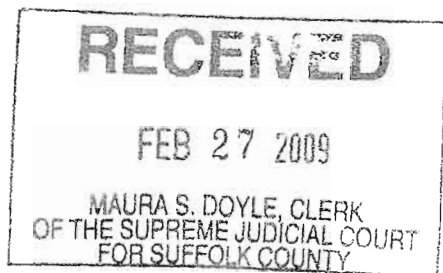


COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. 2009-0105



COMMONWEALTH

v.

KENNY FARROW, RONALD WATSON, KEJUAN CARNEY
and CAMBRIDGE DIVISION OF THE DISTRICT COURT DEPARTMENT¹

COMMONWEALTH'S PETITION FOR EXTRAORDINARY RELIEF
PURSUANT TO G.L. c. 211, § 3

Now comes the Commonwealth and respectfully asks this Honorable Court to grant relief pursuant to its general superintendence powers under G.L. c. 211, § 3 from an order issued by the Cambridge District Court, Justice Severlin B. Singleton, III, on December 23, 2008 sanctioning "the Commonwealth in the amount of \$25,000 plus the expenses of each defense attorney in litigating their motions for

¹ While the sanction order issued under the caption of the criminal case, the sanction imposed is a punitive fine, ancillary to the criminal case, to which the defendants have no interest and likely no standing to pursue. As such, the Commonwealth has served this petition on the Office of the Attorney General as the real party in interest is the Cambridge Division of the District Court Department.

discovery and sanctions."² (Attachment A, p. 4). The imposition of this sanction is based on Justice Singleton's finding that the state police violated court orders by (1) DNA swabbing the firearm; (2) test-firing the firearm; and (3) failing to produce the firearm and marijuana to the Cambridge District Court by 10:00 a.m. on September 10, 2008. (Attachment A, pp. 3-4). While Justice Singleton found these actions to be "intentional and deliberate," he specifically found that these actions "were not sufficiently egregious or prejudicial to warrant dismissal or suppression of the evidence in the case." (Attachment A, p. 4). Instead, the basis for the sanction is to "communicate to the Commonwealth, the state police and all police departments that a wilful and intentional violation of a valid court order will not be permitted, nor tolerated by this Court. See Mass. R. Crim. Pro., Rule 14(c)(1)." (Attachment A, p.4).

As reasons for its petition, the Commonwealth asserts that the imposition of this monetary sanction, which Justice Singleton imposed pursuant to Mass. R. Crim. P.

² This sanction order provided that the order would be amended upon receipt of affidavits from defense counsel as to the hours expended litigating the motions for discovery and sanctions. To date, no such affidavits have been submitted and an amended sanction order has not issued. For the reasons discussed in Argument V, below, such an assessment is also unwarranted.

14(c)(1), is a clear error of law for which there is no other available remedy. The review of a sanction imposed pursuant to Rule 14 that affects the prosecution of the criminal case could be appealed in the normal course, see e.g., Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 75 (1983) (Superior Court judge to review District Court's order de novo and appeal from dismissal can be taken pursuant to Mass. R. Crim. P. 15(b)); Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 202 (2004) (interlocutory appeal of sanction of suppression of evidence), however this punitive fine is ancillary to the actual criminal case rendering these appellate avenues unavailable. While Mass. R. Crim. P. 48 does authorize the imposition of a "citation for contempt or the imposition of costs or a fine" for "willful" violations of court orders, it does not provide an express avenue of appeal for the imposition of this punitive monetary fine. Contrast Mass. R. Crim. P. 43 (summary contempt provides contemnor with right to appeal to the Appeals Court); Mass. R. Crim. P. 44 (criminal contempt provides contemnor with right to appeal to the Appeals Court). As there is no other remedy expressly provided to appeal this \$25,000 punitive fine, and this is not the only instance of the imposition of unlawful sanctions (see Commonwealth's G.L. c. 211 § 3 petition in

Commonwealth v. Frith, et al., submitted this same day), this Court should invoke its general superintendence power of the lower courts to correct these errors and abuses.

G.L. c. 211, § 3.

SUMMARY TIMELINE³

DATE	EVENT
9/5/08	Defendants arrested Evidence seized: firearm, magazine, 11 rounds of ammunition, plastic "Lids" bag in which the firearm was found, and baggies of marijuana
9/9/08	
12:00 p.m	Ex parte hearing in chambers off the record with defense counsel on defense motion which, the Commonwealth learned only after the three week evidentiary sanction hearing, asserted a need to secretly smell the marijuana resulting in issuance of first order to "make all evidence seized in this matter available for inspection to defense counsel and her designees (including but not limited to CPCS Investigator Sarah Galante), immediately and in any event prior to the transport of said evidence to any lab for testing." (Attachment B)

³ The Commonwealth submits in supplement to this petition a detailed recitation of facts and the filings before the Court on this matter that extended from September 9, 2008 through December 23, 2008, including an evidentiary hearing that spanned eleven days. While tapes of the hearings have been ordered and received, the transcripts have not yet been ordered, due in part to the associated costs to transcribe these extensive proceedings.

DATE	EVENT
9/9/08 (cont.)	
2:00 p.m.	Hearing held upon Commonwealth's request to revise the order to clarify what "inspection" means. Because the firearm evidence had already been transported to the crime lab and the marijuana evidence was due to be transported the next day, the revised order ordered the State Police to bring to the second session of the Cambridge District Court by 10:00 a.m. the following morning "all evidence seized in the investigation of this matter (including all alleged drugs and all alleged firearms evidence)" and clarified "inspection" to mean "on request by the defense, the evidence must be taken out of whatever State Police packaging it has been placed in since its seizure." (Attachment C) (hereinafter, the "10:00 a.m. order").
9/10/08	
8:30 a.m.	Middlesex District Attorney's Office files G.L. c. 211, § 3 petition for relief
9:41 a.m.	Crime lab analyst swabs firearm for DNA
9:55 a.m.	The Single Justice issues oral stay of 10:00 a.m. order
Approx. 1:00 p.m.	State Police Trooper Stephen Walsh test-fires the firearm
1:50 p.m.	The Single Justice issues written order which includes an order to maintain the status quo of all of the evidence and requests written findings from the District Court for a hearing to be held the following day

ARGUMENT

- I. THE EX PARTE HEARINGS AND THE ORDERS THAT RESULTED WERE UNLAWFUL AND CANNOT SERVE AS THE BASIS TO IMPOSE SANCTIONS.

In determining whether the imposition of sanctions for an alleged violation of a discovery order is proper, the reviewing court determines whether the discovery order was valid in the first place. Commonwealth v. Hernandez, 421

Mass. 272, 274 (1995) (sanction for violation of an order will only lie where judge had authority to issue the order in the first place). Here, the discovery orders were invalid for numerous reasons, including the fact that they were issued on an ex parte basis. There is no record of the ex parte hearing held on September 9, 2008 as the hearing was held in chambers, off the record and there has not been any documentation or attempt to recreate the substance of these proceedings. See Commonwealth v. O'Brien, 423 Mass. 841, 848 (1996) (“[a] judge’s reliance on information that is not part of the record implicates fundamental fairness concerns”). As such, the only record of the basis for the September 9th ex parte hearing and the resulting orders is the ex parte motion filed by Attorney Carolyn McGowan on September 9th (Attachment D). The Commonwealth did not learn of the contents of this filing, which asserted a need to secretly smell the marijuana evidence, until November, at the conclusion of the three week evidentiary hearing on the defendants’ motion for sanctions. At that time the Commonwealth learned of additional ex parte filings (an ex parte affidavit of Attorney Carolyn McGowan filed on September 11th (Attachment E), an ex parte affidavit of Attorney Daniel Beck also filed on September 11th (Attachment F), and an ex

parte affidavit by Attorney Carolyn McGowan filed on September 22nd in support of the defendants' motion for sanctions). The Commonwealth remains unaware of what other ex parte hearings may have been held. As it was unlawful to issue these discovery orders on an ex parte basis, there was no valid order to violate.

Ex parte procedures are only warranted in "exceptional" circumstances. Commonwealth v. Mitchell, 444 Mass. 786, 793-794 (2005). The only law relied on in the September 9th ex parte motion was Commonwealth v. Dotson where the Supreme Judicial Court held that "the prosecution has no proper role to play in a defendant's motion for defense funds unless the judge requests the prosecution's participation" as a "judge is quite capable of evaluating the various factors involved in awarding funds for expert witnesses without the Commonwealth's adoption of an adversarial stance." 402 Mass. 185, 187 & n.2 (1988). Clearly there is a vast difference between holding a one-sided hearing to determine whether to grant an indigent defendant's request for funds pursuant to G.L. c. 261, § 27C and a one-sided hearing to order the Commonwealth not to test any of the evidence and to make all of the evidence available, outside of the State Police packaging it has been placed in since its seizure, to defense counsel four

days after the defendants' arrests. While the Reporter's Notes to Mass. R. Crim. P. 14(a)(2) do provide that "nothing in this Rule is intended to prohibit the court from ex parte consideration of discovery motions in appropriate circumstances, consistent with law," the procedures here were not consistent with law.

The Commonwealth is unaware of any cases in which discovery orders pursuant to Rule 14 have been issued ex parte. In Commonwealth v. Mitchell, the Supreme Judicial Court outlined the limited and "exceptional" circumstances when an ex parte procedure may be warranted. 444 Mass. at 793-794. While Mitchell focused on obtaining documents from a third party pursuant to Mass. R. Crim. P. 17 rather than accessing evidence in the Commonwealth's possession and subject to Rule 14 discovery, the Commonwealth's interests in documents held by third parties is substantially less than its interest in evidence in its possession necessary to prove its case beyond a reasonable doubt. In such instances, even though the sought after material is not possessed by the Commonwealth, the Commonwealth is still entitled to notice unless a defendant has demonstrated (1) a reasonable likelihood that the prosecution would be furnished with information incriminating to the defendant which it otherwise would not

be entitled to receive; or (2) a reasonable likelihood that notice to a third party could result in the destruction or alteration of the requested documents." Id. at 797.

Recognizing the split in the Federal District Courts about the propriety of ex parte procedures, Massachusetts rejected the line of cases that prohibited ex parte motions altogether and instead adopted the stance "that ex parte motions are not appropriate in most cases, but rule 17(c) does not completely bar the use of such a process." Id. at 793. As such, an ex parte motion will be entertained only in the above listed circumstances and the Supreme Judicial Court expressly excluded the consideration of ex parte motions "on the basis that notice to the Commonwealth will reveal trial strategy or work product or might disclose client confidences." Id. The Court recognized that "[a]dding the latter grounds as justifications for ex parte consideration would create a loophole that could not be contained, because matters of trial strategy, work product, and client communications are involved in almost every case where a rule 17 (a) (2) motion might be filed. The ex parte procedure could then become the norm and not the exception, something the rule was never intended to permit." Id.

Here, the only basis advanced for justifying the ex parte proceeding on September 9th, was the assertion that

the defense should not have to tell the Commonwealth about their "investigation" into the smell of the marijuana.

(Attachment D). Indeed, the additional September 11th filing of Attorney McGowan's affidavit (Attachment E) does not include any justification of why the filing needed to be ex parte. This does not establish a reasonable likelihood that the prosecution would be furnished with information incriminating to the defendant which it would otherwise not be entitled to receive or a reasonable likelihood that notice could result in the destruction or alteration of the evidence.

It is only the affidavit submitted by Attorney Beck on September 11th in which he baldly asserts "that any delay will enable the police to tamper with the evidence" and "[i]f the police become aware of the details of defendants' inspection, I believe that they will change their testimony." (Attachment F). Attorney Beck's sentiments about police, without more, are not adequate. Moreover, these baseless assertions which evidence an extreme bias against police generally and, by implication, the prosecution, were not even offered until September 11th in what appears to be an after-the-fact attempt to justify having ordered the Commonwealth to turn over all the firearm evidence. As such, Attorney Beck's personal bias

against police cannot be considered in the issuance of the original September 9th orders.

Even if the defense had asserted substantiated claims that there was a "a reasonable likelihood that notice to a third party could result in the destruction or alteration" of evidence, Mitchell, 444 Mass. at 797, such a showing still would not justify excluding the attorneys representing the Commonwealth, who, as officers of the court, are permitted access to restricted, confidential material that they are duty bound not to divulge and/or disseminate. Following the teachings of Holliday, such a showing would at most justify precluding disclosure to the police. 450 Mass. at 800. Indeed, "[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth -- as well as fairness -- is 'best discovered by powerful statements on both sides of the question'." Commonwealth v. Rahim, 441 Mass. 273, 284-285 (2004), quoting Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975). See also Commonwealth v. Durham, 446 Mass. 212, 226 (2006), quoting Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. Rev. 228, 249 (1964) ("the

truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise").

The unlawful procedure utilized here cannot serve as the basis to require the Commonwealth to stop testing all the evidence and for defense counsel to open all the evidence packaging four days after the defendants' arrests in a case to be presented to the grand jury for prosecution in the Superior Court. As such, even if the Commonwealth had violated these orders, which the Commonwealth maintains it did not, violation of an invalid order cannot serve as the basis to impose sanctions. Commonwealth v. Florence F., 429 Mass. 523, 525 (1999) (courts inherent power of contempt for violation of orders is recognized only if the underlying order is valid); Hernandez, 421 Mass. at 274.

II. THERE WAS NO "NO TESTING" ORDER OF THE FIREARM.

Justice Singleton found that the "effect of all orders was that the state police were ordered to not conduct testing on the evidence until further order of this Court or the single justice of the Supreme Judicial Court." (Attachment A, p. 3). As Justice Singleton recognized that there was no explicit "no testing" order as he expressly stated in the middle of the three week evidentiary hearing during Trooper Walsh's testimony that the 10:00 a.m. order did not include a no testing order, he appears to find that

this order was implicit. However, this finding of an "implicit order" cannot be the basis to impose a punitive fine. Mass. R. Crim. P. 48. See Demoulas v. Demoulas Super Mkts., 424 Mass. 501, 565-566 (1997) (enforcement of underlying order only available where underlying order is sufficiently clear so that the party to be bound is provided with adequate notice of the required or prohibited activity). See also Warren Gardens Housing Cooperative v. Clark, 420 Mass. 699, 700-701 (1995).

As the "status quo" order by the Single Justice did not issue until 1:50 p.m. on September 10th, the Commonwealth could not have notified anyone prior to that time that DNA swabbing or test-firing of the firearm was prohibited. As the DNA swabbing took place before 10:00 a.m. and the test-firing occurred at approximately 1:00 p.m., the communication after 1:50 p.m. of the Single Justice's status quo order cannot be included in the "orders" that had the "effect" of ordering the state police not to test the evidence. The two earlier orders, specifically the 10:00 a.m. order as that was the only order actually provided to the state police, did not even include an "implicit" no testing order. Justice Singleton's own written findings of December 12, 2008 ("Decision Re: Discovery") confirm that there was no intent

to prohibit testing as he stated "the method proposed by defense counsel to obtain the requested discovery will not hinder the Commonwealth's ability to examine and conduct tests on same, nor will it prevent the Commonwealth from properly preserving the evidence for trial." (Attachment G). As the status quo order did not issue until 1:50 p.m. on September 10, 2008, the processing of the firearm that occurred before that time cannot be the basis for sanctions.

III. EVEN WERE THE COURT TO CONCLUDE THAT THE "EFFECT" OF THE ORDERS ORDERED THE STATE POLICE NOT TO TEST THE FIREARM, THERE WAS NO VALID BASIS TO IMPOSE SUCH AN ORDER

The only basis for the two orders that issued by Justice Singleton on September 9th was the ex parte motion filed by Attorney McGowan. (Attachment D). As the Commonwealth later learned, this motion asserted a need to secretly smell the marijuana evidence. This motion contains no reference to the firearm evidence. The Commonwealth is unaware of any case in which a broad "no testing" order has ever been imposed and therefore is unaware of the standard that would support such an order. Such a broad order may indeed run afoul of the separation of powers expressed in Art. 30 of the Massachusetts Declaration of Rights. Commonwealth v. Gonsalves, 432

Mass. 613, 619 (2000) (“[a]n act of one branch of government does not violate art. 30 unless the act unduly restricts a core function of a coordinate branch as the essence of what cannot be tolerated is the creation of interference by one department with the power of another department”) (internal quotations and citations omitted). Precluding the prosecution from identifying the evidence to be used in its prosecution of the defendants (collection of DNA, fingerprints, ballistic evidence) required to prove its case beyond a reasonable doubt unduly interferes with the power of the executive branch to prosecute criminal cases. See id. (“prosecutor has wide discretion in deciding whether to prosecute a particular defendant and the judiciary cannot short-circuit the adversary process by silencing the people’s elected voice”) (citations omitted). As there was no valid basis to impose a no testing order on the firearm, the DNA swabbing and test-firing that occurred cannot be the basis to impose a \$25,000 punitive sanction.

IV. THERE WAS NO VIOLATION OF THE 10:00 A.M. ORDER AS THAT ORDER WAS STAYED BY THE SINGLE JUSTICE

As the 10:00 a.m. order had been stayed by the Single Justice, there is no basis to sanction the Commonwealth for having "failed to produce the firearm and marijuana to this Court by 10:00 a.m. on September 10, 2008 for inspection."

(Attachment A, p. 4). Justice Singleton's conclusion appears to be based on his erroneous finding that the Single Justice did not stay the order until 1:50 p.m.

(Attachment A, p. 2-3). Such a finding is contrary to the undisputed evidence that the clerk to the Single Justice orally communicated a stay prior to 10:00 a.m.

Moreover, the marijuana, the only evidence that should have even been the subject of the order, was in court at 10:00 a.m. The undisputed evidence established that Trooper Briody was seated in the courtroom, dressed in full uniform, from before 10:00 a.m. until approximately 11:30 a.m. with the marijuana evidence. As there was no basis to include the firearm in the 10:00 a.m. order, even if the 10:00 a.m. order had not been stayed, this invalid order cannot provide the basis to impose sanctions. Hernandez, 421 Mass. at 274. See also Southern Railway Company v. Lanham, 403 F.2d 119, 124 (5th Cir. Ga. 1968) (if the order of production was improper then the contempt conviction must be reversed).

There was no violation of the 10:00 a.m. order, not only because it was stayed, but because it was invalid with respect to the firearm.

V. EVEN IF THE COMMONWEALTH COMMITTED SANCTIONABLE CONDUCT, WHICH IT DID NOT, THE DISTRICT COURT HAS NO AUTHORITY TO IMPOSE A \$25,000 MONETARY PUNISHMENT

Justice Singleton declined to impose sanctions with respect to the defendants' cases finding that the defendants were not sufficiently prejudiced. (Attachment A, p. 4). Instead, he sanctioned the Commonwealth in the amount of \$25,000 to "communicate to the Commonwealth, the state police and all police departments that a willful and intentional violation of a court order will not be permitted, nor tolerated by this Court. See Mass. R. Crim. Pro., Rule 14(c)(1)." (Attachment A, p. 4).

While Mass. R. Crim. P. 14(c)(1) does provide that the violation of discovery orders authorizes the Court to "make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances," there is no indication that this Rule authorizes the Court to issue a punitive monetary order ancillary to the criminal case. Indeed, the Rule deals with remedies that will benefit the defendant.

Although Justice Singleton does not cite to Mass. R. Crim. P. 48 in imposing this punitive fine, the Commonwealth does not dispute that Rule 48, as well as a court's inherent contempt powers, do authorize a "citation for contempt or the imposition of costs or a fine" for

"willful" violations of court orders. Mass. R. Crim P. 48. However, monetary sanctions not imposed pursuant to a citation for contempt must be in the form of costs "tailored to the resources wasted or unnecessarily expended as a result of the misconduct" or a fine to act as a "coercive" remedy to procure compliance with the court's order. Avelino-Wright v. Wright, 51 Mass. App. Ct. 1, 5 (2001) (on remand judge reminded to "take care to articulate the reason or reasons for the assessment and to explain how the amount was established"). Not only was there no misconduct on the part of the Commonwealth, the Commonwealth was not responsible for any "resources wasted and unnecessarily expended." Indeed, the resources wasted were a result of the Commonwealth is attempting to protect its rights while being kept in the dark, and resources were further wasted due to the defendants' pursuit of this unlawful motion for sanctions.

As the monetary punishment imposed here is clearly not in the form of reimbursement costs or coercive fines to compel compliance, but rather to vindicate the Court's authority, the contempt is deemed criminal. Mahoney v. Commonwealth, 415 Mass. 278, 284 (1993), citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 446 (1911) (it is the purpose of the punishment that determines the nature of

contempt proceedings and punishment for "completed acts of disobedience" is deemed criminal contempt). See also Manchester v. Department of Environmental Quality Engineering, 381 Mass. 208, 212 n.3 (1980). Criminal contempt proceedings must proceed as a criminal case. Mass. R. Crim. P. 44. Miaskiewicz v. Commonwealth, 380 Mass. 153, 156 (1980) (after the effective date of the Massachusetts Rules of Criminal Procedure, unless the standards of summary contempt proceedings are met pursuant to Mass. R. Crim. P. 43, criminal contempt proceedings must proceed as a criminal case, initiated by complaint, with the attendant constitutional rights including notice to the alleged contemnor and a right to be tried by a jury). Not only is it doubtful that "the Commonwealth" could be the defendant in a criminal contempt proceeding, but the proceedings here most definitely did not proceed as a criminal case. Int'l Union v. Bagwell, 512 U.S. 821, 838 (1994) (sanction order vacated as the serious contempt fine imposed was criminal and constitutionally could not be imposed absent a jury trial).

Recognizing that a punitive fine can be imposed in a summary contempt proceeding pursuant to Mass. R. Crim. P. 43, the maximum fine "for each contempt" is "no more than five hundred dollars." Mass. R. Crim. P. 43(a)(3). As

such, this Rule does not authorize the imposition of a \$25,000 fine. Moreover, Rule 43 requires the judgment of contempt to be "entered upon the occurrence of the contemptuous conduct," Mass. R. Crim. P. 43(a)(2), not after a three week evidentiary hearing with seventeen witnesses which included eight crime lab personnel and two assistant district attorneys.⁴

Not only is there no authority in the rules or law to impose this \$25,000 punitive fine, but the fine is also unenforceable as it is unclear as to who under the umbrella of "the Commonwealth" is responsible for the payment of this fine. Moreover, as the lack of a specified recipient would require that the money go to the State Treasurer, G.L. c. 280, § 2, the result would be the redistribution of \$25,000 from one area of the Commonwealth's budget back to

⁴ The Commonwealth did not present any witnesses and repeatedly objected to the proceedings. The Commonwealth also repeatedly requested that the Court clarify the scope of the hearing which the Court denied stating that it was the defendants' motion and the theories were up to them. As such, the Commonwealth's numerous objections on relevance grounds were repeatedly overruled. The Commonwealth requested that the defendants file an affidavit in support of their motion which the Court denied; unbeknownst to the Commonwealth an affidavit in support of the motion for sanctions had been filed ex parte. However, the scope of the hearing was well beyond the bases set forth in the affidavit. The wasted resources expended and costs of attorneys' fees in pursuing this unlawful motion for sanctions should not be assessed to the Commonwealth.

the State Treasurer. This reappropriation of taxpayer money that is not connected to any kind of reimbursement by one agency to another cannot be a proper exercise of the judiciary's authority. See Art. 30 of the Declaration of Rights of the Massachusetts Constitution. See also Gonsalves, 432 Mass. at 619, ("[t]he power to direct the spending of State funds is a quintessential prerogative of the Legislature").

On this basis alone, the sanction order must be vacated.

CONCLUSION

For all these reasons, the Commonwealth asks this Court to vacate the \$25,000 sanction order and declare the underlying discovery orders invalid.

Respectfully Submitted,
For the Commonwealth,

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

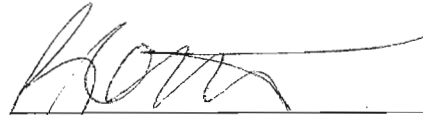
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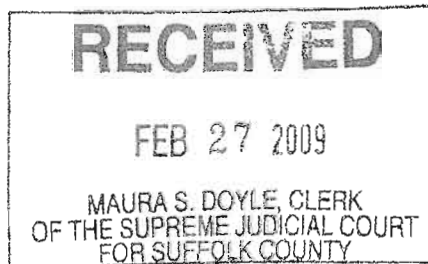
Dated: February 27, 2009

CERTIFICATE OF SERVICE

I certify that a true copy of the Commonwealth's Petition for Extraordinary Relief pursuant to G.L. c. 211, § 3 and Index of Attachments was served upon James Arguin, Assistant Attorney General and Chief of the Appellate Bureau by mail this 27 day of February, 2009. Although the defendants may not have standing to oppose this petition, the Commonwealth has also served by mail this same day a true copy of the aforementioned Petition on Carolyn McGowan, counsel for defendant Farrow; Lorenzo Perez, counsel for defendant Watson; and Daniel Beck, counsel for defendant Carney.



BETHANY STEVENS
ASSISTANT DISTRICT ATTORNEY



ATTACHMENT A

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

TRIAL COURT
DISTRICT COURT DEPT.
CAMBRIDGE DIVISION
CRIM. NO. 0852CR2553
0852CR2554
0852CR2555

-----)
COMMONWEALTH)
)
 V.)
)
KENNY FARROW, RONALD WATSON))
and KEJUAN CARNEY)
-----)

DECISION and ORDER
RE: DEFENDANTS' REQUEST
FOR SANCTIONS

BACKGROUND

On the morning of September 9, 2008, the defendant Farrow, through his attorney, filed an ex parte motion for discovery. After an ex-parte hearing in chambers, this Court allowed the defendant's motion. It ordered, "The Commonwealth and law enforcement associated with the above captioned matter [to] make all evidence seized in this matter available for inspection to defense Counsel and her designees (including but not limited to CPCS Investigator Sarah Galante) immediately and in any event prior to the transport of said evidence to any lab for testing."

During a subsequent hearing in the afternoon at approximately 2:00 P.M., this Court heard from all parties, including the Commonwealth, regarding the order. During the

hearing defense counsel informed this Court of the state police's communication to her expressing their intention not to comply with the Court's order. In support of their position, the Commonwealth cited its concerns regarding possible contamination of the evidence (the marijuana, the firearm, the magazine and the ammunition) if they removed it from the sealed evidence bags.

Defense counsel submitted a second proposed order addressing this concern that this Court endorsed. It ordered the Commonwealth to bring the evidence (marijuana, firearm, and ammunition) to the court the following day [September 10, 2008] at 10:00 A.M. to give defense counsel "a meaningful opportunity to inspect said evidence." The order defined "a meaningful opportunity to inspect" as "on request by the defense, the evidence must be taken out of whatever State Police packaging it has been placed in since its seizure." The District Attorney's Office communicated both orders to the state police by 5:00 P.M. on September 9, 2008.

The Commonwealth also objected to this subsequent order and gave the court notice of its intent to seek review pursuant to G.L. c. 211, §3, while requesting this Court to stay its orders. The request was denied.

On September 10, 2008 at approximately 8:30 A.M., the Commonwealth filed its G.L. c. 211, §3 petition and at

approximately 1:50 P.M., a single justice of the Supreme Judicial Court stayed the proceedings pursuant to G.L. c. 211, §3 and ordered the Commonwealth to “. . . maintain the status quo of the evidence at issue” The effect of all orders was that the state police were ordered to not conduct testing on the evidence until further order of this Court or the single justice of the Supreme Judicial Court.

RULINGS OF LAW

1. The defendants have “. . . an unquestioned right, under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights to obtain relevant evidence that bears on the question of his guilt or innocence or which otherwise will help [their] defense.” Commonwealth v. Mitchell, 444 Mass. 786, 795 (2005), also, see Commonwealth v. Holiday, 450 Mass. 794, 802 (2008);

2. In this case, the discovery and method proposed to obtain it was reasonable and necessary to guarantee a fair trial for the defendants. Without it, the defendants could have been denied a substantial defense. Such discovery is mandated by G.L. c. 218, §26A, also see Mass. R. Crim. Pro., Rule 14(a)(6);

3. The Commonwealth, i.e., the state police, did not maintain the status quo as ordered and intentionally disregarded orders of this Court and the single justice of the Supreme

Judicial Court when after receiving notice of the court orders on September 9, 2008, it (1) conducted DNA swabbing of firearm evidence on September 10, 2008, (2) test-fired the firearm on September 10, 2008 and (3) failed to produce the firearm and marijuana to this Court by 10:00 A.M. on September 10, 2008 for inspection.¹

4. This Court finds that the actions of the Commonwealth, although intentional and deliberate, were not sufficiently egregious or prejudicial to warrant dismissal or suppression of the evidence in this case.

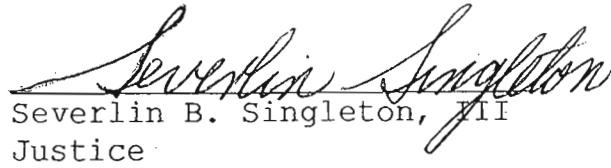
5. Nevertheless, the Commonwealth's actions were sufficiently egregious to warrant sanctions. Sanctions are necessary when a party deliberately disobeys a court order. Such a sanction should communicate to the Commonwealth, the state police and all police departments that a wilful and intentional violation of a valid court order will not be permitted, nor tolerated by this Court. See Mass. R. Crim. Pro., Rule 14(c)(1).

ORDER

Therefore, this Court hereby sanctions the Commonwealth in the amount of \$25,000 plus the expenses of each defense attorney in litigating their motions for discovery and sanctions. Upon

¹The affidavit of Kristen Sullivan, although inaccurate at the time of filing with the SJC, was of no consequence to any subsequent court decision or order and not relied upon by the Commonwealth in the District Court.

submission of affidavits from defense counsel as to the hours expended litigating the above motions an amended order reflecting same shall be entered pursuant to this order.


Severlin B. Singleton, III
Justice

Dated: December 23, 2008

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

DISTRICT COURT DEPT.
CAMBRIDGE DIVISION
DOCKET: 2008-2553

COMMONWEALTH

v.

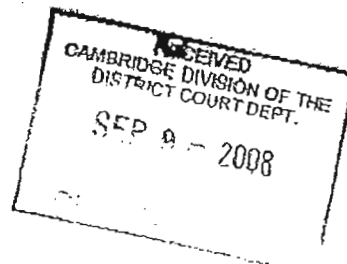
KENNY FARROW

ORDER

The Commonwealth and law enforcement associated with the above-captioned matter are hereby ordered to make all evidence seized in this matter available for inspection to defense counsel and her designees (including but not limited to CPCS Investigator Sarah Galante), immediately and in any event prior to the transport of said evidence to any lab for testing.

SO ORDERED.

Singletary, J.
Associate Justice
9/9/08



ATTACHMENT C

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

DISTRICT COURT DEPT.
CAMBRIDGE DIVISION
DOCKETS: 2008-2553,
2008-2555

COMMONWEALTH

v.

KENNY FARROW
and
RONALD WATSON

ORDER

The Commonwealth and law enforcement associated with the above-captioned matter(s) (including but not limited to the State Police) are hereby ordered to make all evidence seized in the investigation of this matter available for a meaningful opportunity to inspect by defense counsel and counsels' designees (including but not limited to CPCS Investigator Sarah Galante), immediately, regardless of whether the evidence has left the state police barracks facility and has been transported to another state lab or state police facility (including but not limited to the state's Maynard ballistics unit, the State Lab in Sudbury, or the drug storage unit in Foxborough).

In particular, it is ordered that the State Police bring on September ¹⁰ 9, 2008, by 10:00 am, to this Court (at Courtroom 13A (Motions Session)) all evidence seized in the investigation of this matter (including all alleged drugs and all alleged firearms evidence), so that defense counsel may have a meaningful opportunity to inspect said evidence.

A "meaningful opportunity to inspect" means that on request by the defense the evidence must be taken out of whatever State Police packaging it has been placed into since its seizure. X

SO ORDERED.

Singleton, J.
Associate Justice 9/9/08

ATTACHMENT D

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

DISTRICT COURT DEPT.
CAMBRIDGE DIVISION
DOCKET: 2008-2553

COMMONWEALTH

v.

KENNY FARROW

MOTION FOR IMMEDIATE DISCOVERY AND
FOR LEAVE TO FILE SAME EX PARTE AND
FOR MOTION TO REMAIN IMPOUNDED*Ex Parte /
Impounded*

The Defendant hereby respectfully moves this Court for an Order (proposed language attached) directing the State Police or whatever Commonwealth body currently has possession and custody of the items seized in this matter, to provide defense counsel an opportunity to inspect all such items immediately and, if said items have yet to be transported to the State Crime Lab for testing, before such transport.

The Defendant further requests that this Motion be addressed ex parte and that it be impounded upon allowance for reasons set forth below.

As grounds, the Defendant states as follows:

1. This case alleges possession by the Defendant of a large capacity, loaded firearm that according to the police report was seized by the State Police and the Boston Police pursuant to a warrantless search of a vehicle in which the Defendant was a passenger. The firearms evidence seized was, according to the report, hidden in a closed, secret compartment in the vehicle.

2. The vehicle, driven by a co-defendant, was reportedly stopped by police for an alleged traffic violation. The police report then approaching the vehicle and “detect[ing] an odor . . . consistent with fresh marijuana.” They report then commanding all three occupants to exit the car and “pat frisking” them. No contraband was found. The police then “conduct[ed] a pat frisk of the passenger compartment” of the car, and as part of that warrantless search took apart the plastic molding surrounding the gear shift. They reportedly found there the loaded firearm at issue in this case.
3. The defendants were then arrested and transported to the State Police barracks in Boston by vehicle. Allegedly, when co-defendant Carney was taken from the police vehicle police “observed a plastic bag with 4 smaller plastic bags containing a green leafy vegetable . . . consistent with marijuana.” No other marijuana was found either in the car or on any defendants’ person.
4. Based on the undersigned’s training and experience in criminal law, a central issue in this case will be the reasonableness of the warrantless seizure and search of the defendants’ and the vehicle. This critical suppression issue is potentially dispositive of the case. Based on the case law, and my training and experience, I anticipate the Commonwealth will rely heavily to defend the police’s warrantless conduct on the claim that the officers who conducted the purported traffic stop could indeed smell the marijuana described above, which purportedly was in possession of co-defendant Carney.
5. On information and belief, it is unlikely, given the nature of many plastic bags, that the stopping officers could smell marijuana through two plastic bags, particularly from their vantage point outside the vehicle they were stopping, with the bags presumably, if present, not in plain view or in any manner easily accessible to smell (considering the

searches of the defendants' and of the car revealed no marijuana). Logically, this is especially true if the amount of marijuana at issue is very small.

6. On information and belief, the amount of marijuana at issue is very small.
7. The officers' credibility with respect to the claim that they could smell fresh marijuana will thereby be a critical issue to the defendant's anticipated motion to suppress the fruits of the warrantless search and seizure.
8. Based on my professional experience, I believe that time is of the essence with respect to any defense investigation of the ability of anyone to smell the marijuana at issue through the two plastic bags.
 - a. On information and belief, the smell of fresh marijuana, like any herb or vegetable matter, can change over time and dissipate.
 - b. If the defense cannot smell the marijuana immediately, then the Commonwealth would be expected to put an expert on at a suppression hearing several months from now who would assert that the odor of the substance has dissipated, but that it was strong enough to smell on the date of alleged offense (Sept. 5, 2008).
 - c. In order to challenge this claim thoroughly and effectively, the defense needs to be able to smell the bags of marijuana immediately.
9. Based on the undersigned's experience, at this early stage in a case (i.e., before the non-concurrent jurisdiction felony charges at issue are considered and presented for indictment, or considered and the case breaks down and proceeds in District Court), she and/or her investigator will not be permitted by either the police, the state lab, or the District Attorney's Office, to inspect the physical evidence.

10. Therefore, in order to adequately investigate the smell or lack of smell of the marijuana, and thus to adequately prepare for the suppression hearing in this matter and develop and prepare for all available defenses, the attached proposed Order is necessary.
11. This Motion should be heard ex parte and impounded because the Defendant should not ever be put in a position of having to reveal or explain to the prosecution the nature of his intended investigation and defense positions prior to any determination that he intends to utilize the anticipated results of the investigation opportunity. Commonwealth v. Dotson, 402 Mass. 185, 187 (1988) (considering whether "prosecutor's [improper] participation compelled the defendant to reveal trial strategy that would otherwise have remained undisclosed).
12. The prosecution has no adversarial role to play in any such hearing, as the evidence defense counsel seeks to access immediately will ultimately have to be made available to the defense, per the Rules of Criminal Procedure (Rule 14(a)(mandatory, automatic discovery)).
13. The prosecution (and the police) need not know what defense counsel is thinking with respect to the smell of the marijuana and potential testimony as to that issue.
14. Such discovery is essential to the preservation of the Defendant's rights to a fair trial, to permit defense counsel to investigate and consider all available defenses and prepare adequately for trial including cross-examination, and to the effective assistance of counsel, as those rights are guaranteed by the U.S. Constitution and the Mass.

Declaration of Rights.

Respectfully submitted,
KENNY FARROW
By his attorney:

Carolyn L. McGowan (BBO No. 635818),
Committee for Public Counsel Services
189 Cambridge Street
Cambridge, MA 02141
(617) 868-3300

Dated: September 9, 2008

ATTACHMENT E

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

DISTRICT COURT DEPT.
CAMBRIDGE DIVISION
DOCKET: 2008-2553

COMMONWEALTH

v.

KENNY FARROW

SUPPLEMENTAL AFFIDAVIT OF COUNSEL
IN SUPPORT OF
MOTION FOR IMMEDIATE DISCOVERY AND
FOR LEAVE TO FILE SAME EX PARTE AND
FOR MOTION TO REMAIN IMPOUNDEDFILED EX PARTE

I, Carolyn I. McGowan, do hereby depose and state:

1. I am counsel of record in the above-captioned case for the above-captioned defendant.
2. It is my professional opinion, based on my training and experience in this criminal law, that a critical issue to the defense of this case will be the credibility of the officers who conducted the warrantless search at issue as to the alleged "sticking out" in plain view of a portion of a plastic bag that the police have reported was squeezed between the plastic molding of the vehicle that surrounded the secret compartment in the car in which the firearms evidence was seized.
3. On information and belief, if there were such a plastic bag, it would at the point of seizure, and likely still, have a crease or other marking in it where the plastic molding was squeezed down on it.
4. In order to adequately prepare to challenge the credibility of the Commonwealth's anticipated witnesses on this point, I need to have a witness observe that bag as soon as possible, since, on information and belief, such a crease or mark could likely disappear over time. Therefore, I need to know what the state of the plastic bag is at this early stage in the case and as soon as possible, in order to rebut adequately an anticipated Commonwealth argument that there was a crease or marking, but it has disappeared.

5. I do not know where the bag is currently, but expect, based on my experience, that the bag has accompanied the firearms evidence to the state's ballistics laboratory and therefore is unavailable currently for inspection by the defense.

Signed under the penalties and pains of perjury on this 11th day of September 2008.



Carolyn I. McGowan

ATTACHMENT F

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

CAMBRIDGE DISTRICT COURT
No.

COMMONWEALTH OF MASSACHUSETTS

v.

KEJAUN CARNEY

Defendant

Ex Parte

AFFIDAVIT

I, Daniel Beck, hereby depose and say:

1. I am the lawyer for defendant in this case. I have read the police report provided in this case and believe the police version of events not to be credible.
2. According to the police report, the police believed that the defendants were gang members. They therefore followed them and noticed a marked lanes violation. Upon pulling the vehicle over, they claim to have noticed the smell of fresh (unburned) marijuana.
3. There was a small quantity of marijuana later discovered. On information and belief, this marijuana was on the person of Mr. Carney at the time of the stop of the vehicle. According to the police report it was in plastic bags that were inside another plastic bag.
4. Defense counsel are understandably suspect of the officer's olfactory claim and wish to have an independent witness examine the marijuana to determine whether the officer's potential testimony is credible.
5. In order to do this, the witness needs to remove the marijuana from any evidence bag in which it has been placed. Defendants will **not** remove the marijuana from the bags in which it was found.
6. The officers also claim in the police report that the gun was found in a plastic bag that was partially protruding from under the molding around the shift lever.
7. I believe that, if this is true, there would be a mark on the plastic bag where the molding was pressing down on it.

I therefore would like to have someone observe the bag. I am afraid that any delay will enable the police to tamper with the evidence to create this mark.

8. If the marijuana is sent to the Department of Public Health for analysis, this will in my experience require several months. If defendants' inspection is delayed until then, the Commonwealth will be able to argue that the odor had weakened over time. See *State v. Fairbanks*, 118 Wash.App. 1037, 2003 WL 22121052 (copy attached).
9. Defendants are more than willing to have their inspection of this evidence supervised by an independent party, that is one who will report only to the Court, not to the Commonwealth, in order to allay the Commonwealth's fear of contamination of the evidence.
10. If the police become aware of the details of defendants' inspection, I believe that they will change their testimony.

Signed under the penalty of perjury,

September 11, 2008

Daniel Beck

ATTACHMENT G

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

TRIAL COURT
DISTRICT COURT DEPT.
CAMBRIDGE DIVISION
CRIM. NO. 0852CR2553
0852CR2554
0852CR2555

-----)	
COMMONWEALTH)	
V.)	DECISION
	re: DISCOVERY
KENNY FARROW, RONALD WATSON)	
and KEJUAN CARNEY)	
-----)	

PROCEDURAL BACKGROUND

On September 5, 2008, complaints issued charging the three defendants with various firearm offenses. The defendant Carney was also charged with a drug offense.

On the morning of September 9, 2008, the defendant Farrow, through his attorney, filed an ex parte motion. This Court heard the motion in chambers with counsel for all three defendants present, and did not permit the Commonwealth to attend. After the hearing, this Court allowed the defendant's motion and noted the Commonwealth's objection. Pursuant to the motion, this Court ordered that, "The Commonwealth and law enforcement associated with the above captioned matter are hereby ordered to make all evidence seized in this matter available for inspection to

defense Counsel and her designees (including but not limited to CPCS Investigator Sarah Galante) immediately and in any event prior to the transport of said evidence to any lab for testing."

During a subsequent hearing in the afternoon, this Court heard from all parties, including the Commonwealth, regarding the order. The Commonwealth cited its concerns regarding possible contamination of the evidence (the substance believed to be marijuana, the firearm, and the ammunition) if they removed it from the sealed evidence bags. Defense counsel submitted a second proposed order, purportedly addressing this concern, which this Court endorsed. The second order, ordered the Commonwealth to bring the evidence (including the suspected marijuana, firearm, and ammunition) to the court the following day at 10:00 A.M. to give defense counsel "a meaningful opportunity to inspect said evidence." The order defined "a meaningful opportunity to inspect" as "on request by the defense, the evidence must be taken out of whatever State Police packaging it has been placed in since its seizure."

The Commonwealth objected to this subsequent order and gave the court notice of its intent to seek review pursuant to G.L. c. 211, §3, while requesting that the court stay its decision. This Court denied the Commonwealth's motion to stay and ordered the Commonwealth to produce the evidence in court on September 10,

2008. A single justice of the Supreme Judicial Court stayed the proceedings pursuant to G.L. c. 211, §3.

Subsequently, this Court sua sponte scheduled a further hearing on the matter on September 11, 2008. All parties, including the Commonwealth were fully heard in open Court and on the record.

RULINGS OF LAW

1. The defendants have "... an unquestioned right, under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights to obtain relevant evidence that bears on the question of his guilt or innocence or which otherwise will help [their] defense." Commonwealth v. Mitchell, 444 Mass. 786, 795 (2005), also, see Commonwealth v. Holiday, 450 Mass. 794, 802 (2008);

2. The discovery and method proposed to obtain it is reasonable and necessary to guarantee a fair trial for the defendants. Without it, the defendants may be denied a substantial defense. Such discovery is mandated by G.L. c. 218, §26A, also see Mass. R. Crim. Pro., Rule 14(a)(6);

3. The reasons for the Commonwealth's objection to the requested discovery and method to obtain it as stated in open court and contained in the affidavit of Kristen Sullivan do not justify preventing access to the requested discovery in the

manner proposed by defense counsel.

4. The prejudice to the defendants if prevented from obtaining the requested discovery in a timely manner far outweighs any of the Commonwealth's concerns.

5. The method proposed by defense counsel to obtain the requested discovery will not hinder the Commonwealth's ability to examine and conduct tests on same, nor will it prevent the Commonwealth from properly preserving the evidence for trial.

6. The defendants' initial ex parte hearing on this matter was justified and reasonable considering the nature of their request and the reasons offered in support of same. (See Exhibit A: Documents under seal submitted by defense counsel on September 11, 2008). See Commonwealth v. Mitchell, Id. Regardless, any purported prejudice to the Commonwealth in the Court conducting such a hearing was dissipated during the two subsequent hearings where the Commonwealth was given a full opportunity to be heard.

ORDER

Therefore, the Commonwealth and law enforcement associated with the above-captioned matters (including but not limited to the Massachusetts State Police) are hereby ORDERED:

1. To make all evidence seized in the investigation of this matter available for a meaningful opportunity to inspect by defense counsel and/or counsels' designees ("the defense")

forthwith.


2. Such inspection shall be conducted at any location designated by the Commonwealth. The items to be inspected are: (1) ballistics evidence, including firearms items (gun and ammunition) and its original packaging (i.e., a plastic bag); and (2) drug evidence, including alleged marijuana and its original packaging (i.e., plastic bags).

3. The defense shall be given an opportunity to view all of the items listed above outside any packaging in which the Commonwealth has placed them. The defense shall not remove any items from the packaging in which police seized it. The defense shall use all reasonable precautions to avoid risk of contamination including the use of latex gloves, surgical masks, and any other protective gear supplied by the Commonwealth.

4. At the Commonwealth's request, the Court may appoint an independent party to observe the inspection to ensure there is no violation of any of the above provisions.

5. It is further ordered that this order is stayed pending a hearing on the Commonwealth's petition for relief pursuant to G. L. c. 211, §3 before a single justice of the Supreme Judicial Court.

Dated: September 12, 2008


Severlin B. Singleton, III
Justice