

COMMONWEALTH OF MASSACHUSETTS

Essex, ss.

Trial Court of the Commonwealth
District Court Department
Salem Division
Docket Nos.: 0836 CR 895
0836 CR 896
0836 CR 897
0836 CR 899 ✓
0836 CR 900

In re: Commonwealth

vs.

Ryan T. Caverly
Jason Mostacci
Andrew Murley
Harrison Lounsbury
and Joseph J. Olson.

Defendants

Findings of Fact, Rulings of Law and
Order:

I.

These matters arise out of an alleged incident which occurred on March 25, 2008 within the town of Danvers, Massachusetts. Each of the defendants is charged with possession of class D controlled substance with intent to distribute in violation of G.L. Ch. 94C, s. 32c(a) and conspiracy pursuant to G.L. Ch. 94C, s. 40. In addition, the defendant Lounsbury is charged with possession of class B controlled substance with intent to distribute in violation of G.L. Ch. 94C, s. 32A(a).

Facts are found briefly as follows:

On March 25, 2008 at approximately 9:05 p.m. the Danvers Police Chief was patrolling that town in an unmarked police vehicle. He came upon the "Planet Fitness" gym parking lot and determined to patrol the lot looking for persons involved in motor vehicle break ins. The town had been having a rash of such incidents during this period of time. As he drove into the parking lot, the Chief observed the heads and shoulders of two persons standing next to a white pick up truck. The doors to the truck were open and two white males were looking into the truck. Based upon photos of the parking lot introduced at an evidentiary hearing in these matters, finding is made that the white pick up truck could not have left its parking space as the Chief parked his

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unmarked vehicle in the lot. There was insufficient room to do so.

The Chief made an observation of a Lincoln Navigator vehicle parked in the space next to the white pick up truck. He was unaware that anyone was in that vehicle. It has tinted glass installed on it.

Upon parking his unmarked vehicle and seeking to exit, the Chief determined to radio his station for back up units. As he did so, the unmarked vehicle's emergency blue lights came on. It appears the Chief did this in error. Nevertheless, as he exited his vehicle, the blue lights remained on and the white pick up truck could not leave.

Upon exiting, the Chief identified himself to the two white males, displaying his badge and the fact that he was armed.

In response, these two persons approached the Chief, told him they were going into Planet Fitness and proceeded to do so. The Chief ordered them to stop and stay where they were. Olson at this time was carrying a black gym bag. Olson was told by the Chief to produce his identification. He produced a valid Massachusetts driver's license and motor vehicle registration to the Chief who kept them on his person. (It was subsequently determined that the gym bag was empty.)

The Chief then began to engage Olson in conversation. Olson again indicated he was going into the Planet Fitness gym. The defendant Caverly avoided any further confrontation with the Chief and entered the gym. The Chief continued to question Olson and indicated to him that if he failed to tell the truth, the department's K-9 unit (which was on the way) would search his pick up truck.

Back up officers then did arrive. Up to this point again, there was no awareness of anyone being in the Lincoln Navigator.

Testimony was further given by police witnesses that in plain view on the seat and floor of the white pick up truck, banded currency, packaged class D controlled substance consistent in amount with distribution and a hammer were observed and seized. At hearing no evidence of banded currency, drugs or a hammer or an inventory of the same was produced by the Commonwealth. In addition, there was no evidence of any break in or broken glass on the ground at the scene or in the area of the white pick up truck or the Lincoln Navigator. The pick up truck was in fact the defendant Olson's.

As Olson was further questioned, he admitted that there was controlled substance in the pick up truck.

As Olson was being arrested, an order was given for police to go into Planet Fitness and arrest

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the defendant Caverly.

Based upon a claim of observations of furtive movements within the Lincoln Navigator by other officers arriving on the scene (said to be seen through a partially opened driver's side window), the defendants Lounsbury, Mostacci and Murley were ordered out of that vehicle and searched.

Lounsbury was removed by police and patted down. Nothing was found. Murley was removed from the vehicle and was patted down. Nothing was found. Mostacci was removed from the vehicle and patted down. He was found to be carrying \$1,900.00 in currency on his person which he stated he was about to deposit at an ATM machine.

The police on the scene proceeded to conduct a warrantless search of the Navigator and found a notebook inside the vehicle with names and money amounts written on it and \$300.00 in currency. The notebook was produced by the Commonwealth and placed into evidence at the hearing.

A police K-9 dog trained in drug detection searched the Navigator. There were "no hits" according to the police. The currency seized was subjected to a test back at the police station using the K-9 dogs to see if they again would "hit" on the currency for residual substances. This test is however found to have been unreliable for two reasons, viz: a) the dog had provided false "hits" in the past and the currency was not shielded or controlled at the police station from picking up other scents of residual drugs while secreted at the station for the dog to try and find.

All three were placed under arrest and charged as noted above. At the police station booking desk, Lounsbury was also found to have Oxycodone pills in a cast on his arm.

Olson and Caverly were also arrested at the scene and charged as noted above.

II.

We begin by examining the facts surrounding the arrests of Lounsbury, Mostacci and Murley. At the time the Chief was conducting his investigation of Olson and Caverly, he was unaware that anyone was in the Lincoln Navigator. Upon police back up arriving and determining that three males were in that vehicle during the time of the Olson and Caverly investigation, they were ordered out of the Navigator and searched. Nothing in the nature of contraband was found on their person. Mostacci was found to have \$1,900.00 on his person. It is not such a large amount of currency as to support probable cause to search the Navigator. In addition, Mostacci provided a plausible explanation for his having the money on his person. Nevertheless, he was arrested along with the other two occupants of the Navigator and the vehicle was searched. No currency was introduced into evidence by the Commonwealth establishing that this money was even seized by the police. A K-9 sniffing dog detected no drugs in the vehicle.

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Thus, based upon the same, ruling is now entered that as to the defendants Lounsbury, Murley and Mostacci, there was insufficient evidence of probable cause produced by the Commonwealth to support the search, seizure and arrests of these three individuals. Evidence seized from them must be suppressed. Under the "fruit of the poisonous tree doctrine" (Wong Sun v. United States, 371 US 471, 1963), the notebook, currency and Oxycodone seized by the police must also be suppressed.

The complaints against these three individuals are order dismissed pursuant to a *DiBenedetto* standard (Commonwealth v. DiBenedetto, 427 Mass. 414, 1998). The \$1,900.00 in currency seized from the defendant Mostacci shall be returned to him, the notebook shall be destroyed by the Commonwealth along with the Oxycodone pills. In the event the currency found in the notebook is not claimed by any of these three defendants, it shall be forfeited to the District Attorney's drug funds seizure account.

III.

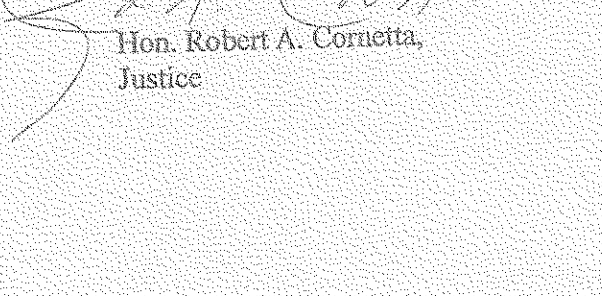
We now turn to the matters of the defendants Olson and Caverly. As to each of these defendants at their motions to suppress hearing, the Commonwealth produced no evidence of banded monies, drugs or any hammer. In addition, Olson had complied at the scene with the Chief's orders. He handed the Chief a valid driver's license and registration. There was no evidence found at the scene at that point of any break in or other crime afoot. There were no smashed windows observed, no pried open doors or trunks and no glass pieces on the pavement. The Chief knew of no one in the Lincoln Navigator.

At that point, there was no further reason for the police to detain either Olson or Caverly. They should have been sent on their way. Instead, Olson's identification documents were seized, he was questioned and taken into custody. Caverly was sought within the Planet Fitness gym, seized and taken into custody. They were both arrested and charged as noted above. Any evidence said to have been seized from them (\$2,700.00, packaged class D controlled substance and a hammer), has not been introduced into evidence by the Commonwealth. Nor has any inventory of the same been presented by the Commonwealth.

Based upon facts as found, ruling is now entered that both the defendants Olson and Caverly were searched, seized and arrested in violation of their state and federal constitutional rights (citations omitted).

Thus, the motions to suppress of the defendants Olson and Caverly are allowed and at any trial in these matters, the Commonwealth shall be precluded from introducing the same into evidence.

These matters are next scheduled for hearing on December 2, 2008.

By the Court:

Hon. Robert A. Corsetta,
Justice

November 28, 2008