

USE OF VEHICLE WITHOUT AUTHORITY

The defendant is charged with knowingly using a motor vehicle without authority. Section 24(2)(a) of chapter 90 of our General Laws provides that “. . . whoever uses a motor vehicle without authority knowing that such use is unauthorized . . .” shall be punished.

In order to prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant used a motor vehicle;

Second: That at the time he (she) used that motor vehicle, he (she) did so without the permission of the owner, or the permission of some other person who possessed the legal right of control ordinarily exercised by the owner; and

Third: That at the time he (she) used the motor vehicle, the defendant *knew* that he (she) was not authorized to use that vehicle.

A person “uses” a motor vehicle within the meaning of the law if he rides in it, either as the driver or as a passenger. It is not necessary that the defendant personally drove or controlled the vehicle, only that he (she) rode in it while it moved.

The Commonwealth may prove that the defendant was not authorized to use the vehicle either by testimony from the owner or other person in charge of the vehicle, or through inferences that you are reasonably able to draw from all the circumstances.

Finally, the defendant must have *known* that his (her) use of the motor vehicle was unauthorized. If it has been proved that the defendant was a passenger in the vehicle, that fact alone does not establish that he (she) *knew* that he (she) was not authorized to use it. You should consider all of the circumstances, and any reasonable inferences which you can draw from the evidence, in determining whether the defendant had actual knowledge that his (her) use of the vehicle was unauthorized. If the defendant did *not* know that his (her) use was unauthorized, you must find him (her) not guilty.

NOTES:

1. **Knowledge.** Mere presence is not enough to support an inference of guilty knowledge, and therefore the owner's testimony that he had not authorized use of the vehicle is not enough, without more, to convict a defendant-passenger of knowledge that the use was unauthorized. *Commonwealth v. Boone*, 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969); *Commonwealth v. Conway*, 2 Mass. App. Ct. 547, 554, 316 N.E.2d 757, 761-762 (1974). Mere presence plus consciousness-of-guilt evidence is similarly insufficient. *Commonwealth v. Butler*, 7 Mass. App. Ct. 918, 389 N.E.2d 431 (1979); *Commonwealth v. Johnson*, 6 Mass. App. Ct. 956, 383 N.E.2d 541 (1978). However, presence coupled with other incriminating evidence can be sufficient to permit an inference of knowledge. *Id.*; *Commonwealth v. Porter*, 15 Mass. App. Ct. 331, 445 N.E.2d 631 (1983) (inference of knowledge from unexplained, or incredible explanation of, possession of recently stolen vehicle).

2. **Lack of authority.** Authorization apparently may be given either by the owner or "by one who in law possesses the right of control ordinarily vested in the owner." *Commonwealth v. Coleman*, 252 Mass. 241, 243, 147 N.E. 552, 553 (1925). See *Commonwealth v. Campbell*, 352 Mass. 387, 402, 226 N.E.2d 211, 221 (1967). The owner

or controller's testimony is not always essential; lack of authority can be inferred from circumstantial evidence (e.g. of stealth). See *Commonwealth v. Patti*, 10 Mass. App. Ct. 857, 857-858, 407 N.E.2d 1301, 1301-1302 (1980).

3. **Larceny of motor vehicle as lesser included offense.** Use of a motor vehicle without authority is a lesser included offense of larceny of a motor vehicle (G.L. c. 266, § 28), without the element of intending to deprive the owner of possession permanently. *Commonwealth v. Giannino*, 371 Mass. 700, 703, 358 N.E.2d 1008, 1010 (1977); *Commonwealth v. Linder*, 17 Mass. App. Ct. 967, 967, 458 N.E.2d 744, 745 (1983).

4. **Public way.** "Public way" is not an element of the crime of use of a motor vehicle without authority. *Commonwealth v. Morris M.*, 70 Mass. App. Ct. 688, 876 N.E. 2d 462, 488 (2007) (rejecting dictum in *Commonwealth v. Giannino*, 371 Mass. at 702, suggesting that "in a public way" is a fourth element of offense).

5. **Use.** The statutory term "use" includes use as a passenger. *Coleman, supra*. However, "use" requires some movement of the vehicle; merely sitting on the passenger side of a stationary motor vehicle in a parking lot is insufficient. *Linder, supra*.

6. **Not lesser included offense of receiving stolen motor vehicle.** Use without authority is not a lesser included offense of the crime of receiving a stolen motor vehicle. *Commonwealth v. Bynoe*, 49 Mass. App. Ct. 687, 691, 732 N.E.2d 340, 344 (2000). Consequently, an acquittal on the latter would not bar a prosecution on the former. *Id.*