

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET NO. 1801CR5009

COMMONWEALTH)
)
v.)
)
BXXXXXX BXXXXXX,)
 Defendant)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO
COMMONWEALTH v. DIBENNADETTO

FACTS

The Defendant faces charges of leaving the scene of an accident causing personal injury and refusing to identify himself to a police officer while operating a motor vehicle.

The charges issued after a clerk magistrate found probable cause at a hearing on October 26, 2018, at which Boston Police Officer Katherine Shea testified. See Affidavit of Attorney Christopher Basso. Officer Shea had no personal knowledge of the events leading to the instant charges, and instead, her testimony was based on the statements of other police officers who had responded to the scene. Id.

Officer Shea testified that the instant charges arose from an incident which occurred on Prince Street in Boston's North End, near the intersection of Prince Street and Hanover Street. She testified that Prince Street is a narrow, one-lane road with on-street parking on the right side. This incident occurred at around 9:00 p.m. on a Saturday night, a time during which heavy pedestrian and vehicle traffic occurs due to the many restaurants and bars in the Hanover Street area of the North End. Id.

Officer Shea testified that Sgt. Moy told her that he had spoken with "pedestrians" who flagged him down and claimed that a bicyclist had been hit by a taxi. Police did not note the identities of the "pedestrians." Id.

Sgt. Moy saw the Defendant's taxi move forward in traffic and then stop, as traffic had backed up approaching the stop sign at the intersection at Hanover Street. Sgt. Moy knocked on the Defendant's window, asked him for his license and registration, and asked him to pull over. Consequently, the Defendant's car began to move. Sgt. Moy knocked on the Defendant's window again, and again requested the Defendant's license and registration. The Defendant did not immediately comply, but upon further request provided both his license and registration. Then he pulled his car onto the sidewalk. Id.

The Defendant also testified. Id. He stated that, while stopped in the line of traffic approaching the stop sign at the intersection of Hanover Street, he saw the bicyclist approaching in his rearview mirror. The bicyclist was attempting to navigate the narrow strip of road between the line of traffic and the cars parked on the side of the street when he lost control of his bicycle and fell off, next to the Defendant's car. The bicyclist got up, picked up his bicycle, and walked back in the direction from which he came. ID.

When the traffic ahead of him moved forward, the Defendant moved his car forward and then stopped again. While waiting to inch forward again, an officer knocked on the Defendant's window, then instructed him to pull over and provide his license and registration. Confused, the Defendant asked what was going on. The officer again asked him for license and registration and instructed him to pull over. The Defendant began to pull over when the officer again knocked on his car and indicated that he preferred that the Defendant provide his license and registration prior to pulling over. The Defendant provided his license and registration, and then pulled his car onto the sidewalk as instructed. Id.

The clerk magistrate found probable cause and issued a complaint. Id. The clerk magistrate did not record the hearing, and did not memorialize in writing the facts upon which probable cause was based. Id.; See Application for Criminal Complaint, attached.

ARGUMENT

1. The clerk magistrate failed to memorialize the facts upon which the complaint is based.

Mass. R. Crim. P. 3(g) requires that a complainant's account of facts supporting probable cause "shall be either reduced to writing or recorded." This requirement applies to "all cases," including complaints based on testimony at a clerk magistrate's hearing. Mass. R. Crim. P. 3, Reporter's Note subdivision (g).

A defendant "may seek to dismiss [a] complaint if . . . the magistrate failed to comply with the rule's directive to preserve an adequate record of the facts underlying the probable cause finding." Standards of Judicial Practice - The Complaint Procedure, Commentary to § 4:00.

Here, the clerk magistrate received Officer Shea's oral testimony in support of the complaint. Her testimony was not recorded. The clerk magistrate did not reduce her testimony to writing or otherwise memorialize the facts forming the basis for probable cause.

The requirement that the basis for charges be recorded serves two purposes. First, "a record of the facts presented to the court will protect the integrity of the complaint process. Mass. R. Crim. P. 3, Reporter's Note subdivision (g). Second, "the existence of a record will facilitate judicial review" where a defendant seeks to challenge probable cause. Id.

Here, the Defendant seeks to challenge the magistrate's finding of probable cause. Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002) ("After the issuance of a complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate[.]") However, where no record of the evidence presented to the clerk magistrate exists, the Defendant lacks a meaningful opportunity to raise such a challenge. Consequently, the instant complaint must be dismissed. Standards of Judicial Practice - The Complaint Procedure, Commentary to § 4:00.

2. The evidence presented to the clerk magistrate did not establish probable cause.

If the Commonwealth fails to present a clerk magistrate evidence sufficient to establish probable cause to support a complaint, the complaint must be dismissed. DiBennadetto, supra. Here, the evidence presented at the hearing failed to establish probable cause of either offense.

A. Leaving the scene of an accident causing personal injury.

The clerk magistrate heard no evidence that the Defendant left the scene of an accident, and moreover, heard no reliable evidence that the Defendant collided with, or otherwise caused injury to, the alleged victim.

No police officers had personal knowledge that the Defendant collided with the bicyclist. The only evidence that a collision occurred came from Officer Shea's testimony of Sgt. Moy's statement that unidentified "pedestrians" claimed that an accident occurred.

Although nothing prohibits a complaint from issuing based on a hearsay statement, that hearsay must be reliable, which the instant hearsay is not.

An officer appearing at the magistrate's hearing need not have personal knowledge of the events forming the basis for the complaint. However, Officer Shea offered no testimony that anyone had personal knowledge of a collision, including the unidentified "pedestrians." Although Officer Shea testified that the "pedestrians" claimed to Sgt. Moy that an accident occurred, no evidence indicated the source of the "pedestrians'" knowledge. Did they personally witness the accident? Did they overhear someone else state that an accident occurred? Did they see the bicyclist fall and simply assume that an accident occurred? Based on the evidence presented to the magistrate, any of the above scenarios are possible.

Moreover, Officer Shea offered no testimony regarding observations of physical evidence indicating that the Defendant collided with, or otherwise caused injury to, the cyclist, rather than the cyclist simply falling off his bike. Officer Shea testified that police observed no indication on the Defendant's car that an accident occurred - no scratches, no dents, no rubber transfer from the bike's tire.

Where the basis of the "pedestrians'" knowledge remains unclear, and where no physical evidence shows that a collision occurred, Officer Shea's testimony failed to establish probable cause that the Defendant collided with, or otherwise caused injury to, the alleged victim.

Even assuming that a collision did occur, the clerk magistrate heard no evidence that the Defendant left the scene. Instead, the evidence indicated only that police encountered the Defendant mere feet from where the accident allegedly occurred.

In fact, the evidence indicated that the Defendant was physically unable to leave the scene, as both Officer Shea and the Defendant testified that traffic had backed up from the stop sign at the intersection of Hanover Street. Officer Shea agreed that Prince Street is a narrow, one-way street with cars parked along the curb. Thus, the Defendant remained stopped in traffic, inching forward slightly each time traffic in front of him began to move.

Where police encountered the Defendant stationary in traffic, mere feet from where the alleged accident occurred, the evidence failed to establish probable cause that the Defendant left the scene of an accident.

B. Refusal to provide a license upon demand while operating a motor vehicle.

The clerk magistrate heard no evidence indicating that the Defendant refused to provide his license to police. To the contrary, the evidence indicated that the Defendant in fact provided his license to police.

At most, the evidence showed that the Defendant did not provide his license upon Sgt. Moy's first request. But upon further request the Defendant provided his license. Thus, at most, the evidence showed that the Defendant delayed prior to producing his license, but in fact produced it mere moments after Sgt. Moy requested it.

Momentary delay does not constitute refusal. Where the Defendant did, in fact, provide his license mere moments after

Sgt. Moy requested it, the evidence does not support probable cause that the Defendant refused to provide his license.

CONCLUSION

For the reasons stated above, the Defendant respectfully asks that this Honorable Court allow his motion.

Respectfully submitted,
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By and through his attorney,
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