COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS.

Trial Court of the Commonwealth
District Court Department
Westfield Division
Complaint No. 0144 CR 01373

COMMONWEALTH OF MASSACHUSETTS

v.

DAVID CARKHUFF

Memorandum of Decision

INTRODUCTION

The defendant, charged with operating a motor vehicle while under the influence of alcohol, filed a motion to suppress all evidence discovered as a consequence of his motor vehicle being stopped by a Massachusetts state police trooper. The defendant was represented at the hearing by Attorney Ryan E. Alekman. The Commonwealth was represented by Assistant District Attorney Eileen M. Sears. There was a single witness at the hearing, Trooper Richard S. Gawron, Jr. After the hearing the parties were given until January 10, 2002 to file memoranda of law in support of their positions. Attorney William C. Newman, of counsel, joined in the defendant's memorandum and supplemental memorandum on behalf of the American Civil Liberties Union of Massachusetts.

FINDINGS OF FACT

Richard S. Gawron, Jr. is a Massachusetts State Police trooper assigned to the Russell barracks. He has served as a trooper for eight years. Previous to that he served as a member of the Amherst Police Department for five years. Prior to his current assignment, Trooper Gawron served with the Hampden County CPAC (Crime Prevention and Control) Unit attached to the Hampden County District Attorney's Office.

On October 15, 2001, Trooper Gawron was assigned to work his regular shift beginning at 3:00 P.M. He then began a second shift which was to run until 7:00 A.M. the next day. Trooper Gawron assigned specifically assigned to guard the Cobble Mountain Reservoir which lies in Blanford and Randolph, Massachusetts. The reservoir supplies fresh water to several localities including the City of Springfield. The water is pumped from pumping stations located at the reservoir. The reservoir includes a dam which prevents the water in the reservoir from flooding local areas including parts of the City of Westfield.

On October 15, the state police were on their highest level alert because of a written notice received one or two days earlier from the new United States Office of Director of Homeland Security. That notice -- received both by teletype and facsimile – warned law enforcement agencies of the existence of a “credible threat” of an impending attack on the

United States. No specific target was identified.[1]

In response, the state police decided to heighten security for the Cobble Mountain Reservoir out of concern that the public safety and welfare could be compromised if an attack was mounted on the pumping station, if the water was contaminated, or if the structural integrity of the dam was compromised. A public road largely encircles the reservoir which lies in a very rural area. The road is a lightly used public way divided into marked lanes and just wide enough for two cars to pass while traveling in opposite directions. At the sides of the road are signs warning passers by that one is not permitted to stop one's vehicle nor trespass on the reservoir property. The road lies right at the edge of the reservoir. It connects to other public ways at either end. There are houses located near the road and the reservoir.

To address security concerns, Sgt. Kenneth Eithier, who did not testify at the hearing, ordered that officers protecting the reservoir stop all pedestrians and vehicles. Officers were under orders to inquire of anyone stopped as to their reason for traveling near the reservoir, and to examine the contents of all box trucks and tankers passing by. The order required that locked compartments be forced open if necessary to facilitate an inspection.

[1]The warning was issued just over a month following the September 11 destruction of the World Trade Center in New York City and the subsequent intentional dissemination of anthrax spores through the United States Postal Service.

Just before 2:00 A.M. on October 15, Trooper Gawron was in his marked cruiser in the area of the dam. A second officer was stationed about a quarter mile away closer to the pump house. When Trooper Gawron saw a car approaching from about 300 feet away, he turned on his blue overhead emergency lights. When the car approached to a distance of about 200 feet, Trooper Gawron put up his hand for the driver to stop. The car – a sedan – stopped at a distance of about 100 feet and Gawron gestured for the driver to pull closer. The vehicle accelerated quickly toward him and began to pass him at which time he yelled for the driver to stop. The car stopped a couple of feet past Trooper Gawron who approached the driver and asked what he was doing in the area. Their conversation led to the discovery of clues which ultimately resulted in the driver's arrest for operating a motor vehicle under the influence of intoxicating liquor.

Trooper Gawron stopped the defendant pursuant to Sgt. Eithier's order. There was no evidence of any malicious attacks on area reservoirs or public facilities, nor any threats specific to the Western Massachusetts area.

RULINGS OF LAW

The Commonwealth concedes that Trooper Gawron's warrantless stop of the defendant's vehicle constituted a seizure. "A seizure occurs under the Fourth Amendment and art. 14 whenever a motor vehicle is stopped by an agent of

government. *Commonwealth v. Rodriguez,* 430 Mass. 577, 579 (2000). See *Commonwealth v. Medeiros*, Mass. App. Ct. 240 (1998). The seizure was not justified by a reasonable suspicion based upon specific, articulable facts that the defendant might be committing or be about to commit a crime.[2] The Commonwealth asserts, however, that the seizure was reasonable because of evidence of "a credible, although non-descript, threat to public safety" which created exigent circumstances.

When the government seeks to circumvent the constitutional requirement of a warrant, it frequently asserts as justification the co-existence of exigent circumstances and probable cause.

> Generally, searches and seizures must be conducted pursuant to a warrant based on probable cause. See Fourth Amendment to the United States Constitution; art. 14 of the Declaration of Rights of the Massachusetts Constitution. Where obtaining a warrant is not practical, searches and seizures may be proper if probable cause or reasonable suspicion exists. [citations omitted]

Commonwealth v. Rodriguez, 430 Mass. 577, 579 (2000). Here, however, the government relies solely on what it claims are exigent circumstances without any evidence establishing probable cause or even a reasonable suspicion that the

[2] The parties stipulated that Trooper Gawron was not acting pursuant to a "roadblock plan." It is clear that this roadblock did not meet the criteria established in *Commonwealth v. McGeoghegan,* 389 Mass. 137 (1983) and *Commonwealth v. Trumble,* 396 Mass. 81 (1985).

defendant was engaged in criminal activity. The Commonwealth would have the court carve a new "homeland security" exception to the warrant requirement of the Fourth Amendment and art. XIV. The security exception would allow police to make unannounced warrantless stops of all motor vehicles traveling near reservoirs and other important public facilities -- even in the absence of articulable facts creating a reasonable suspicion that a targeted vehicle or its occupants posed a threat to the public provided that the U.S. Office of Homeland Security had issued an alert that there existed a "credible threat against the United States."[3] Such an exception, the Commonwealth argues, would not contravene the constitutional prohibition against unreasonable searches and seizures.

In fact, recognition of such a broad "homeland security" exception would constitute a sea change in constitutional law. The evidentiary record is wholly inadequate to justify such an enormous change. Despite its decision to seek recognition of a broad, new exception to the warrant requirement, the Commonwealth failed to provide adequate evidentiary support to establish that the reported threat was indeed credible --

[3] The police posted no signs on the approach to the Reservoir warning motorists that they would be stopped or truckers that their locked compartments might be forced open and inspected. Without such signs, the Commonwealth is also precluded from arguing that the defendant consented to the seizure by entering upon this particular stretch of public road. See *Commonwealth v. Harris*, 383 Mass. 655 (1981) (announced courthouse searches are constitutional as they are voluntary and, like airport searches, of no surprise).

either generally or as it related specifically to either Western Massachusetts or the Cobble Mountain reservoir. There was no evidence as to the source of the information relief upon by the U.S Office of Homeland Security nor of the reliability of its source or sources. "Where hearsay is the basis of action by the police, they must have a substantial basis for crediting the hearsay." *Commonwealth v. Stevens*, 362 Mass. 24, 27 (1972). See also *Commonwealth v. Riggieri*, 53 Mass. App. Ct. 373 (2001). From the evidence adduced at the hearing, the Court concludes that Trooper Gawron had no basis for crediting the hearsay upon which the Commonwealth relies.

> Where an unnamed informant's tip is relied on by law enforcement officers as supplying probable cause to arrest and to search, art. 14 requires that the information pass muster under the two-pronged standard set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). That standard may be met in one of two ways. As a rule, the Commonwealth must demonstrate some of the underlying circumstances from which (a) the information gleaned his information (the "basis of knowledge" test), and (b) the law enforcement officials could have concluded the informant was credible or reliable (the "veracity" test). [citation omitted.]

Commonwealth v. Cast, 407 Mass. 891, 896 (1990). The Commonwealth demonstrated neither. No evidence was offered as to the informant's basis of knowledge or veracity.

> "[W]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' -- for example, searches now routine at airports and at entrances to courts and other official buildings...But where...public safety is not genuinely in jeopardy, the Fourth Amendment precludes

> the suspicionless search, no matter how conveniently arranged."

Commonwealth v. Rodriguez, 430 Mass. 577 at 580 (2000), quoting from *Chandler v. Miller*, 520 U.S. 305, 323 (1997). Here there was no evidence presented that the threat against the United States was "substantial and real." There was absolutely no evidence of a threat specifically to the Cobble Mountain reservoir or even to Western Massachusetts.

The Commonwealth refers to the warning from the U.S. Office of Homeland Security as "a credible, although non-descript, threat to public safety." Even were its assessment of the credibility of the warning accurate, the Commonwealth would bear the burden of showing that the seizure effected by Trooper Gawron was rationally related to the aim of protecting against the envisioned threat. There was, however, no evidence from which the Court might conclude that the protocol followed by Trooper Gawron in effecting the seizure of the defendant's sedan was rationally related to the aim of protecting the reservoir, its pumping stations, or its dam. Stopping a motor vehicle after it had already traveled unimpeded a distance along the edge of the open reservoir and engaging in a brief fact-to-face contact with the occupant provided no meaningful security to the reservoir or its dam. To secure these from attack would require stopping vehicles before they reached the area and thoroughly searching them for the presence of such things as chemicals and explosives. That

kind of search was not undertaken. There was no evidence presented that the limited intrusion effected here served the pressing public purpose put forward as its justification. Consequently, it cannot be said that the seizure of the defendant was a reasonable seizure arising out of the circumstances which the Commonwealth argues created the claimed legitimizing exigency.

The "homeland security" exception argued for by the Commonwealth would substantially gut the protections of both the Fourth Amendment and art. XIV if the government did not have to satisfy the basis of knowledge and veracity tests. The rationale supporting the seizure and search of a car near a reservoir today could with ease be extended tomorrow to homes and apartments situated near critical public facilities including hospitals, government offices, bridges, major roadways, water towers, and airfields. As a result, general warrantless searches could be authorized on a colossal scale without meaningful judicial review whenever police received notice of an unsubstantiated threat broadcast by the executive branch's Office of Homeland Security. Roadblocks set up in these circumstances should fare no better than roadblocks set up to interdict drugs. Both amount to general searches conducted without probable cause.

> Roadblocks established for the purpose of interdicting drugs and other contraband essentially give to the police the same powers with respect to individuals in their automobiles as the writs of assistance granted to the British officials with respect to individuals in their

> homes. Viewed in light of the Commonwealth's history, it is clear that the Holyoke roadblock is precisely the type of search that the drafters of art. 14 sought to prevent. Drug interdiction roadblocks stop citizens without probable cause or reasonable suspicion to look for evidence of criminal activity (in colonial times, untaxed goods). Such a search is precisely what James Otis and John Adams sought to prevent by art. 14.

Commonwealth v. Rodriguez, 430 Mass. 577, 586 (2000). This Court is not inclined to read into either the Fourth Amendment or art. XIV such an enormous retraction of the right to be free against unreasonable searches and seizures. The tragic and horrific events of September 11 did not topple the prohibition against unreasonable searches and seizures. Therefore, as previously ordered, the defendant's motion to suppress is allowed.

/s/ David W. Ross

David W. Ross
Associate Justice of the District Court

Entered: _____