COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
NO. SJ-2009-0212_____

(Newton District Court Dkt. No. 0912SW03)

IN RE MATTER OF SEARCH WARRANT EXECUTED ON MARCH 30, 2009 AT THE RESIDENCE OF MOVANT RICCARDO CALIXTE

REPLY IN SUPPORT OF
RICCARDO CALIXTE'S EXPEDITED APPLICATION FOR LEAVE TO APPEAL

I. INTRODUCTION

The Commonwealth's Opposition highlights the ongoing constitutional harm to Mr. Calixte, its misguided conception of the Fourth Amendment and Article 14, and above all the need for prompt corrective action from this Court. The Commonwealth apparently conceives of the Fourth Amendment and Article 14 as mere rules of evidence to be invoked at trial, available only on a timetable of the Commonwealth's choosing, and not as rights that provide affirmative protection from unreasonable searches and seizures. The Court should reject the Commonwealth's cramped and unsupported view of these fundamental constitutional rights.

While any evidence seized pursuant to the Commonwealth's illegal search must indeed be suppressed, that is not enough. As the constitutional harm to Mr. Calixte is concrete, irreparable, and ongoing, this Court should bring this matter to a close and order the immediate return of his property. Mr. Calixte has identified a range of dispositive reasons why the search was illegal, but ultimately his motion should be granted because of a single inescapable fact: *the search warrant was not supported by probable cause*. The evidence presented in the affidavit does not constitute probable cause of a violation of either the two statutes cited in the warrant application. Nor does that evidence provide probable cause of a violation of any of the three new statutes now offered by the Commonwealth after the fact. As a result, not only must the Commonwealth be denied the fruits of its illegal search, the ongoing damage must be halted as well. The Commonwealth's flippant response – that Mr. Calixte ought to make do by "borrowing a friend's phone" or "using a computer lab" while the Commonwealth continues to

search his seized property – amounts to no response at all. As no argument raised by the Commonwealth redeems its illegal search, Mr. Calixte's motions should be granted.

II. ARGUMENT

A. No Probable Cause Justified the Issuance of the Warrant.

The Commonwealth offers three arguments as to why it believes the search warrant was issued pursuant to probable cause:

(1) That the district court correctly found probable cause that Mr. Calixte violated G. L. c. 265 § 120F by allegedly "hacking" into the school's grading system;

(2) That despite the district court's ruling to the contrary, probable cause existed that Mr. Calixte violated G. L. c. 265 § 120F by sending an email "purporting to be from another individual"; and

(3) That the information submitted in Detective Christopher's affidavit could support a finding of probable cause that Mr. Calixte committed either larceny, harassment, or a civil rights violation not mentioned in the warrant application.

None of these arguments have merit. As the Commonwealth fails to rebut Mr. Calixte's arguments with respect to its first two arguments made in his opening brief, Mr. Calixte will rely on the discussion of these issues contained there. *See* Mot. at 6-8.

The Commonwealth's new third argument – that even if Detective Christopher's affidavit did not establish probable cause that the two statutes cited in the affidavit were violated, the affidavit could support the conclusion that Mr. Calixte committed some *other* previously-unmentioned crimes – is contrary to the law. Probable cause must be based on information presented to the magistrate at the time the warrant was issued and may not rely on information obtained after the fact, or information that was not communicated to the magistrate. *Whiteley v. Warden*, 401 U.S. 560, 564 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not

disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless."). Nor, of course, can the Commonwealth retroactively justify the search based on information that was unknown the affiant or which may only be obtained through subsequent unlawful searching. *Commonwealth v. Stegemann*, 68 Mass. App. Ct. 292, 299 (2007) (sufficiency of the search warrant application always begins and ends with the four corners of the affidavit).

Even had these additional statutes been included in the original application to the magistrate, the affidavit fails to provide probable cause to support any of the Commonwealth's newly-presented theories. No probable cause existed, for example, that Mr. Calixte committed larceny pursuant to G. L. c. 266 § 30 because there is not even an allegation – and in any case no basis to conclude – that Mr. Calixte obtained anything "by a false pretense" or "converted the property of another" as per the statute. Instead, the informant merely stated that he "downloaded movies as well as music from the internet," an empty allegation that furthermore does not indicate that the informant personally witnessed Mr. Calixte do anything. In fact, the informant's conclusion that Mr. Calixte's media files were copied illegally and not lawfully obtained is entirely unsupported and can be treated as nothing mere speculation.

Similarly, no probable cause existed that Mr. Calixte committed "criminal harassment" pursuant to G.L. c. 265 § 43A(a) because the affidavit provides no evidence of a "pattern of conduct or series of acts over a period of time directed at a specific person." *See, e.g, Commonwealth v. Welch*, 444 Mass. 80, 89 (2005) (Commonwealth must prove that the defendant committed not less than three separate incidents to establish a violation of G.L. c. 265 § 43A). If the complaining student was the target of alarming conduct three or more separate times, as the statute requires, the Commonwealth could easily have included those facts in the affidavit. It did not. Indeed, the Commonwealth appears to acknowledge its failure as it notes that sending the emails in question might only constitute "part" of the pattern of conduct to support such a charge. Opp. at 10. The affidavit does not provide the slightest support for an

allegation that Mr. Calixte engaged in any "pattern" of harassment "over time" or what the "other" allegedly harassing behavior was.[1]

Finally, the affidavit does not establish probable cause that Mr. Calixte committed a "civil rights violation" pursuant to G.L. c. 265 § 37 as there is no allegation (nor even an inference) that he did *anything* "by force or threat of force."

The Commonwealth's after-the-fact scramble to justify its unconstitutional warrant underscores the weakness of its application and lends further weight to Mr. Calixte's argument that the search and seizure of his property was nothing more than a "fishing expedition" based on "allegations that the petitioner was involved in unsavory activites (sic), *which may or may not be illegal*." Opp. at 4 (emphasis added). Police searches must be based on probable cause that a crime occurred. They may not be based on legal but "unsavory" activity. Yet, by including these claims in the affidavit, the Commonwealth has managed to muddy the fact that the original (though insufficient) justification for the search was its erroneous claim that sending an email "outing" a student as gay constituted a computer crime.

B. The Informant's Testimony Does Not Meet the Reliability Standard Demanded By the Fourth Amendment.

The Commonwealth asserts that the minimal information about its sole informant satisfies the Supreme Court's *Aguilar-Spinelli* standard for evaluating informant reliability. To the contrary, in *every case cited by the Commonwealth*, the Supreme Judicial Court or Court of Appeals found an identified informant or eyewitness reliable *only* when (a) there was no basis to question his or her motivation, (b) other corroborating evidence was introduced to support the informant's allegations, and/or (c) the information provided to investigators in support of the allegation was detailed and specific. *See, Commonwealth v. Mullane*, 445 Mass. 702, 706 (2006), (citing "level of detail given both in [the informant's] sworn statement and at the subsequent meeting between her and [detectives],"); *Commonwealth v. Burt*, 393 Mass. 703, 710

[1] The affidavit also provides no reason to conclude that the emails would qualify as "fighting words" acting as a "face to face personal insult" that could be constitutionally prohibited by G. L. c. 265, § 43A. *Commonwealth v. Welch*, 444 Mass. 80 (2005).

(1985) ("disinterested" eyewitness); *Commonwealth v. Vynorius*, 369 Mass. 17, 22 (1975) (detailed descriptions of prior reliable interactions and corroboration through independent police investigation); *Commonwealth v. Martin*, 6 Mass. App. Ct. 624, 628 (Mass. App. 1978) (disinterested eyewitnesses provided specific information to police). None of these indicia of reliability exist in the immediate case.

As Detective Christopher included in his affidavit no information to support the reliability of his informant apart from his own naked assertion that the informant had provided "reliable" information in some unnamed past case in the past, the warrant application fails the requirements of the Fourth Amendment and Article 14. To the contrary, the affidavit at best sets forth facts from which the magistrate could infer that the informant is unreliable and has an axe to grind. *See* Mot. at 11. Furthermore, police made no independent verification of any of the allegations made by the informant. Contrary to what the Commonwealth implies in its brief, the affidavit does *not* say that the informant claimed to know who sent the emails about him, so any police investigation that allegedly ties Mr. Calixte to those emails is irrelevant to corroborating the informant's reliability. Nor did police "confirm[] that the petitioner was using the same nickname for his computer which [the informant] had reported to police." Opp. at 16. The informant said that Mr. Calixte used the nicknames "enigma" and "Bootleg enigma" but the computers mentioned in the affidavit were "bootleg-laptop" and "calixtri-ubuntu." Further, nothing in the affidavit says that either of these computer monikers were also the name of any of Mr. Calixte's machines.

C. The Commonwealth's Procedural Objections Are Without Merit.

The Commonwealth raises a series of procedural arguments challenging the timing and propriety of Mr. Calixte's motion. All are without merit. The Commonwealth's first argument – that Mr. Calixte's motion to quash the search warrant is moot – fails on its face: the Commonwealth concedes that the search of Mr. Calixte's property has not been completed but is instead "underway." Opp. at 6. As the Commonwealth does not contest the argument that the retention and the ongoing search of property seized in violation of the Fourth Amendment

constitutes ongoing constitutional injury, Mr. Calixte's motion is not moot. *See, e.g., U.S. v. Silvestri*, 787 F.2d 736, 740 (1st Cir. 1986) (if police do not relinquish control over illegally seized property, the illegal seizure is ongoing); *Mayfield v. U.S.*, 504 F. Supp. 2d 1023, 1034 (D. Or. 2007) (government's retention of documents seized in violation of the Fourth Amendment establishes an ongoing injury-in-fact).

The Commonwealth's second argument – that it is statutorily obligated "to safely keep" property seized pursuant to a search warrant, even an illegal one – borders on the obtuse. *See* Opp. at 6. G. L. c. 276 § 3 requires officers to safely preserve seized material "so long as necessary to permit them to be produced or used as evidence in any trial." This statutory requirement, along with requirement under G. L. c. 276 § 3A for a search warrant return and inventory, exists to protect the rights of the *accused*, not to give the Commonwealth *carte blanche* to indefinitely retain possession of illegally seized personal property. The statute preserves the integrity of evidence *admissible at trial* and ensures that personal property is not damaged by law enforcement officials. *See, e.g., Commonwealth v. Ocasio*, 434 Mass. 1, 6 (Mass. 2001) (statutory protection "protects the searched party from having his seized property stolen or misplaced by the police."). It does not authorize the continued retention of illegally seized property. Furthermore, if the Court finds that Mr. Calixte's property was seized in violation of the Fourth Amendment or Article 14, it can never be "used as evidence in any trial" against him and therefore must be returned. G. L. c. 276 § 3.

While never directly explaining the relevance of its observation, the Commonwealth attempts to bolster its argument in opposition to the request for the return of Mr. Calixte's property by belittling the magnitude of his constitutional injury, implying for example that the seizure of his computer and phone do not constitute real injuries because he could "use a payphone" or "access a public computer lab." Opp. at 6. The Commonwealth's interference with Mr. Calixte's property rights in violation of the Fourth Amendment and Article 14 is quite enough to establish irreparable harm. *See, infra, Mayfield*, 504 F. Supp. 2d at 1034. That he

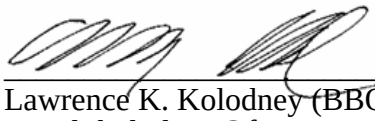
may partially mitigate the impact of that constitutional violation by, for example, "borrowing the phone of a friend" is of no consequence to Mr. Calixte's motion and the relief that he now seeks.

Third, for reasons similar to the ones discussed above, Mr. Calixte's request for suppression of evidence is timely. The Commonwealth suggests that Mr. Calixte "may well be able to" (but possibly not) challenge the admissibility of illegally seized property if the Commonwealth decides to bring criminal charges against him. Opp. at 7. Moreover, the Commonwealth notes that the issue would be moot "if charges are brought and the petitioner prevails by winning a motion to dismiss or securing an acquittal." *Id.* As noted above, Mr. Calixte's property was seized in violation of the Fourth Amendment and Article 14 and in no case can be used against him. While the Commonwealth may be correct that it could still in any event bring charges against Mr. Calixte if it wished, it has yet to do so even with the "benefit" of Mr. Calixte's property, perhaps providing some indication of the strength of its case. A judicial ruling at this stage that the seized material is inadmissible will promote judicial economy by strongly indicating to the Commonwealth that its resources would be best spent elsewhere. *See, e.g., Commonwealth v. Vaden*, 373 Mass. 397, 399 (1977) (interlocutory appeal appropriate where it would "contribute more to the reasonably prompt disposition of the case than it would to delay or further delay in the disposition.").

III. CONCLUSION

Impermissibly based on conjecture and ambitious legal theories at odd with the facts on the ground, the police illegally entered Mr. Calixte's home and seized his property. The police continue their illegal search to this day. As the Commonwealth cannot remotely justify its ill-advised behavior, Mr. Calixte respectfully asks this Court to end this ongoing infringement of his constitutional rights.

Riccardo Calixte
By His Attorneys:



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