

COMMONWEALTH OF MASSACHUSETTS

DISTRICT COURT DEPARTMENT
EASTERN HAMPSHIRE DIVISION
DOCKET # 1098CR605

COMMONWEALTH)
)
v.) **MEMORANDUM IN SUPPORT OF ELI DAMON'S**
) **MOTION TO DISMISS**
ELI DAMON)

The charges against Mr. Damon for violating G.L. 272 section 53, Disorderly Conduct, and G.L. 85 section 11b, Bicycles; ... must be dismissed. The conduct described in the police report, which is attached to this motion, does not constitute probable cause that either of these two statutes was violated.

Argument

I. The Complaints Must Be Dismissed Because the Police Report Fails Establish Probable Cause that a Mr. Damon Committed Offenses.

The officer's police report does not establish probable cause that Mr. Damon committed offenses. For complaints to issue, a judicial officer must be presented with information that "establishes probable cause to believe that the person against whom the complaint is sought committed an offense." Mass. R. Crim. Pro. Rule 3. *Com. v. DiBennadetto*, 436 Mass. 310, 315 (2002) (stating that if a complaint is not supported by probable cause, it should not have issued, and should be dismissed). Because the officer's police report does not describe any conduct that

would be a violation of G.L. chapter 85 section 11B or a chapter 272 section 53, the citation and complaint must be dismissed.

II. The Police Officer's Report Does Not Establish Probable Cause That Mr. Damon Violated G.L. 85 section 11b.

The officer's police report does not describe conduct that would be a violation of G.L. 85 section 11b. In fact, the report describes Mr. Damon operating his bicycle in just the way G.L. 85 section 11b suggests. The first two and half lines of section 11B states "[e]very person operating a bicycle upon a way ... shall have the right to use all public ways in the commonwealth except limited access or express state highways where signs prohibiting bicycles have been posted..." The officer's report does not state that Russell St. is a limited access highway. The report also does not state that Russell St. is an express state highway where signs prohibiting bicycles have been posted. The officer's report describes Mr. Damon conducting himself in compliance with G.L. 85 section 11b.

The citation must be dismissed because the officer cited Mr. Damon for violating a statute which does not exist. The officer unlawfully issued a citation for "Failure to Keep to the Right While Being Overtaken," chapter 85, section 11b. The operation of bicycles is regulated. G.L. ch. 85 sec. 11b (stating in clause 1 that, "...on public way on a roadway with more than one lane in a direction of travel, bicyclist must ride within a single lane." But this statute has created no duty for a bicyclist to keep right while being overtaken. The citation must be dismissed because the officer's report does not describe conduct in violation of chapter 85 section 11b.

III. The Officer's Report Does Not Establish Probable Cause that Mr. Damon Violated G.L. Chapter 272 Section 53

The officer's report does not establish probable cause that Mr. Damon violated the law through his Disorderly Conduct. The SJC judicially narrowed Chapter 272 section 53 to only criminalize instances where a person "creates a hazardous or physically offensive condition by any act, which serves no legitimate purpose of the actor." *Commonwealth v. A Juvenile*, 368 Mass 580, 586 (1975) (quoting from the Model Penal Code), *See also Commonwealth v. Feigenbaum*, 404 Mass 471, 475 (1989) (Defendant was entitled to an acquittal because the Commonwealth offered no evidence that the disorderly conduct of protesters blocking cars from being towed served no legitimate purpose). This court has stated that "the import of the phrase (that the defendant's action served no legitimate purpose) is to broadly exclude any conduct that directly furthers some legitimate desire or objective of the actor". *Commonwealth v. Zettel*, 46 Mass.App.Ct. 471, 476 (1999) (Defendant was entitled to an acquittal where she double parked her car at her child's daycare because her conduct, while disorderly, served a legitimate purpose.).

Because here the officer's report states that Damon was serving a legitimate purpose, traveling, he can not be charged with disorderly conduct. Mr. Damon has a fundamental right to travel within the Commonwealth. *Commonwealth v. Weston W.*, 455 Mass 24, 30-33 (2009) (stating "Inherent in the right to life, liberty, and happiness is the right to move freely and peacefully in public without interference by police.") Traveling was Mr. Damon's legitimate purpose. Therefore, the complaint must be dismissed because the officer's report does not establish probable cause that Mr. Damon violated G.L. chapter 272 section 53.

Respectfully submitted,
Eli Damon,
By his attorney

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