

I wrote this memorandum in the summer of 2015 while a student intern at Roxbury Defenders Unit, in Roxbury, Massachusetts. I have permission from my supervisor to use it as a writing sample, and it is my own substantially unedited work. Dates and the names of all parties have been changed in the interest of confidentiality.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
ROXBURY DIVISION
1502 CR *****

COMMONWEALTH

v.

CHRISTOPHER CUMBERBATCH

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT’S MOTION TO SUPPRESS
PHYSICAL EVIDENCE AND STATEMENTS

FACTS AS ALLEGED¹

On April 18, 2015, at 2:00 a.m., while on patrol in Roxbury, Officers Patrick O’Malley and Michael Simmons observed a 1997 Ford Taurus with Massachusetts plate number ***** on Dale Street. They ran the license plate number through their unmarked cruiser’s mobile data terminal, discovering that the vehicle was uninspected. The officers then executed a traffic stop, utilizing the cruiser’s emergency equipment.

Officer O’Malley approached the driver’s side window, and shined his flashlight into the back seat area of the vehicle. The driver, Christopher Cumberbatch, stated, “I have to be honest with you, I don’t have a license.” Mr. Cumberbatch also told the officer that he did not have identification, and provided his true name and date of birth.

As Officer O’Malley returned to his cruiser to run Mr. Cumberbatch’s information, Mr. Cumberbatch called out to a passerby (later identified as Jacob Williams), “Uncle, I might need you to drive the car, so stick around.”

¹ The facts are as alleged in Officer O’Malley’s incident report, dated April 18, 2015. Quotations in this section are from the report.

Officer O'Malley, after determining that Mr. Cumberbatch's driver's license was indeed suspended, again approached the driver's side window, and again shined his flashlight into the back seat area of the vehicle. Officer O'Malley "gave CUMBERBATCH an exit order to inventory the vehicle, and handed him off to Officer Simmons."

After searching the "front driver's compartment," Officer O'Malley moved to the "rear passenger door" and observed, through the window, what he believed to be a package of crack cocaine, "approx. '8 ball' size" (that is, about an eighth of an ounce) "lying in the middle of the rear passenger floor." (Officer O'Malley notes in his report that "during both occasions when the operator was still seated in the vehicle, he shined his flashlight into the rear driver's side passenger compartment, and didn't observe the crack cocaine lying on the floor.")

Four other officers arrived on the scene. Mr. Cumberbatch "requested that if, after his vehicle is checked, can his uncle (Jacob Williams), take his vehicle." Mr. Cumberbatch was then transported to the District B-2 police station for booking. A K-9 unit arrived, searched the vehicle, and did not find any additional contraband. The vehicle was then turned over to Mr. Williams.

At the police station, Mr. Cumberbatch was Mirandized and booked. Officers found \$822 in cash on his person, "which he admitted that the majority was drug proceeds, but some was from his employment." Mr. Cumberbatch was allowed to keep \$240 for bail, and the remaining \$582 was seized. Detectives also seized Mr. Cumberbatch's cellular phone.

Mr. Cumberbatch is charged with operating a motor vehicle with a suspended license (G.L. c. 90, § 23), operating an uninspected motor vehicle (G.L. c. 90, § 20), and possession with intent to distribute a class B substance, subsequent offense (G.L. c. 94C, § 32A(b)).

ARGUMENT

1. THE SEIZED EVIDENCE MUST BE SUPPRESSED BECAUSE THE SEARCH OF MR. CUMBERBATCH’S VEHICLE WAS NOT LEGAL UNDER ANY EXCEPTIONS TO THE WARRANT REQUIREMENT OF THE UNITED STATES CONSTITUTION OR THE MASSACHUSETTS DECLARATION OF RIGHTS.

Searches and seizures conducted without a warrant are presumed to be unreasonable. *Commonwealth v. Antobenedetto*, 366 Mass. 51, 57 (1974). When a search and seizure is conducted without a warrant, the burden is on the Commonwealth to show that it falls within one of the warrant exceptions. *Id.* There are several well-established exceptions, such as; inventory searches of seized vehicles; searches incident to arrests; and observations and seizures under the “plain view” doctrine.

As set forth below, none of these exceptions apply here. It was not a legal motor vehicle inventory search, as the police did not take control of the vehicle, but rather surrendered it to the care of Mr. Williams. Hence, there was no need to inventory the contents of the vehicle. It was not a legal search incident to arrest, as Mr. Cumberbatch was in the custody of Officer Simmons at the time of the search. It was not a valid plain view observation and seizure, as Officer O’Malley only came to view the contraband while executing an illegal search.

Suppression is appropriate where, as here, there is a connection between unlawful police activity and the discovery of evidence. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *Commonwealth v. Crowe*, 21 Mass. App. Ct. 456, 463 (1986). The search of Mr. Cumberbatch’s vehicle was illegal, and all evidence seized must therefore be suppressed.

A. THE SEARCH OF MR. CUMBERBATCH’S VEHICLE WAS NOT A LEGAL INVENTORY SEARCH.

The purpose of an inventory search is to record the contents of a vehicle for the safekeeping of the owner, as well as to protect the police and those involved in moving the vehicle. *Commonwealth v. Matchett*, 386 Mass. 492, 510 (1982) (inventory search conducted as

matter of standard police procedure is not a mere pretext concealing investigatory police motive). An investigatory search conducted under the guise of an inventory search is invalid. *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976); *Commonwealth v. Woodman*, 11 Mass. App. Ct. 965, 965 (1981).

Article 14 of the Massachusetts Declaration of Rights requires that evidence seized during an inventory search that is not in compliance with written police procedures must be excluded. *Commonwealth v. Bishop*, 402 Mass. 449, 451 (1988); *Commonwealth v. Ellerbe*, 430 Mass. 769, 773-74 (2000). Rule 103, Section 31 of the Rules and Procedures of the Boston Police Department allows officers to leave a vehicle “with a person having apparent authority to assume control of it.” Boston Police Department, *Rules and Procedures, Rule 103, Section 31*, <http://bpdnews.com/rules-and-procedures/> (last visited Aug. 5, 2015). Section 32 allows an officer to conduct an inventory search when “an officer is securing a vehicle on the street” (i.e., leaving the vehicle locked on the street). *Id.* at *Rule 103, Section 32*.

Here, Officer O’Malley was not securing the vehicle. Officer O’Malley knew that Mr. Williams had authority to assume control of the vehicle, as he heard Mr. Cumberbatch ask Mr. Williams to take control of the vehicle before he began the search. Additionally, after the vehicle was searched, it was not impounded but was in fact turned over to Mr. Williams. Thus, Officer O’Malley had no justification to conduct the “inventory” search and the search was not in compliance with written procedures. The evidence seized must therefore be suppressed. *Commonwealth v. Bishop*, 402 Mass. 449, 451 (1988).

B. THE SEARCH OF MR. CUMBERBATCH’S VEHICLE WAS NOT A LEGAL SEARCH INCIDENT TO ARREST.

In 1974, the Massachusetts legislature adopted G.L. c. 276, § 1 in response to *United States v. Robinson*, 414 U.S. 218 (1973). The Supreme Court’s decision in *Robinson* upheld the

admissibility of contraband found on a defendant during a search incident to arrest for an unrelated crime. 414 U.S. at 224 (1973). Massachusetts statutory and common law is clear about the purpose of a search incident to arrest, and the inadmissibility of evidence seized as a result of an invalid search incident to arrest:

“Mass. Gen. Laws ch. 276, § 1, provides, in part, that a search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband, and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.”

Commonwealth v. Toole, 389 Mass. 159, 159 (1983). Because a search incident to arrest is conducted for these specific purposes, the search must be limited to the area into which the arrestee might physically reach. *Commonwealth v. Cavanaugh*, 366 Mass. 277, 280 (1974) (citing G.L. c. 276, § 1).

According to Officer O’Malley’s incident report, the search was executed *after* Mr. Cumberbatch was handed over to the custody of Officer Simmons (and after Mr. Cumberbatch had expressed that Mr. Williams had authority to take control of the vehicle). This was not a valid search incident to arrest, as G.L. c. 276, § 1 makes clear. Where police have no reason to believe that there is contraband in a vehicle, they have no probable cause or exigent circumstances to justify a search. *Commonwealth v. Toole*, 389 Mass. 159, 163 (1983). The search was not executed to seize “fruits, instrumentalities, contraband, and other evidence of the crime for which the arrest [had] been made” – driving an uninspected vehicle without a license – and Officer O’Malley had no reason to believe that there was a weapon in the vehicle. *Id.* at 159.

Additionally, at the time that Officer O’Malley searched the vehicle, Mr. Cumberbatch was already removed from the vehicle, seized, and in the control of Officer Simmons. Therefore, even if Officer O’Malley had reason to believe that there was a weapon in the vehicle, Mr.

Cumberbatch would not have been able to access it, making the search illegal, and any evidence seized subject to suppression. *Id.* at 162-63 (where defendant was arrested for outstanding warrant for assault and battery, search of vehicle was improper as defendant was handcuffed, unable to access any weapons, and no evidence of the crime would have been found in vehicle); *Commonwealth v. Rose*, 25 Mass. App. Ct. 905, 905 (1987) (where defendant was arrested for drunk driving, search of tote bag found in rear seat after driver was arrested was improper as driver was handcuffed in cruiser, unable to access weapons, and intoxicating liquors which are being consumed are not usually stored in such bags).

Additionally, Officer O'Malley was not justified in searching the vehicle for evidence of drug crimes; nothing in his report indicates probable cause to believe that a drug crime had occurred (such as the smell of marijuana, any indication that Mr. Cumberbatch was under the influence of controlled substances, or that Mr. Cumberbatch fit the description of a person involved in a drug transaction witnessed by police or informants).

C. THE PLAIN VIEW DOCTRINE DOES NOT APPLY TO THE ILLEGAL SEARCH OF MR. CUMBERBATCH'S VEHICLE.

An observation of an item in plain view is not a search, but the seizure of an item in plain view implicates the Fourth Amendment. *Commonwealth v. Figueroa*, 412 Mass. 745, 749 n.6 (1992). "Under the 'plain view doctrine,' if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Commonwealth v. Santana*, 420 Mass. 205, 211 (1995).

The plain view doctrine requires that police have a valid prior justification for the intrusion in the course of which they inadvertently come across the evidence. *Commonwealth v. Balicki*, 436 Mass. 1, 8-10 (2002). (Again, Massachusetts law offers a higher level of protection

than federal law. The Supreme Court rejected the “inadvertence” requirement for plain view searches in *Horton v. California*, 496 U.S. 128, 130 (1990), but the Supreme Judicial Court retained this requirement in *Balicki*.)

“The police are lawfully in a position from which they view an object if they did not violate the Fourth Amendment to the United States Constitution in arriving there.”

Commonwealth v. D'Amour, 428 Mass. 725, 731 (1999). Thus, this “position” is not merely a physical location, but also a legal “position,” as is illustrated by *Commonwealth v. Knowles*, 451 Mass. 91 (2008).

In *Knowles*, an officer responded to a complaint about a man swinging a baseball bat on the street. 451 Mass. at 92. Arriving at the scene, the officer observed Knowles place a bat against a telephone poll and then lean into the open trunk of a vehicle parked on the street. *Id.* Knowles turned around, saw the officer approaching, removed “something” from his pocket and tossed it into the open trunk. *Id.* The officer ordered Knowles to stop, step away from the vehicle, and walk towards the officers with his hands out of his pockets. *Id.* Knowles complied. *Id.* Other officers arrived at the scene. *Id.* Officers ascertained Knowles’ identity. *Id.* The first officer then left Knowles in the care of the other officers and “inspect[ed] the open trunk to determine what Knowles had thrown inside ‘to make sure it wasn't a weapon.’” *Id.* The officer found pills and heroin, and Knowles was arrested. *Id.* The court concluded that the plain view doctrine did not apply because the seizure of Knowles, which was “in violation of the protections against unreasonable searches and seizures embodied in the Fourth Amendment and art. 14 ... preceded and facilitated the officer’s investigation of the contents of the trunk.” *Id.* at 100. The defendant’s motion to suppress was allowed. *Id.*

The officer in *Knowles* had a right to be there on the street, the trunk was open, and the contraband was visible, in plain view, to anyone who happened to look. If the officer had not seized Knowles, but had instead happened to walk by an open trunk on the street, glance inside, and observe contraband, the seizure of the contraband would have been upheld under the plain view doctrine. *See Commonwealth v. Sergienko*, 399 Mass. 291 (1987) (denying a motion to suppress because there was no intrusion and no expectation of privacy where an officer, without cause, looked inside a parked car and observed through the window, in plain view, a roach clip and marijuana cigarette). However, the unjustified seizure of Knowles preceded and facilitated the plain view observation of the contraband, requiring the court to find that the plain view doctrine did not apply.

Likewise, Officer O'Malley is within his rights to look through the passenger side rear window of a vehicle. If Officer O'Malley had not seized Mr. Cumberbatch and ordered him to exit the vehicle to conduct the illegal search, but had instead walked by a vehicle, peered through a window, and observed an 8-ball on the floor, this court would be justified in upholding the seizure under the plain view doctrine and denying this motion to suppress. However, Officer O'Malley observed the contraband during the course of an illegal search.

Where, as here and in *Knowles*, the plain view observation is “preceded and facilitated” by a “violation of the protections against unreasonable searches and seizures embodied in the Fourth Amendment and art. 14,” the plain view doctrine does not apply and the evidence must be suppressed. *Id. See also Commonwealth v. Helme*, 399 Mass. 298, 302 (1987) (motion to suppress allowed after plain view observation of cocaine following unjustified threshold inquiry where arresting officer had not observed suspicious conduct indicating criminal activity, such

that there was no “prior police justification for an intrusion in the course of which an officer inadvertently comes across incriminating evidence”).

According to Officer O’Malley’s report, he began the illegal search of the vehicle in the front compartment. After completing this portion of the search, Officer O’Malley continued the search when he walked to the rear passenger-side door and observed, through the window, the contraband on the floor of the back seat compartment. Officer O’Malley’s observation of the contraband was therefore “preceded and facilitated” by the illegal search.

As explained above, this search was not a valid inventory of the vehicle. This search was a violation of the Fourth Amendment and Article 14 as soon as it began. The observation of the contraband was therefore not made from a lawful position, and the evidence must be suppressed. Whereas the officer in *Sergienko* was within his legal rights to peer through the window of a car in a public parking lot, Officer O’Malley’s conduct was tainted by the illegal search, much like the observation of the contraband in *Knowles* and *Helme*.

There was no justification to search Mr. Cumberbatch’s vehicle. Officer O’Malley should have instead arrested or cited Mr. Cumberbatch for operating an uninspected vehicle with a suspended license. The vehicle should have then been turned over to Mr. Williams, in accordance with Boston Police Department policy. Had this happened, Officer O’Malley would not have discovered the contraband. The seizure did not arise from a valid warrant exception, and the evidence must be suppressed.

2. MR. CUMBERBATCH’S STATEMENTS, CASH, AND CELLULAR PHONE MUST BE SUPPRESSED AS FRUIT OF THE POISONOUS TREE.

Under the “fruit of the poisonous tree” doctrine, the exclusionary rule applies to evidence that is seized derivative to the constitutional violation, as well as to evidence seized as a direct result of the violation. *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); *Commonwealth*

v. Damiano, 444 Mass. 444, 453-54 (2005). The doctrine applies to physical evidence as well as to statements. *See Commonwealth v. Hill*, 51 Mass.App.Ct. 598 (2001) (suppression of \$400 cash, crack cocaine, and a pager as fruit of the poisonous tree); *Commonwealth v. DiMarzio*, 436 Mass. 1012, 1012 (2002) (suppression of statements used to locate marijuana as fruit of the poisonous tree).

Because the seizure of the contraband was the direct result of the illegal search of Mr. Cumberbatch's vehicle, Mr. Cumberbatch's alleged statements about the source of the cash, the cash itself, and his cellular phone were derivative of the illegal search and arrest. If the police had not illegally searched Mr. Cumberbatch's vehicle, he would have likely been issued a citation for the vehicle violations; Mr. Cumberbatch would have had no reason or occasion to make the alleged statements, and the police would have had no reason or occasion to seize the cash or phone. Therefore, the statements, the cash, and the phone must be suppressed as fruit of the poisonous tree.

CONCLUSION

For the reasons stated above, because the evidence obtained are fruits of the violation of the defendant's Fourth Amendment and Article 14 rights, the defendant's motion to suppress should be allowed. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); *Commonwealth v. Crowe*, 21 Mass. App. Ct. 456, 463 (1986).

Respectfully submitted,
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