry and an FID card for the Assistant District Attorney who was handling this case in the District Court. I was concerned

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that he might seek advice from an Assistant District Attorney from the Superior Court or from the Appeals Division and that he would be better prepared for trial. He might also receive a suggestion to refer Elbery for federal prosecution.

29. I concluded that it would not be in my client's best interest to file a motion to dismiss. I decided that it would be better to proceed to trial before a jury of six in the District Court. I planned to defend the charges under G.L. c. 269, §10(h) on the grounds that Elbery had a valid FID card. I planned to defend the charge under G.L. c. 269, §10(a) on the theory that the storage unit, which was used to store personal property solely because Elbery did not have enough space in his apartment, was the functional equivalent of a residence and, therefore, the statute was inapplicable.

30. It was my hope that I could raise these issues in a motion for a required finding of not guilty once the Commonwealth had presented its case, or that I would be able to convince the Assistant District Attorney or a busy trial judge that the Commonwealth could not prove its case.

31. I told Elbery that I would not file a motion to dismiss the firearms charges. I also informed Elbery that if he disagreed with me, he could seek new counsel.

32. Elbery fought with me over the motion to dismiss, but he did not seek new counsel at that time.

33. While I represented Elbery, the Worcester County District Attorney's office offered Elbery a plea agreement of one year for each of the firearms charges with sentences to run concurrently. I communicated this offer to Elbery. He immediately refused it.

34. While I represented Elbery, the Worcester County District Attorney's office never offered to dismiss the firearms charges against Elbery.

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35. At all times, I attempted, in good faith, to defend Elbery on the firearms charges.

36. My actions in defending Elbery on the firearms charges met the standard of care applicable to criminal defense attorneys defending a client under similar circumstances. My interpretation of G.L. c. 269, § 10(a) was reasonable and consistent with the language of the statute.

37. I did not deviate from the standard of care ordinarily exercised by criminal defense attorneys when I decided not to file the motion to dismiss based upon the FID card. In my opinion, it was unlikely that the motion would have succeeded, because an FID card is not a defense to a charge under G.L. c. 269, § 10(a). The motion was also problematical because it would have focused the Assistant District Attorney's attention on this case and, as a result, he would have been better prepared for trial. The motion may also have prompted the Assistant District Attorney to refer Elbery for federal prosecution.

38. Even if I obtained a dismissal of all of the firearms charges against Elbery, it was still within Judge Toomey's discretion to refuse to reinstate the stay of execution on Elbery's 10-year sentence for the intent to maim conviction. Given the fact that Elbery had been arrested for a large number of firearms, it was my opinion that Judge Toomey probably would have declined to reinstate the stay of Elbery's sentence on the intent to maim conviction.

39. I did not communicate with or form an agreement with any member of the Worcester County District Attorney's Office to put or keep Elbery in jail, to deprive Elbery of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive Elbery of access to the courts in connection with the firearms charges.

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40. I did not communicate with or form an agreement with any member of the Shrewsbury Police Department to put or keep Elbery in jail, to deprive Elbery of his constitutional rights, to cover up an allegedly illegal search and seizure, or to deprive Elbery of access to the courts. I do not know any members of the Shrewsbury Police Department.

41. Elbery's trial on the firearms charges was originally scheduled for January 18, 1995. The Worcester County District Attorney's office requested that the trial on the firearms charges be continued. Subsequently, the trial was rescheduled for April 3, 1995.

42. In or about March of 1995, Elbery dismissed me from representing him on the firearms possession and carrying charges. Elbery told me to continue to represent him on the appeal of the assault, disorderly conduct, and intent to maim convictions. I continued to represent Elbery into 1996 on the appeal.

43. It is my understanding that Elbery subsequently retained Attorney Kenneth Brekka to represent him in connection with the firearms charges.

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Signed under the pains and penalties of perjury this 26th day of October 2000.



Robert Sheketoff

CERTIFICATE OF SERVICE

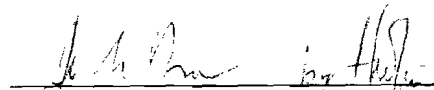
I, Anthony M. Doniger, attorney for the defendants, Robert Sheketoff, Kimberly Homan and Sheketoff & Homan, hereby certify that on this 27th day of October 2000, I served the foregoing Affidavit of Robert Sheketoff upon the other parties to this litigation by causing copies thereof to be sent by first-class mail, postage pre-paid to:

Michael Elbery
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M.C.I. Concord
Concord, MA 01742

Michael Elbery
168 Fairfield Street
Needham, MA 02192

Gerald Fabiano, Esquire
Pierce, Davis & Perritano, LLP
Ten Winthrop Square
Boston, MA 02110

and to all counsel of record in the consolidated cases.


Anthony M. Doniger