

COMMONWEALTH OF MASSACHUSETTS

SPRINGFIELD, ss

DISTRICT COURT
CRIMINAL SESSION
0723CR12276

COMMONWEALTH

VS

ELI DAMON

Now comes the Defendant and moves this Honorable Court to dismiss the complaint against the defendant, as the information presented by the complainant does not establish probable cause to believe that the defendant committed a criminal offense.

This memorandum will outline the relevant law in these areas. All facts will refer to the police report filed with this court as part of the application for complaint, and is attached hereto.

Legal Arguments.

In order to obtain a complaint in District Court, the following process must occur pursuant to Mass. R. Crim. Pro. Rule 3:

(g) The Complaint Process.

(2) Probable Cause Requirement. The appropriate judicial officer shall **not authorize a complaint unless the information presented by the complainant establishes probable cause** to believe that the person against whom the complaint is sought committed an offense.

Any alleged defects in the procedure before the clerk-magistrate should be remedied by means of a motion to dismiss after the issuance of the complaint. *Com. v. DiBennadetto*, 436 Mass. 310, 315, (2002).

The police officer's report underlying the complaint states that he found the defendant riding in the middle of one of several lanes on Riverdale Road, West Springfield. He pulled the defendant over to the side of the road. The defendant identified himself. The officer informed him that he was not allowed to ride in the travel lane and that he was causing a hazard. "He advised me that he had every right to ride on the road."¹ As the officer and the defendant debated, the defendant "stepped into the travel lane of Rt 5 stating and pointing to the center white line stating that is the middle of the road, I was riding here pointing to the travel lane of Rt 5." [sic] Several motor vehicles swerved into the travel lane to avoid hitting him. The officer continued to tell the defendant that he could not ride his bicycle on the highway (see footnote 1). As the officer lectured the defendant that he was not allowed to ride on the road (again, see footnote 1), with his cruiser's overhead lights flashing to draw attention to itself, the officer observed that that "several vehicles were slowing down to see what Eli Damon was doing which was causing traffic to back up." So the officer arrested the defendant.

The defendant is charged with being "disorderly" in violation of G.L. c. 272 sec 53. Pertinent to this case, the statute has been judicially narrowed to those 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). The statute was narrowed so that the "disorderly' conduct may now only be validly applied to conduct which involves no lawful exercise of a First Amendment right'." *Commonwealth v. Zettel*, 46 Mass. App. Ct. 471, 473 (1999). The statute only reaches "conduct which by its

¹ Perhaps the defendant was relying on G.L. c. 85 sec. 11B which states, in relevant part: "Every person operating a bicycle upon a way ... shall have the right to use all public ways in the commonwealth ..." Perhaps the defendant was relying on the Supreme Judicial Court's decision in *Opinion of the Justices to the Senate*, 370 Mass 895 (1976) which provides that "bicycles have a recognized place on highways and are expressly authorized by this section to use most public ways." Perhaps the defendant believed that the officer was making up his own rules of the road and the officer did not know what he was talking about. It is noteworthy that although the defendant was "subject to the traffic laws and regulations of the commonwealth" G.L. c 85B sec. 11B, no citation issued.

very nature involves the use of physical force or violence or any threat of use of such force” Conduct which creates a condition of physical menace to others is also reached, ...[such as] throwing ‘stink bombs, the strewing of garbage, nails or other noxious substances in public passageways, tuning off the lights in a theatre’ and like conduct creating a hazard to the public safety.” *A Juvenile, supra* at 597. Finally the government must affirmatively show that “the defendant’s action served no legitimate purpose”. *Zettel, supra* at 475.

In *Commonwealth v. Feigenbaum*, the defendant was blocking a tow truck and disregarded the officer’s repeated commands to move. The car was illegal parked along a rotary during a protest. As cars were towed, protesters would place themselves in front of the next car to be towed. Although the Supreme Judicial Court found sufficient evidence that the defendant created a hazardous condition, the defendant was entitled to an acquittal where there the government “‘offered no evidence to show that the defendant’s actions were taken without legitimate purpose.” 404 Mass 471, 475 (1989)

In *Commonwealth v. Zettel* the defendant was double parked illegally while she waited for her child to emerge from daycare. An officer ordered her to move, stating that it was a safety hazard for children. He gave her a ticket. She moved the car, again illegally, this time obstructing a sidewalk. The officer and the defendant argued, and he eventually arrested her because she “‘became loud,’ ‘had refused to park the car legally,’ and ‘because it was becoming a pretty serious safety hazard.’” She also resisted arrest. *Zettel, supra* at 472. The jury was not warranted in finding the conduct tumultuous, nor that the conduct served “no legitimate purpose.” The Appeals Court noted that “the import of the phrase is to broadly exclude from this subsection any conduct that directly furthers some legitimate desire or objective of the actor.’ *Zettel supra* at 476.

In the instant case, the defendant was attempting to assert his lawful right to ride on a highway. The officer’s repeated attempt to dispute this right does not make the defendant’s conduct illegal. Even if part of Defendant’s communication

occurred momentarily on the highway does not make it illegitimate, even if the officer declares it a public hazard. See *Zettel* and *Feigenbaum, supra*. The Defendant's assertion of right is legitimate, and the government did not present the magistrate a report establishing probable cause.

Accordingly the complaint must be dismissed.

4 The Defendant,,
By his attorney,

Date: November , 2009

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CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing by delivering a copy thereof, in hand , to District Attorney's Office, Hampden County District Court, 50 State Street, Springfield, MA 01103, with notice that it is to be heard on November 10, 2009.

Date: November 2009

Donald W. Frank