

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPREME COURT

Patrick Lynch, Rhode Island Attorney General :
 :
 vs. :
 :
 City of Providence, Providence Police Dept. :

C.A. No. 02-715-A

Rhode Island Affiliate of the American Civil :
 Liberties Union :
 :
 vs. :
 :
 The Providence Police Dept. by and through :
 Dean Esserman, its Chief :

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO REMAND

The Appellee, Rhode Island Affiliate of the American Civil Liberties Union (RIACLU) hereby submits the following memorandum of law in support of its motion to remand this matter to the Superior Court, specifically to Mr. Justice Fortunato, in order that the RIACLU may move to adjudge the Appellant, The Providence Police Dept. by and through Dean Esserman its Chief (the Providence Police), in contempt of a court order entered by Judge Fortunato following a hearing before him on February 26, 2003.

BACKGROUND FACTS AND TRAVEL

This case has a long and tortured history. The underlying matter arises out of consolidated cases filed by the then-R.I. Attorney General, Sheldon Whitehouse, and by the RIACLU against the Providence Police. The consolidated case began in October 2001 when Steven Brown, Executive Director of the RIACLU sent a notice to the

Attorney General, the Providence Police and the Traffic Stops Study Advisory Committee relative to the low reporting of traffic stops by the Providence Police for the month of June 2001, and raised questions regarding the Providence Police's apparent non-compliance with the Traffic Stops Statistics Act (the Act). A lawsuit was filed by RIACLU on November 6, 2001.

As part of a consent agreement, the matter was monitored with the assistance of Presiding Justice Rodgers from November 2001 through August 2002, when he referred the matter to Judge Fortunato "to conduct a hearing on the Providence Police Department's failure to comply with the Rhode Island Traffic Stops Statistics Act, and with the terms of previous Orders entered by the Court in these actions." A true copy of the Court's Order dated August 27, 2002 is attached hereto as Exhibit A.

Following a lengthy evidentiary hearing before Judge Fortunato, on October 31, 2002, Providence Police was adjudged in civil contempt of previous court orders. A true copy of the Court's Order dated October 31, 2002 is attached hereto as Exhibit B.

Providence Police appealed to this Court.

This Court granted the parties relief whereby the matter was remanded to the Superior Court to permit a stay of the order from which the appeal was taken. A true copy of this Court's Amended Order dated February 14, 2003 is attached hereto as Exhibit C. The Superior Court, however, only retained jurisdiction of the case through September 15, 2003. *See* Exhibit C.

The Superior Court granted the stay through September 15, 2003 in order to allow the Providence Police to continue to collect racial profiling data through July 31, 2003 pursuant to a General Order of the Police Department. A true copy of the General Order

is attached hereto as Exhibit D. The General Order encompassed each of the requirements of the Court's previous orders relative to the case, including the contempt provisions in the order.¹ Following a hearing before Judge Fortunato on February 26, 2003, the motion was granted. However, as part of the order, the Court incorporated the General Order to ensure compliance and preserve the parties' rights to enforce the provisions with powers of contempt. A true copy of the Court's Order is attached hereto as Exhibit E.

Information has been filed with the court indicating that Providence Police is not in compliance with its General Order and the Order of the Court relative thereto. Thus, the RIACLU seeks an order of remand from this Court in order to proceed on a new motion to adjudge Providence Police in Contempt.

ARGUMENT

Obtaining information relative to Providence Police's compliance with its General Order (and the Orders of the Court and with the Act) has been difficult and slow. While Providence Police was adjudged in contempt in October 2002, information relative to the data collected in November 2002, one month after being adjudged in contempt, was not received until the end of March 2003. Indeed, counsel for the RIACLU inquired with the Attorney General's office in mid-March 2003 regarding the lack of timely data analysis and seeking information relative to Providence Police's compliance post-contempt. A true copy of correspondence dated March 13, 2003 is attached hereto as Exhibit F.

Information relative to Providence Police compliance for data collected in December

¹ The only provision not encompassed in the General Order was the award of reasonable attorney's fees and costs to the RIACLU. *See* Exhibit D.

2002 was not received until June 2003.² Only in September 2003 did RIACLU receive information relative to Providence Police compliance for data collected in May 2003.³ A true copy of the May 2003 Report is attached hereto as Exhibit G.

Data from May 2003 provides some truly troubling statistics which demonstrate poorer compliance than at any time since the Providence Police was held in contempt of court in October 2002. Of the six categories measured by Northeastern in the past six months of reports to help determine the level of the Providence Police Department's compliance with the Act and Order, the May figures were worse in four of the categories compared to October 2002; worse in five of the categories compared to November 2002; worse, or no better, in five of the categories compared to December 2002; worse in all six categories compared to January 2003; and worse in five categories compared to February 2003.

In response to this information, Steven Brown, the Executive Director of the RIACLU sent correspondence to Mayor David Cicilline (who is also the acting Commissioner of Public Safety and the person who instituted the General Order requiring compliance with the provisions of the previous court orders) inquiring as to the apparent decline in compliance. A true copy of the correspondence from Steven Brown to Mayor Cicilline is attached hereto as Exhibit H.

No response was received. On October 15, 2003, RIACLU received a report of the experts analyzing data and compliance for June 2003. A true copy of the Report of June 2003 is attached hereto as Exhibit I. As indicated in the report, using in-car videos

² The reports analyzing January 2003 and February 2003 data were not filed with the court (and the parties) until July 1, 2003 and August 5, 2003 respectively.

³ Data from March and April has never been analyzed in order that more current data could be examined. Notably, however, by the time more recent data was reviewed, the collection had ceased.

supplied by the Providence Police, the experts only observed 12 stops. As stated by the experts, “[t]he low number of observed stops is a concern. **It is not possible to derive any meaningful conclusions with this low number of observations.**” *See* Exhibit I (emphasis added). As concluded in the report, the low number of videotaped stops “raises questions about the Department’s compliance with the court order and the status of their video monitoring program.” *See id.*

As part of the General Order that is incorporated in the Court order, “[w]hen conducting a routine traffic stop, the officer shall activate the cruiser’s overhead lights, and if so equipped, the cruiser’s video camera. Both audio and video shall remain activated during the entire traffic stop.” *See* Exhibit D page 2 of 3. The experts inquired regarding the reduction in the number of recorded traffic stops during June 2003. In a letter to the experts dated September 12, 2003, Sergeant Gerald E. DeLomba indicates that a response “will be forthcoming soon.” *See* Exhibit I. To date, RIACLU has not been given any response to this inquiry.

Moreover, Sgt. DeLomba in this same communication with the experts apparently is transmitting videotaped data for July 2003.⁴ As part of the General Order (as incorporated into the court order), the Providence Police is required to “transmit all data, documents and video tapes at two week intervals.” *See* Exhibit D. Submitting data for July (and June) in September clearly violates this provision. The submission indicates clear noncompliance on Providence Police’s part. Only 23 of 31 videotapes in operation were submitted. Eight videotapes were not collected in time. *See* Exhibit I. Further, the

⁴ This communication also indicates that 8 of 31 operable videotapes for June were not submitted in a timely manner and were therefore not analyzed as part of the June 2003 report of the experts.

small number of observed stops raises the question that perhaps the Providence Police is assigning vehicles equipped with videotape capabilities to non-traffic patrols.

Videotaped observation has been a point of contention regarding compliance since the provision was instituted by the experts. It was believed to be critical to gauging compliance. In October 2002 (the month when contempt proceedings were occurring), the experts observed 86 stops from the videotaped data. A true copy of the October 2002 report is attached hereto as Exhibit J. Additionally, in that particular month, 1851 traffic stop statistics cards were collected. *See* Exhibit J. By contrast, in June 2003, only 12 stops could be observed and only 652 traffic stops statistics cards were collected. *See* Exhibit I.

This Court's prior order of remand allowed for the collection of traffic stop data through July 31, 2003. It was anticipated that this data would be analyzed on a monthly basis and would have been current by September 15, 2003 (although the final report regarding racial profiling would not have been completed until October 31, 2003).⁵ As delineated above, this did not occur. As of the filing of this motion, data analysis has been submitted for only four of the seven months for which extended data collection was to occur. The data that has been submitted thus far indicates that there are serious issues of contempt that necessitate a court hearing in the Superior Court.

⁵ The RIACLU is aware that the delay in submitting data analysis may have been caused by the enormous task the experts were undertaking with respect to the completion of a final report under the Act relative to racial profiling throughout the State. Despite the fact that the delays may not be attributable to any bad faith or motive, the need to remedy the apparent non-compliance remains paramount.

CONCLUSION

Because there are serious questions regarding Providence Police's compliance with the Superior Court ordered entered in this case that did not come to light until the matter had been transferred back to this Honorable Court, the RIACLU respectfully requests that this Court remand the matter back to the Superior Court, specifically to Judge Fortunato, so that appropriate relief may be sought.

Rhode Island Affiliate of the American
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CERTIFICATION

I hereby certify that on the ___ day of October, I mailed a true copy of the within to Gerald J. Coyne, Esq., Deputy Attorney General, 150 South Main St., Providence, RI 02903 and Raymond Dettore, Jr., Esq. and Bruce Todesco, Esq., Providence City Solicitor's Office, 275 Westminster St., Suite 200, Providence, RI 02903.