STATE OF RHODE ISLAND
PROVIDENCE, SC. SUPREME COURT

Patrick Lynch, Rhode Island Attorney General	:	
vs.	:	
City of Providence, Police Department	:	
	:	C.A. No. 02-715-A
Rhode Island Affiliate of the American Civil Liberties Union	:	
vs.	:	
The Providence Police Department by and through Dean Esserman, its Chief	:	

APPELLEE
RHODE ISLAND AFFILIATE OF THE
AMERICAN CIVIL LIBERTIES UNION'S
12(A) STATEMENT

INTRODUCTION

In response to statewide concerns regarding the practice of racial profiling, the Rhode Island General Assembly enacted the Rhode Island Traffic Stops Statistics Act, R.I. Gen. Laws § 31-21.1-1 *et seq*. (the "Act") requiring that the state police and each municipal police department report "information **for each traffic stop** conducted by the police." R.I. Gen. Laws § 31-21.1-4(a) (emphasis added). During the implementation of the Act, the litigation which is the subject of this appeal arose.

Specifically, the genesis of the underlying consolidated cases began in October 2001 when Steven Brown, Executive Director of the RIACLU sent a notice to the Attorney General and the Providence Police (and the Traffic Stop Study Advisory Committee) as required by the Act, R.I. Gen. Laws § 31-21.1-7. The notice called into question the low reporting of traffic

stops by the Providence Police for the month of June 2001 as reported by quarterly reports issued by Northeastern University's Center for Criminal Justice Policy Research (Northeastern) whom the Attorney General retained to conduct the analysis of the data as required by the Act, R.I. Gen. Laws § 31-21.1-5(f). After the first two quarterly reports were issued by Northeastern, the RI ACLU became alarmed at the disproportionately low number of traffic stops reported by the Providence Police Department. The third quarterly report disclosed numbers so low that the RI ACLU believed that intervention was necessary in order to gain compliance with the Act by Providence.

Indeed, as reported in the third quarterly report, in June 2001, the Providence Police reported only 116 traffic stops for the entire month. Despite being the largest department in the State, Providence Police reported fewer traffic stops than Little Compton, Tiverton, Hopkinton and North Smithfield. As the Act required, the RI ACLU waited fifteen (15) days following notice to the Attorney General before pursuing the litigation that is the subject of this appeal. The Attorney General, on the last day permitted by the Act's grace period, filed suit against the Providence Police challenging Providence's non-compliance with the Act. The only remedy sought by the Attorney General in his lawsuit against Providence for its non-compliance with the Act was the request for an Order requiring them to comply with the law. The Attorney General did not, in the RI ACLU's view, seek the "appropriate relief" that was necessary in this case and that an organization such as the RI ACLU is entitled to pursue according to R.I. Gen. Laws § 31-21.1-7.

Believing this remedy to be totally ineffectual in light of the circumstances leading up to the lawsuit, the RI ACLU continued with its plans to file suit, doing so at the earliest possible

date allowed by the Act. Initially, both the Attorney General and Providence challenged the RI ACLU's standing to file suit. Over the objections of Providence and the Attorney General, at a hearing held on November 15, 2001, the lower court consolidated the RI ACLU action with the Attorney General's action. A hearing was scheduled for November 20, 2001 on the RI ACLU's request for a TRO and the appointment of a Special Master. Prior to that hearing, however, the Attorney General moved for the assignment of the matter to a single judge for management purposes before Presiding Justice Rodgers.

As part of a consent order entered on the day of that hearing, the Providence Police subjected itself to a preliminary review into any and all facts regarding allegations of non-compliance by the Providence Police with the Act by Northeastern. The review conducted by Northeastern disclosed that the Providence Police had been in "**substantial noncompliance** with the terms of the Act since its initial implementation." Included among the requirements of a preliminary Order issued by Presiding Justice Rodgers, was a mandate that the Providence Police would "fully comply with the terms of the Rhode Island Traffic Stops Statistics Act, as set forth in Sections 31-21.1.-1 et seq." More importantly, the Order also set forth a number of prophylactic measures to not only ensure compliance with the Act, but to also enable Northeastern to confirm Providence Police's compliance with the Act. A series of Orders issued relative to the requirements of Providence Police.

By June 2002, Northeastern was reporting that the Providence Police "has yet to achieve full compliance with the Traffic Stop Statistics Act." The report went on to note that Providence Police's "compliance rate may in fact be decreasing." Additional measures were put into place with respect to Providence Police's compliance. Presiding Judge Rodgers was to review the

matter again in August. The report issued by Northeastern in August stated that Northeastern has "some concern that a smaller number of officers are intentionally or unintentionally failing to call in their stops, thus raising questions about the accuracy of the overall data used in the audit."

In response to this report, Presiding Judge Rodgers, in an Order dated August 27, 2002 referred the case back to the formal and special cause calendar "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."

Both the RIACLU and the Attorney General filed motions to adjudge Providence Police in contempt of the prior court orders. The matter was heard before Mr. Justice Fortunato on October 10, 21, 23 and 24, 2002. The court, following a full evidentiary hearing, found that the RI ACLU and the Attorney General had proven "by clear and convincing evidence" that the Providence Police were "not in substantial compliance with the Traffic Stops Statistics Act, and are in civil contempt for violations of this Court's previous Orders." Providence Police moved for a stay of the Court Order at the conclusion of the hearing on October 24, 2002, which the judge denied.

While Providence Police appealed the Court's decision to this Supreme Court, in a series of cooperative efforts amongst all parties, the appeal was held in abeyance and the matter was remanded to the Superior Court while the Providence Police instituted a General Order that comprised each requirement of the Court's Orders relative to continued data collection through July, 2003. Additionally, these requirements were incorporated into a Court Order.

The case was transferred back to this Supreme Court on September 15, 2003. This Court

denied the RI ACLU's request for a further remand and instituted scheduling on Providence's appeal. Providence filed its 12(A) Statement on December 16, 2003.

Perhaps the most striking aspect of Providence's position is that it does not challenge in whole or in part the lower court's finding of willful contempt. Instead, Providence seeks to absolve itself from liability by challenging the lower court's award of attorney's fees. It should also be noted that the award of attorney's fees is not a final order in that it has not been monetized and approved by the lower court. In an earlier Order of this Court, the award of attorney's fees was stayed.

STANDARD OF REVIEW

A sanction for contempt will not be overturned provided that it was reasonable and within the court's discretion. *Moran v. R.I. Brotherhood of Correctional Officers*, 506 A.2d 542, 544 (R.I. 1986). Here, the lower court's sanctions were both reasonable and within the court's discretion and should therefore be upheld.

ARGUMENT

A. The Lower Court's Award of Attorney's Fees Was Lawful and Justified in this Case.

Significantly, the Providence Police have not even attempted to challenge the lower court's finding of contempt. The Providence Police have all but admitted that they violated the Act and the court's orders. No argument has been put forth stating that the Providence Police did in fact comply with the Act and the court orders. There are no arguments by the Providence Police that the lower court erred in its findings of contemptuous behavior. Instead, the Providence Police set forth technical arguments to support their argument that they should not

have to pay monetarily for their contemptuous behavior.[1]

The technical argument raised in support of the merits of the Providence Police's appeal relates to the collateral issue of the standing of the RI ACLU to bring this action given the Attorney General's involvement in this lawsuit. This argument bears no weight on the merits of the Providence Police's contempt.

Interestingly, even were this Court to find that the RI ACLU had no standing to file the instant action, the Attorney General also filed the motion to adjudge in contempt and thus the order of the lower court finding the Providence Police actions to have been contemptuous would still stand. The Providence Police has never challenged the standing of the Attorney General and thus the contempt order would still exist.

1. The Act Provides that Organizations Such as the RI ACLU Have Standing in this Case.

The lower court correctly found that the RIACLU had standing. "Nothing here says that the commencement of an action by the Attorney General bars the – a civil liberty group such as the Civil Liberties Union or any other group that happens to have an interest in this, whether it is the NAACP or some other group that became involved from pursuing litigation solo, as they say, the condition precedent. This statute, in my view, shows a wise public policy decision on the

[1]This award of fees and costs is specifically permitted by R.I. Gen. Laws § 31-21.1-7. Moreover, it is a common remedy in a contempt proceeding.

part of the Legislature." Transcript, November 15, 2001, p. 11, ll. 7-15.[2]

In fact, the lower court correctly interpreted the statute. R.I. Gen. Laws § 31-2.1-7 does not prohibit organizations from filing suit if the Attorney General does so. The statute is clear and unambiguous and thus should be applied as written. This is precisely what the lower court did. Moreover, the Providence Police offer no case law or other legal authority to support their contention that the RI ACLU lacks standing.

The Act simply requires that two things be done by organizations such as the RI ACLU before filing suit. First, the organization must send written notice to the Attorney General of the non-compliance. The RI ACLU indisputably performed this before filing suit in this case. And second, it must wait fifteen (15) days to allow both the possibility of full compliance within that time frame by the police department, or the possibility of a suit by the Attorney General "to enforce compliance" with the Act. This was also accomplished in this case. There is absolutely no prohibition to suit in the event either occurs.

In fact, to accept the City's argument with respect to its interpretation of the Act would lead to an absurd result and render the remedies provided in R.I. Gen. Laws § 31-21.1-7 illusory. Under the City's scenario, if the Attorney General had filed suit but took no action on the suit, no other lawsuit could be filed. Similarly, with regard to the fifteen (15) day provision to allow for compliance, the only mechanism to determine if this has occurred would be through a lawsuit, thus demonstrating that this language was not intended to be a bar. Further, the City's interpretation would permit an obstreperous police department to "come into compliance" in

[2]Providence likewise does not challenge RI ACLU's standing as an organization dedicated to combating discrimination, racism and safeguarding civil liberties, as in its 12(A) Statement it declares the RI ACLU "has a well-established record of achievement." (See p. 5).

order to pretermit the filing of a lawsuit, and then lapse out of compliance until another notice is sent, causing the City's fitful non-compliance to be in a continuous cycle never capable of reaching judicial review. Clearly, this is not what the legislature intended. This is not the "appropriate relief" envisioned by R.I. Gen. Laws § 31-21.1-7.

The RI ACLU disagrees with the interpretation that the City has given to the last provision of the remedies section of the Act, R.I. Gen. Laws § 31-21.1-7. Providence argues that a suit by the Attorney General precludes the right of the RI ACLU, or any other similarly situated organization, to file its own suit regarding substantial non- compliance with the Act. Nothing in the Act indicates that to be the case. The fifteen (15) day grace period simply allows the Attorney General a period in which to decide if filing a suit under the auspices of that office would also be appropriate.

The RI ACLU submits that in the event full compliance did in fact occur or involvement by a non-profit such as the ACLU was unnecessary, standing would be unaffected; however, such a finding could justify a lower court in not awarding attorney's fees and costs to the organization or rejecting further remedies sought by such organizations. That, however, did not occur in the instant case. Here, full compliance did not occur even in the face of Court orders and the involvement of the RI was necessary to fulfill the legislature's mandate.

2. The RI ACLU provided Valuable Non-duplicative Legal Services in this Case.

The Attorney General filed a one page lawsuit seeking "a Preliminary and Permanent Injunction ordering both the City of Providence and the Providence Police Department to immediately and permanently comply with all terms and conditions of the Traffic Stops Statistics Act and all rules and regulations promulgated thereunder by the Department of the Attorney

General." See Attorney General Complaint. No other relief was sought. In fact by November 15, 2001, a full ten days after having filed his lawsuit, no action had taken place on the Attorney General's lawsuit at the time when the RI ACLU was seeking a Temporary Restraining Order and the Appointment of a Special Master. The Attorney General had not even served his complaint.

At the hearing on the RI ACLU's request for a TRO and the appointment of a Special Master, the matter was continued until November 20, 2001 at 11:00 a.m. The Attorney General changed courses and sought intervention from Presiding Judge Rodgers. On November 19, 2001, the parties agreed that "the Attorney General through their own staff and through their experts from Northeastern University, and the American Civil Liberties Union, collectively, [would] undertake an informal investigation in order to work with Providence and determine the best means of enforcing compliance with The Traffic Stops Statistics Act and that we report back to this Court on November 30th on our progress one way or the other, but with the intention of having a Consent Order before the Court." See Transcript, November 19, 2001 at p. 4, ll. 11-20.

After that investigation disclosed substantial non-compliance with the law on Providence's part, the parties again undertook a cooperative effort whereby "the American Civil Liberties Union, the Attorney General's office, the Providence Police Department, were making an effort to see if all parties could agree as to monitoring compliance with the law so that a full hearing was not required." See Transcript, November 30, 2001 at p. 2, ll. 10-15.

An Order entered on December 4, 2001 with respect to monitoring compliance. A report was presented to the Court on January 29, 2002. At that point the Attorney General was pleased with the progress. "I would say, relatively, the problem is minor compared to what they were

faced with in December; however, there has been some desire to modify some provisions of the Order just to ensure that it continues to move smoothly." See Transcript, January 29, 2002, p. 4, ll. 4-8.

It was the RI ACLU, however, that moved the case forward. "In fact, the ACLU does take a slightly different position that the Attorney General. We believe that while there is obviously some improvement, in compliance, it's either full compliance or not full compliance, and the Order required full compliance. . . . So, to say that we're, you know approaching, full compliance, I think is a bit of an understatement at this point. And I would think that some type of remedial measure is needed to get Providence into compliance with the Act. This is 36 percent of documented stops. I hate to think on the non-documented stops, what that amount is." See Transcript, January 29, 2002, p.4, ll.14 through p. 5, ll. 15.

Throughout the months that followed the RI ACLU worked with the Attorney General and the City in an effort for the Providence Police to comply with the law and the Court Orders monitoring compliance. The RI ACLU offered suggestions and took positions that sometimes complemented the Attorney General's efforts and at times conflicted with the Attorney General's positions. In June, 2002, the RI ACLU stated, "the ACLU is still very troubled by the reports that we have coming in that there does appear to be a continuing problem with compliance. We would like to reserve the right to bring any issues of noncompliance with the court orders at a later date so as we can focus on getting the Providence Police into compliance as the top priority at the present time." See Transcript, June 21, 2002 at p. 3, ll. 23 through p. 4, ll. 5.

At that point, even the Presiding Judge noted his concern, "The Court did review the executive summary issued on June 10 from Mr. McDevitt and Miss Farrell from Northeastern

University, and, to put it mildly, the Court was somewhat disappointed, and, to put it candidly, I'm very frustrated." See Transcript, June 21, 2002, at p. 4, ll. 22 through p. 5, ll. 1.

In fact, it was at the ACLU's urging that the matter was sent to Judge Fortunato for a contempt proceeding. The Attorney General deferred to the RI ACLU. "I will defer to the ACLU to make whatever comments they see fit from our point of view, Your Honor, and in speaking with the staff from Northeastern University, Professors McDevitt and Farrell, who are both here this morning, this report shows substantial improvement by the Providence Police, though certainly not perfection by the Providence Police." See Transcript, August 13, 2002, p. 4, ll. 3-9.

The RI ACLU urged a full hearing on this matter as noted by the Presiding Judge, "I think it's fair to say that consistent with the ACLU's request, it very well might need a full hearing at which time the evidence for or in defense of the actions of the City of Providence, can be brought to the attention of the Court." See Transcript, August 13, 2002, p. 12, 15-20.

In preparing for the hearing on the motions, filed both by the Attorney General and the RI ACLU, it was the RI ACLU that conducted depositions of the Providence Police, namely then acting Chief Sullivan and Inspector Bennett. In the end, even the Attorney General believed that the RI ACLU's efforts where worthy of being compensated. "In addition, the Court in **Ocean State** also noted that, 'The purpose of a civil contempt sanction is to coerce the contemnor into compliance with the Court order and to compensate the complaining party for the losses sustained.' . . . the ACLU has asked for the interim award of legal fees, and it appears that **such an award is warranted in this case**, particularly because of the extensive amount of litigation spent over the last several months to get here to this point." See Transcript, October 23 and 24,

2002 at p. 150 ll. 22 through p. 151, ll. 9 (emphasis added).[3]

While the City urges that the RI ACLU's involvement in this case was solely to obtain an award of attorney's fees, this argument is ridiculous. First, as noted by the City itself, the RI ACLU's achievement is well established. Second, to participate in a case under such circumstances would be unethical. Third, an award of attorney's fees is by no means a certainty and how could the RI ACLU predict that the City would not comply with the law. If the City began complying with the law when it received notice there would be no basis for an award of attorney's fees. Finally, the City's rhetoric with respect to *In re Rule Amendments to Rules 5.4(a) and 7.2(c)*, 802 A.2d 721 (R.I. 2002) is insulting and has no application to the facts in this case. The award of attorney's fees is to the attorney and not the non-profit organization. Here, the RI ACLU is the party and not the non-profit organization supporting litigation filed on behalf of a private individual or organization. The City's diatribe also misses the important point that the award of attorney's fees was appropriate both pursuant to the Act and as a remedy for contempt.

It should also be noted that while the City urges that the RI ACLU's efforts in this case are duplicative, it was the City that had two attorneys handle this matter on its behalf throughout the lower court matter and three attorneys who have signed the City's 12(A) Statement while the RI ACLU has had only one attorney from the inception of the case through this appeal.

[3]Significantly, the Attorney General's genesis for the award of attorney's fees was as a remedy for civil contempt, not the Act. The RI ACLU believes the award was appropriate under both.

B. Continued Data Collection

While the RI ACLU certainly disputes that the Court's order regarding continued data collection constituted an extension of the Act, it agrees that subsequent action has mooted the argument. It is indisputable that data collection occurred through July 31, 2003. While issues remain as to whether such collection was in compliance with the General Order as incorporated into a Court Order, such issues are not presently before this Court on Appeal.

CONCLUSION

Contempt is a serious matter left to the discretion of the trial judge. In this case, given the facts and circumstances involved, the lower court acted reasonably in meting out justice in a difficult case. The decision was consistent with the legislation and the court's equity jurisdiction in matters such as this. This Court should not disturb the lower court decision absent some compelling reason given the gravity of the issues involved. This is especially true here, where, the Providence Police have not offered one iota of evidence to contradict the lower court's finding of contempt.

In light of this, the RIACLU respectfully urges this Honorable Court to deny the appeal and remand the matter to the Superior Court for further proceedings.

Appellee RIACLU
By its Attorney:

CAROLYN A. MANNIS, ESQ. #4275
170 Westminster Street, Suite 800
Providence, RI 02903
401.454.4466 (Tel.)
401.351.3914 (Fax)

CERTIFICATION

I hereby certify that I mailed a true copy of the within to Gerald J. Coyne, Esq., Deputy Attorney General, 150 S. Main St., Providence, RI 02903 and Raymond Dettore, Jr., Esq. and Sara A. Rapport, Esq., and Caroline Cornwell, Esq., Providence Assistant City Solicitors, 275 Westminster St., Suite 200, Providence, RI 02903 on the ___ day of January, 2004.

_____