COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, CHELSEA DISTRICT COURT
DOCKET No: 1914AC000543

REVERE POLICE DEP'T)
Complainant)
)
v.)
JXXX RXXXX--OXXXXX,)
Defendant)

DEFENDANT'S HEARING MEMORANDUM

The Defendant respectfully submits the instant memorandum for the Honorable Magistrate's consideration with respect to the above—numbered complaint application.

HEARING STANDARD

A complaint application must "provide probable cause as to each element of the crime(s) charged." Commonwealth v. Leonard, 90 Mass. App. Ct. 187, 190 (2016) (emphasis added). This standard is "identical" to the standard which governs the sufficiency of an indictment. I d. , citing Commonwealth v. Ilya I., 470 Mass. 625, 627 (2015). For example, in Commonwealth v. Garvey, 477 Mass. 59 (2017) the SJC ordered a habitual offender indictment dismissed because the Commonwealth presented no evidence that the defendant's "prior convictions stemmed from separate criminal episodes" which was "an essential element of the habitual offender statute. " Id., at 68.

COUNT 1: (Operating After Suspension)

According to Mass. Model Jury Instruction 5.200 (Attachment A) this charge requires evidence of the following elements:

> ELEMENT 1: That the defendant operated a motor vehicle;
>
> ELEMENT 2: That at the time the defendant was operating a motor vehicle his driver's license had been suspended; and

> ELEMENT 3: That the defendant had received notice that his license had been or was about to be suspended.

The complaint application contains no evidence on Element 3 — notice of suspension.

The complainant mentioned no notice mailed to the Defendant. The Defendant did not indicate knowledge of the suspension, because he did not know anything about it.

The complainant in this case is a reserve police officer with Revere. The allegations stem from his misunderstanding of the law regarding license suspensions and misinterpretation of the driving record.

In his report, the complainant set forth his belief that, because the defendant was convicted of a second OUI on November 2, 2018, his license was suspended for at least two years, because that is the minimum suspension allowed by law. This is incorrect. A so—called "Cahill" disposition allows for 2nd offenders to receive a 45—day loss of license. Commonwealth v. Cahill, 442 Mass. 127 (2004). This is exactly what occurred here as reflected by the Defendant's driver history (attachment B), criminal docket 1850CR00083 (attachment C), and the tender of plea form (attachment D).

The complainant also claims that the Defendant "was given a lifetime suspension" on November 2, 2018. This is simply incorrect. The Defendant's license was never suspended for life. See attachment B.

The complainant makes clear in his report that he does not actually know what is going on with the Defendant's license. His confusion is the opposite of probable cause.

The complainant notes in his report that the Defendant's vehicle was equipped with an interlock device. However, he concedes that he "could not figure out" how he had an interlock device if, in fact, his license was suspended.

The Defendant' s driving record shows that the Defendant's license was in—fact suspended as of August 8, 2019 -- one day before the instant stop.

However, the complaint application presented no information that the Defendant was aware of that suspension. In fact, it is unlikely that he was, given that the suspension went into effect just the day before.

Because the application presented no evidence of notice, the Court must deny the complaint. See also Commonwealth v. Bailey, 95 Mass. App. Ct. 1122 (2017) (memorandum and order pursuant to Rule 1:28) (attachment E) (trespass complaint was dismissed where application did not establish notice of trespass).

COUNT 2: OAS after OUI

In addition to all of the elements required in Count 1, Count 2 requires the complaint application to establish the following, additional element:

> ELEMENT FOUR: That the defendant's right to operate was suspended pursuant to a violation of § 24(a), § 24D, § 24E, § 24G, § 24L, or § 24N of G.L. Chapter 90. See attachment A.

The complaint application fails to establish this element. This is because the Defendant's suspension was not for an OUI offense. The OUI suspension was cleared up on March 21, 2019. See attachment B. The suspension was for an alleged interlock violation, which, as stated, commenced on August 8, 2019. Count 2 is erroneously charged and must be denied.

COUNT 3: Operation Without an Interlock Device

According to Mass. Model Jury Instruction 5. 520 (Attachment F), Count 3 requires evidence of the following elements:

> ELEMENT 1: That the defendant operated a motor vehicle;
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> ELEMENT 2: That he did so on a public way;
>
> ELEMENT 3: That the motor vehicle driven by the defendant was not equipped with a certified functioning ignition interlock device; and

> ELEMENT 4: That his license to operate was restricted to operating only vehicles with such a device.

The complaint application fails to allege any facts to establish probable cause of Elements 3 and 4.

Regarding Element 3, the complainant failed to allege that the Defendant's vehicle lacked a functioning ignition interlock device.

The complainant conceded that he observed an interlock device in the Defendant's car. His issue was only that "the screen was blank and [he] could see no sign that the device was turned on."

This statement reveals that the complainant had no idea how the device worked.

The Defendant's vehicle was equipped with a Massachusetts—RMV-certified Intoxalock brand Interlock device, installed by a state—approved vendor. See Attachment G (RMV approved interlock vendor list), Attachment H (Intoxalock lease agreement), Attachment I (Intoxalock fact sheet). The machine was connected to the car and the complainant does not allege otherwise. If the interlock device is connected to the car, the car cannot start unless the driver submits a valid sample. Id. Despite his concern that the device was not "turned on, " there is no on/off switch on the device. Id. The interlock device has an LED display, which only comes on when the driver is directed to blow in the device. Id. The screen then indicates "pass" or "fail," then goes blank. Id.

Stated bluntly, the only problem with the interlock device is that the officer did not understand how it worked. His failure to understand the functioning of the interlock device does not amount to probable cause.

Regarding Element 4, the complainant failed to allege that the Defendant's license was restricted to operating with an interlock device. Again, he alleged the opposite - that based on his assumptions, the Defendant's license had been revoked for life. An individual with a revoked license cannot, as a matter of law, commit the offense of operating in violation of an

interlock restriction. Commonwealth v. Pettit, 83 Mass. App. Ct. 401 (2013). Stated differently, a license simply cannot be both restricted and revoked at the same time." Id. at 404. .

Count 4: Tampering with an Interlock Device

To establish probable cause of this offense, the complaint application must allege:

> ELEMENT 1: That a vehicle was equipped with an ignition interlock device;
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> ELEMENT 2: That the device was certified;
>
> ELEMENT 3: That the defendant intentionally interfered with or tampered with the device; and
>
> ELEMENT 4: That the defendant did so with the intent to disable the device.
>
> See Mass. Model Jury Instruction 5.530 (Attachment J).

Here, the complainant failed to allege facts establishing probable cause of Element 3 or 4.

The officer alleged only that the screen on the device was off. As discussed above, the officer misunderstood how the interlock device functioned and somehow jumped to the conclusion that it was disabled.

Setting aside the officer's baseless statement that the fully functional interlock device was not working, the officer presented no information that anyone tampered it. This is because nobody tampered with the device. It was working fine.

Again - the complainant's obvious lack of familiarity with the device is the only reason he believed the device was tampered with. The complaint must be denied.

THE DEFENDANT'S VERSION OF EVENTS

The Defendant was convicted of OUI for the first time on December 5, 2003, in the New Bedford District Court. See 0333CR007480, Attachment K. The Defendant was convicted of a second offense OUI in Malden fifteen years later, on November 2, 2018. See 1850CROC083, Attachment C. The Court granted a second—chance first offender disposition on the 2018 case. Attachment C, D. His license was suspended for 45 days.

When the Defendant went to get his license reinstated, he learned that he had to get an interlock device on his car. The device lease cost a lot of money, and the Defendant could barely pay for it. As a matter of fact, the truck he drove in the instant case was repossessed (interlock device and all) in the middle of the night because he could not finish his payments.

The Defendant brought his truck to get the tires changed at Pride Chevrolet on July 23, 2019. See Attachment L. It seems that the service technicians left the truck running and the interlock device requested running samples, which the technician ignored. This triggered an interlock violation. See driving record, Attachment B. Pride Chevrolet tried to explain what happened to the interlock company. However, unknown to the Defendant, the RMV suspended the Defendant's license as a result, effective August 8, 2019.

The suspension went into effect one day before the stop. The Defendant did not know.

On August 9, 2019, the day of this incident, the Defendant and his family piled in the car to go home from church. The Defendant blew into the machine, which registered a 0.0 BAC. The machine let him drive the car. A short time later, the Defendant got pulled over and charged with the instant offense.

Stated simply, the reserve officer is charging the Defendant with two felonies and two misdemeanors which he did not commit. The complainant charged these offenses not because he had probable cause to support each element of the charged offenses, but because he did not understand the law and the facts.

The Defendant is now taking the train wherever he goes until the situation is cleared up.

CONCLUSION

For the reasons stated above, the Defendant respectfully requests that the complaint application be denied.

Respectfully submitted,
/ s/ Murat Erkan
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