

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT — DISTRICT COURT DEPARTMENT

WORCESTER, SS.

WESTBOROUGH DIVISION
DOCKET NO. 9467 CR 1900

COMMONWEALTH)
)
VS.)
)
MICHAEL ELBERY)

FINDINGS OF FACT AND RULINGS
OF LAW ON DEFENDANT'S MOTION
TO SUPPRESS AND AMENDED MOTION
TO SUPPRESS

On August 4, 1994, Sgt. Chester Johnson was patrol sergeant and arson investigator for the Shrewsbury Police Department. He had worked as an arson investigator for twelve years and was an experienced investigator. At 10:00 P.M. on that date there was a major fire at E-Z Mini Storage, 869 Turnpike Road, Shrewsbury, Massachusetts, involving one of four major storage buildings. The fire fighters fought the fire and brought it under control by morning. At approximately 10:00 A.M., on August 5, 1994, Sgt. Johnson arrived at the fire scene to do a routine arson investigation.

Sgt. Johnson arrived in a marked police cruiser and parked his cruiser inside the security fence surrounding the buildings. He was wearing dickies and a knee level fire coat. He met at the scene with Fire Chief Duhamel of the Worcester Fire Department. They met with Lts. LaFlamme and Miller also of the Worcester Fire Department Arson Squad. Al Benoit who was the property manager was also present. All were wearing fire fighting apparel.

As the investigation proceeded, the fire, although under control, was still in progress. The building engaged in the fire was approximately 200' x 60' and contained approximately one hundred storage compartments, each having an approximate size of 15' to 20' wide. The fire had engulfed approximately one half of the building. Each of the storage bins was numbered. The storage buildings were surrounded and secured by a six foot tall cyclone fence.

The investigators approached bin #C341. The door was opened to the storage bin. The door was a garage type door and lifted from the bottom up. The storage bin #C341 was approximately in the middle of the building. It was the last bin in the line of bins which had been actually involved in the fire. The door had been opened during the fire fighting process. There was fire damage to the roof area and upper walls as the fire had rolled through the building top. Firemen were actively in the process of venting the roof areas of the building to put out hot spots. A 1990 Corvette was parked inside storage bin #C341, and was in plain view.

The defendant, Michael Elberry, was standing outside the fenced area, opposite the entrance to bin #C341. Before any investigation was done by the arson squad, the defendant, Michael Elberry, called to Sgt. Johnson who came to him at the fence area. The area where the defendant, Michael Elberry, was standing was approximately thirty feet from the front entrance of bin #C341. The sergeant did not recognize or know the defendant, Michael Elberry, other than his being a resident of the Town of Shrewsbury. The defendant identified himself by name and he then spoke with Sgt. Johnson. The defendant motioned

to the Corvette located in the storage bin #C341. He told Sgt. Johnson that he was concerned about damage by fire to the Corvette; and he asked if he could come in and inspect it. Sgt. Johnson told him he could not until the fire was completely out. The defendant said he was concerned about the car, that he had no insurance for it and that it was worth a lot of money. He then asked Sgt. Johnson if he would mind inspecting the Corvette to see if there was any fire damage done to it. Sgt. Johnson said he did not mind, and then proceeded with Lt. Miller of the Worcester Fire Department to bin #341, to inspect the car for the defendant. hand

During the visual inspection of the car, Sgt. Johnson observed that there was no fire damage to it. However, he observed in plain view in the center of the car between the two front bucket seats and on the passenger seat, an object which appeared to be four foot long and wrapped in wrapping paper and duck tape, as well as a box marked UZI. The officer's experience was consistent with his belief that the wrapped package was a rifle, and that the box contained an UZI machine gun. Sgt. Johnson then spoke with police officer Carl Hanson who had come to the storage bin C341 where the Corvette was located.

Officer Carl Hanson was working a special detail during the fire and directing traffic. He was in uniform. The building manager, Al Benoit, asked Officer Hanson for help in directing traffic and assisting people who were coming to inspect their damaged property. The officer observed the defendant, Michael Elberry, who he had known as having been previously involved with the police. The defendant asked Officer Hanson if he, the defendant, could inspect the red Corvette in bin C341. Officer Hanson told him "no". He then asked the officer to inspect the car, which he said he would do. Officer Hanson then heard the defendant tell another officer that he (the defendant) could not do anything because he was a convicted felon. Officer Hanson then went to bin C341 where he met Sgt. Johnson. Officer Hanson observed what to him appeared to be a rifle shaped object wrapped and in the front seat as well as a box marked UZI. The officer, because of his experience, believed the car contained a rifle and an UZI machine gun. He observed the defendant at the gate area across from bin C341 and the defendant appeared to be nervous. Officer Hanson then discussed the matter with Sgt. Johnson. Sgt. Johnson told Officer Hanson to go to the office of the storage company and to call in a report to Lt. Wayne Sampson and to request a search warrant. Neither officer entered the Corvette. Both officers simply complied with the request of the defendant to inspect the motor vehicle. Each complied with the defendant's request and what they observed was in plain view.

Officer Hanson then called Lt. Sampson. He relayed to Lt. Sampson his conversation with the defendant as well as his observations; and the conversation of Sgt. Johnson and Sgt. Johnson's observation.

Lt. Sampson then spoke with the Worcester Police Department and verified that Michael Elberry had his license to possess a gun revoked. Lt. Sampson then proceeded to the Clerk's Office to obtain a search warrant. The warrant issued authorizing the search of storage container #C341. The warrant was executed revealing the Corvette, one 12 gauge shot gun, one AK 47 rifle, two boxes each possibly containing an AK 47 rifle, one UZI machine gun, one .22 semi-automatic rifle, and several hundred rounds of ammunition and other miscellaneous gun equipment.

The defendant filed a motion to suppress the warrantless search. The basis of the motion was the affidavit and the search warrant itself which stated that during an examination of the building, Sgt. Chester Johnson had an occasion to inspect storage bin C341, which was open to public view due to the fire. No facts were recited in the affidavit suggesting that the defendant had asked Sgt. Johnson, or Sgt. Hanson, to inspect the vehicle for fire damage. The defendant argues that on the basis of the affidavit of the warrant, the initial observation by the police officer was illegal and the subsequent warrant was based on an illegal entry and therefore all the fruits of the search should be excluded.

Plain view is a doctrine of seizure. Consent to a search assumes a search. In the present case, there was neither a request for consent to search, nor was there a search or a seizure prior to the time that the warrant issued. Both Sgt. Johnson and Officer Hanson complied with a request of an observer to a fire. The observer identified himself by name and as an owner of a car in plain view located inside of a storage bin which storage bin had partial fire damage. The police officers were requested to inspect the car for fire damage, which they did. The inspection revealed to each officer what appeared to be a wrapped rifle and a machine gun in a box. Neither the rifle nor the box were seized by the police at that time. No entry was made into the motor vehicle at that time. Officer Hanson then took the appropriate steps to call Lt. Sampson who then applied for a search warrant. The Court therefore finds that prior to the time that the search warrant was executed, there was no search of the automobile or bin C431. There was no seizure of anything prior to the time that the search warrant issued. The arguments evolving around consent, searches and seizures therefore has no merit because there was neither a search, a seizure, or a request for consent by the police officers. There was merely an invitation by the defendant to have the police inspect his car which by his own inadvertence exposed him to the discovery of whatever may have been in plain view.

The second issue raised by the defendant is whether the omission from the affidavit and the search warrant that Sgt. Johnson and Officer Hanson had been asked by the defendant to inspect the motor vehicle is fatal. The court finds that it is not.

The defendant has not asked for a Franks hearing under Franks vs. Delaware, 438 US 154 (1978), but cites Franks as support that the affidavit of the police department is defective. The Court finds that the omission is not defective. The Court finds that there was no information in the affidavit which was false either intentionally or unintentionally. The Court finds that no facts in the affidavit are untrue, either recklessly or negligently. The affidavit states that Chester Johnson had an occasion to inspect the storage in C341. That occasion, although stated without specific facts as to what the occasion was, could certainly include the invitation of the defendant, Michael Elberry, to inspect his car. The omission of that specific fact, or perhaps more accurately the failure to define by specific terms the occasion that brought Sgt. Johnson to Bin C341, does not rise to the level of misrepresentation. If those facts are added to the affidavit they would in no way defeat the finding of probable cause, but quite to the contrary would bolster the finding of probable cause.

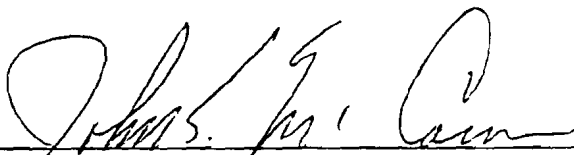
Notwithstanding the findings of the Court, the defendant has raised the question of exigency, The request of the defendant to two police officers to voluntarily inspect his car is certainly consensual and no showing of exigency is necessary to justify any entry.

Commonwealth Vs. Beldotti, 409 MA. 553 (1991)
Commonwealth Vs. Viriyahirantaiboon, 412 MA. 224 (1992)

The defendant argued his original motion to suppress a warrantless search at the hearing at the motion to suppress. During that hearing, the facts which were not in the affidavit came into evidence and the defendant was allowed to file an amended motion to suppress to address facts which were raised during the evidentiary hearing and were not in the affidavit. For the reasons previously recited, the Court denies the defendant motion to suppress and amended motion to suppress.

Date: _____

12/7/94



John S. McCann, Justice