

IDENTITY FRAUD BY POSSESSING A DATA THEFT DEVICE

G.L. c. 266, § 37E(c½)

The defendant is charged with identity fraud by possessing a data theft device. To prove the defendant guilty of this offense, the Commonwealth must prove three things beyond a reasonable doubt:

First: That the defendant possessed a device;

Second: That the device was designed to access certain types of financial, identification, or login data; and

Third: That the defendant did so with (the intent to use) (or) (the knowledge that some person intends to use) the device to commit a larceny.

To prove the first element, the Commonwealth must prove that the defendant possessed a tool, instrument, or other article.

What does it mean to possess something? A person obviously possesses something if they have direct physical control of it at a given time. In that sense, you possess whatever you have in your pocket or purse right now.

However, the law does not require that someone necessarily have actual physical custody of an object to “possess” it. An object

is considered to be in a person's possession without physical custody if they have:

- knowledge of the object,
- the ability to exercise control over that object, either directly or through another person, and
- the intent to exercise control over the object.

For example, the law considers you to be in possession of things which you keep in your bureau drawer at home, or in a safe deposit box at your bank.

Whether the defendant possessed an object is something that you must determine from all the facts and any reasonable inferences that you can draw from the facts. However, I caution you to remember that merely being present in the vicinity of an object, even if one knows that it is there, does not amount to possession.

Mere association. Neither is possession proved simply because the defendant was associated with a person who controlled the object or the property where the object was found.

To show possession, there must be evidence justifying a

conclusion that the defendant had knowledge of the object coupled with the ability and intent to exercise control over the object. Only then may the defendant be considered to have possessed the object.

Commonwealth v. Than, 442 Mass. 748, 754-755 (2004); *Commonwealth v. Owens*, 414 Mass. 595, 607 (1993) (constructive possession of controlled substance requires proof that defendant knew location of illegal drugs plus ability and intent to exert dominion and control). See *Than*, 442 Mass. at 751 (constructive possession inferable from defendant's proximity to gun in motor vehicle, where evidence that, when stopped by police, defendant "first leaned forward and to the right before complying with the order to raise his hands[,] . . . [and] [a] loaded handgun was found protruding from under the passenger seat in the vehicle he was operating"); *Alicea v. Commonwealth*, 410 Mass. 384, 387 (1991) (defendant's presence in vehicle with contraband is not itself sufficient); *Commonwealth v. Ramos*, 51 Mass. App. Ct. 901, 903 (2001) (constructive possession not inferable from proximity of gun to defendant's personal letters that were found in an envelope "addressed to the defendant, at a different address"); *Commonwealth v. Ramos*, 30 Mass. App. Ct. 915 (1991); *Commonwealth v. Handy*, 30 Mass. App. Ct. 776, 780-781 (1991) (constructive possession supported by proof of ownership or tenancy, personal effects in proximity to contraband, large amounts of cash, or admissions); *Commonwealth v. Arias*, 29 Mass. App. Ct. 613 (1990) (constructive possession inferable from presence in early morning in heavily barricaded, sparsely furnished apartment, in absence of owner or tenant); *Commonwealth v. Rarick*, 23 Mass. App. Ct. 912, 912 (1986) (in shared dwelling, possession of controlled substance may be inferred from proximity to defendant's effects in areas particularly linked to defendant); *Commonwealth v. Rodriguez*, 16 Mass. App. Ct. 944, 945-946 (1983) (same); *Commonwealth v. Gill*, 2 Mass. App. Ct. 653, 656-657 (1974) (same); *Commonwealth v. Miller*, 4 Mass. App. Ct. 379, 383-384 (1976) (same rule applicable to van; possession also inferable from attempted flight); *Commonwealth v. Deagle*, 10 Mass. App. Ct. 563, 567-568 (1980) (proximity and knowledge do not establish possession unless they permit inference of control).

Joint possession. **A person can also "possess" something even if they are not its sole owner or holder. For example, a person is considered to "possess" something which they own or holds jointly with another person, who is keeping it for both of them. A person is also considered to "possess" something which they own or hold jointly with another person, and which they have agree to deposit**

somewhere where both of them will have access to it.

Commonwealth v. Beverly, 389 Mass. 866, 870 (1983) (possession of controlled substance need not be exclusive; it may be joint and constructive); *Commonwealth v. Conroy*, 333 Mass. 751, 755 (1956) (lookout was in joint possession of accomplice's burglarious tools); *Commonwealth v. Conlin*, 188 Mass. 282 (1905) (depositing bag of burglarious tools with another while retaining key was possession); *Commonwealth v. Gonzalez*, 23 Mass. App. Ct. 990 (1987) (possession may be joint and constructive); *Commonwealth v. Ronayne*, 8 Mass. App. Ct. 421, 426 (1979) (joint flight from burglary supported inference of joint possession of, though only one defendant carried, tire iron); *Commonwealth v. Johnson*, 7 Mass. App. Ct. 191, 194 (joint possession of items in auto trunk inferable against passenger only with other evidence).

To prove the second element, the Commonwealth must prove that the device the defendant possessed was adapted, designed, or commonly used for accessing a person's (financial services account number or code) (savings account number or code) (checking account number or code) (brokerage account number or code) (credit card account number or code) (debit card number or code) (automated teller machine number or code) (personal identification number) (mother's maiden name) (computer system password) (electronic signature) (or) (unique biometric data that is a fingerprint, voice print, retinal image, or iris image of another person).

To prove the third element, the Commonwealth must prove that the defendant possessed the device with (the intent to use) (or) (the knowledge that some person intends to use) the device to commit a larceny. Obviously, it is impossible to look directly into a person's mind. But in our everyday affairs, we often decide from the actions

of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all the surrounding circumstances, to help you determine what their intent or knowledge was at the time in question.

In determining whether the defendant (had the intent to use) (or) (had knowledge that some person intended to use) the device to commit a larceny, I instruct you that larceny is the taking of property of another, with the intent at the time of the taking to permanently deprive the owner of that property.

Here, if appropriate, the jury may be instructed on Larceny by Embezzlement (Instruction 8.480), Larceny by False Pretenses (Instruction 8.500), or another specific type of larceny.

If the Commonwealth has proven all three elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.