

SUPREME JUDICIAL COURT

BRISTOL COUNTY

FAR NO. 28172

APPEALS COURT

NO. 2019-P-1431

COMMONWEALTH OF MASSACHUSETTS

V.

CHRISTOPHER D. DEJESUS

DEFENDANT'S APPLICATION FOR LEAVE TO OBTAIN
FURTHER APPELLATE REVIEW

Now comes Christopher D. DeJesus and hereby
applies to this Honorable Court, pursuant to Mass.
R.A.P. 27.1, for leave to obtain Further Appellate
Review of his conviction arising out of Bristol
Superior Court.

SHORT STATEMENT OF PRIOR PROCEEDINGS¹

On September 6, 2018 a grand jury returned three
indictments charging Christopher D DeJesus ("Mr.
DeJesus") with possession of a firearm without a

¹The transcripts of the four-day jury trial held from
May 20, 2019 to May 24, 2019 are in four volumes with
the first day cited as "(Tr(I). [page no.])," the
second day cited as "(Tr(II). [page no.])," and the
third day cited as "(Tr(III). [page no.]), and the
fourth day cited as "(Tr(IV). [page no.])." The
transcript of the motion to suppress evidentiary
hearing held on February 1, 2019 is cited as "(Tr(M).
[page no.])." The Record Appendix will be cited as
("R. [page no.])" and is submitted in separate filing.

license in violation of G.L. c.269, §10(a), possession of a large capacity feeding device in violation of G.L. c.269, §10(m), and possession of ammunition in violation of G.L. c.269, §10(h). (R. 14-22).

On December 4, 2018, defense counsel filed a motion to suppress and an evidentiary hearing (J, Dupuis, presiding) was held on February 1, 2019. After the hearing the motion judge requested parties to submit memorandums of law. On February 8, 2019, a hearing was held in which the court heard oral argument from both parties. On March 26, 2019, the motion judge issued a memorandum and order with findings of facts denying Mr. DeJesus' motion to suppress. (R. 23-29).

From May 20, 2019 to May 23, 2019 a four-day a jury trial, (J, Maguire, presiding), was held in Bristol Superior Court. At the close of the Commonwealth's case Mr. DeJesus filed a written motion for a required finding of not guilty on all counts and after a hearing the Court denied the motion on all counts. (Tr(III). 191), (R. 11). The jury returned guilty verdicts on the first two indictments. (Tr(IV). 71-72), (R. 12).

The Court sentenced Mr. DeJesus to state prison for a term of two and one-half years to five years for the conviction of possession of a firearm without a license. (Tr(IV). 106-107), (R. 12). The Court sentenced Mr. DeJesus to state prison for a term two and one-half years to five years for the conviction of the possession of a large capacity device and to run concurrently with the first term. (Tr(IV). 106-107), (R. 12).

Mr. DeJesus timely filed his Notice of Appeal on June 11, 2019. (R. 13, 30). On March 1, 2021, the Appeals Court issued an order affirming the judgment.

STATEMENT OF FACTS

Motion to Suppress

On March 26, 2019, Judge Renne P. Dupuis issued an order denying Mr. DeJesus's motion to suppressed evidence. (R. 23-29). Judge Dupuis issued a findings of facts with the order, the facts are cited below and supplemented by some additional facts from the evidentiary hearing. (R. 24-25).

In the summer of 2018, the city of Fall River experienced a number of shootings. As a consequent, the police department organized a task force to address the growing violence in the city. Officer Matthew Mendes ("Officer Mendes"), a member of the Fall River police gang unit, was part of this task force. Officer Mendes would monitor the social media of various individuals suspected of contributing to the violence in the city. In the late afternoon of July 26, 2018, Officer Mendes was monitoring the Snapchat account belonging to Darius Hunt ("Mr. Hunt"), an individual known to Officer Mendes as a member of the Asian Boys, a violent gang with a presence in the city of Fall River. (R. 24).

The Snapchat application is similar to other social media sharing sites, and allows account holders

to share videos and photographs with their contacts through a "story" function. Through this story function, Officer Mendes observed a number of videos that Mr. Hunt shared on the application with his contacts. When viewing videos or photographs on the Snapchat application, there is a distinct difference in the feature of a recently taken video that is then immediately shared on the application, compared to a video that was previously taken, stored on the device's camera roll, and then uploaded to the application. From these differences, Officer Mendes could tell when the video was taken. (R. 24-25).

The videos that Officer Mendes observed on the afternoon of July 26, 2018 were all taken within twenty-four hours before he viewed the videos. These videos depicted Mr. DeJesus, Mr. Hunt, and Derek Pires ("Mr. Pires") holding firearms at 14 Downing Street in Fall River. These three individuals were known to be members of the Asian Boys. In particular, both Mr. Hunt and Mr. DeJesus are depicted on the video holding a black semi-automatic pistol with an extended magazine and a distinct tan/cream colored grip. The home at 14 Downing Street is a three-family dwelling. It has a porch in the front with a white railing.

There are stairs leading up to the front door. Mr. DeJesus does not reside at 14 Downing Street, nor does he claim to have been an invited guest in the home. (R. 24-25).

Officer Mendes decided to conduct further investigation and travelled to the location with several other police officers, one of which was Officer Frederick Mello ("Officer Mello"). Upon arriving at the location, Officer Mendes observed Mr. DeJesus and Mr. Hunt in the right-side yard. Mr. DeJesus walked down the sidewalk toward 4 Downing Street, the home of his girlfriend and her mother.

A number of individuals ran toward the back yard of 14 Downing Street, Officer Mendes believed Mr. Hunt went around the back of the home and gave chase. When Officer Mendes got to the back yard, it was empty. Officer Mendes could see that the rear door leading to the basement was ajar. Officer Mendes could hear people running in the basement. Officer Mendes followed the Running footsteps and entered the basement. The basement is a common area utilized by the residents of the apartments of the home. There are no locks on the doors leading into the basement.

The back outside door was open and easily accessible from the outside. (R. 25).

Upon entering the basement, Officer Mendes could hear people running up the front stairs leading out of the basement. These individuals were apprehended by the officers located out front. Officer Mello observed a firearm in plain view in an open bag placed on a table in the basement. The firearm appeared to be the same firearm that he observed in the video being handled by Mr. Hunt and Mr. DeJesus. The bag containing the firearm and other items was seized. (R. 25).

Additional evidence from the suppression is as follows:

After viewing the video Officer Mendes dispatched officers to the location to do a drive by and no individuals were scene at the location. (Tr(M). 73-74). The officers returned to the station between 6:30 P.M. and 7:00 P.M. (Tr(M). 73-74). The police decided not to secure a search warrant or an arrest warrant, but instead decided to go back to the location later in the evening to conduct more surveillance. (Tr(M). 74).

The police arrived on the scene between 10:15 P.M. and 10:30 P.M. (Tr(M). 43, 70). Once the individuals saw the police they began to disperse. (Tr(M). 47). Mr. DeJesus lives next door at 4 Downing Street. (Tr(M). 47). As the police approached to location, they noticed Mr. DeJesus and Mr. Hunt in the side yard of 14 Downing Street. (Tr(M). 44). Mr. Hunt was the owner of the video. As the people started to disperse, the police stopped Mr. DeJesus as he walked to his house, which is next door at 4 Downing Street. (Tr(M). 47-48).

There is no evidence that anyone gave consent to the search of the cellar or consent to the entry into the building.

Trial Testimony

The facts at trial were substantially similar to the facts at the motion to suppress hearing.

On July 26, 2018 at around 4:00 P.M., Officer Mendes viewed a minute long video on Mr. Hunt's SnapChat account, which was taken about 20 hours earlier. (Tr(II). 181). The video contained different folks performing different activities and one of which with was playing and posturing with firearms. A portion of the video was taken on the porch of 14 Downing Street. (Tr(II). 176). A redacted portion of the video was entered into evidence. (Tr(III). 182-184).

After viewing the video, Officer Mendes decided to conduct some additional surveillance of the location at 14 Downing Street, but did not secure a search warrant. (Tr(II). 190). Later, at around 10:15 P.M.-10:30 P.M., nine police officers arrived at 14 Downing Street to do a surveillance of the location, and noticed about 10-15 people hanging outside in the yard. (Tr(II). 190-191, 226-227), (Tr(III). 53-54). No criminal activity was observed.

After seeing the police, the folks started to scatter in different directions. (Tr(II). 193-194,

228), (Tr(III). 11). Instead of leaving the area as their surveillance is complete, the police decided to exit their vehicles and give chase, following some individuals into the cellar of building. (Tr(III). 14, 74), (Tr(II). 194). While in the basement, the police decided to conduct a sweep and search, finding a firearm with an extended magazine in an open red and black backpack. (Tr(II). 196-197, 203), (Tr(III). 61-62, 76). Nothing with Mr. DeJesus's name was found in or around the backpack. (Tr(III). 108).

After the police exited the cruisers Officer Bashara noticed Mr. DeJesus in the yard near the porch of the building and on the side of 4 Downing Street. (Tr(III). 51, 53-54). Mr. DeJesus began to walk in the direction of Officer Bashara which was also in the direction of 4 Downing Street. (Tr(III). 54). Ms. Alston was present and stayed on the porch. (Tr(III). 54). Officer Bashara asked Mr. DeJesus to stop walking, he complied, was very polite and cooperative. (Tr(III). 52). Mr. DeJesus lives at 4 Downing Street with his girlfriend Ms. Alston and her mother. (Tr(II). 174), (Tr(III). 52). The police secured a search warrant for 4 Downing Street and were not able to find anything of interest. (Tr(II). 217-218).

STATEMENTS OF POINTS WITH RESPECT TO WHY
FURTHER APPELLATE REVIEW IS APPROPRIATE

I. MR. DEJESUS'S CONVICTION FOR POSSESSION OF A FIREARM WITHOUT A LICENSE SHOULD BE REVERSED WHERE THE MOTION JUDGE ERRED IN DENYING HIS MOTION TO SUPPRESS AS THE COMMONWEALTH FAILED TO ARTICULATE THE PRESENT OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF 14 DOWNING STREET

II. MR. DEJESUS'S CONVICTION FOR POSSESSION OF A LARGE FEEDING DEVICE SHOULD BE REVERSED WHERE THE MOTION JUDGE ERRED IN DENYING HIS MOTION TO SUPPRESS AS THE COMMONWEALTH FAILED TO ARTICULATE THE PRESENT OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF 14 DOWNING STREET

III. THE TRIAL JUDGE ERRED IN DENYING MR DEJESUS'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY WITH RESPECT TO THE CHARGE OF POSSESSION OF A FIREARM WITHOUT A LICENSE WHERE HE ONLY HAD MOMENTARY POSSESSION OF THE FIREARM

IV. THE TRIAL JUDGE ERRED IN DENYING MR DEJESUS'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY WITH RESPECT TO THE CHARGE OF POSSESSION OF A LARGE CAPACITY FEEDING DEVICE WHEN HE ONLY HAD MOMENTARY POSSESSION OF THE FIREARM WHICH HELD THE DEVICE

BRIEF STATEMENT WHY
FURTHER APPELLATE REVIEW IS APPROPRIATE

I. MR. DEJESUS'S CONVICTION FOR POSSESSION OF A FIREARM WITHOUT A LICENSE SHOULD BE REVERSED WHERE THE MOTION JUDGE ERRED IN DENYING HIS MOTION TO SUPPRESS AS THE COMMONWEALTH FAILED TO ARTICULATE THE PRESENT OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF 14 DOWNING STREET

As possession is an element of the crimes charged, Mr. DeJesus has automatic standing to challenge the entry and search of the cellar. (R. 14-22). Commonwealth v. Ware, 75 Mass. App. Ct. 220, 227-228 (2009), Commonwealth v. Amendola, 406 Mass. 592, 601 (1990), Commonwealth v. Midi, 46 Mass. App. Ct. 591, 593 (1999). The Commonwealth and Appeals Court argue that Mr. DeJesus does have automatic standing as the crime happening earlier and that he was not present at the premises at the time of the search. (R. 26-27). However, Mr. DeJesus was present.²

The facts are as follows: when the police arrived on the scene, they noticed Mr. DeJesus and Mr. Hunt in the side yard of 14 Downing Street. (Tr(M). 44). As the people started to disperse, the police stopped Mr.

² The Appeals Court agreed with the motion judge's finding that Mr. DeJesus was not present at the time of the search. However, this a matter of legal opinion and not a finding of facts, and is therefore subject to review.

DeJesus as he walked to his house, which is next door at 4 Downing Street. (Tr(M). 47-48). The police then followed folks into the cellar where they conducted the search and found the firearm. (Tr(M). 47-48).

To be deemed present one need not be in the same room or exact location as the search. Commonwealth v. Franklin, 376 Mass. 885, 890, 900 (1978). Commonwealth v. Ware, supra, Commonwealth v. Amendola, supra, Commonwealth v. Midi, supra. Here, Mr. DeJesus was in the yard at the time the police arrived on the scene. Commonwealth v. Franklin, supra. at 890, 900 (individual in room next to room searched deemed present). It is not like he left the location on his own volition prior the arrival of the police. Contrast Commonwealth v. Mora, 402 Mass. 262 (1988). In addition, Mr. DeJesus was with Mr. Hunt, the owner of the video and tenant, further creating a nexus. Lastly, the Commonwealth places Mr. DeJesus on the premises, to create a nexus between he and the firearm, argued Mr. DeJesus was "in the exact same location" of the source of the investigation, here video and the cellar. (Tr(IV). 24-25). Fairness dictates that the Commonwealth is estopped from saying otherwise. Commonwealth v. Franklin, supra at 900.

Expectation of Privacy

Mr. DeJesus may challenge the search if he demonstrates as least someone had an expectation of privacy in the cellar. Commonwealth v. Mubdi, 458 Mass. 385, 392-393 (2010), Commonwealth v. Amendola, supra. Commonwealth v. Montanez, 410 Mass. 290, 301 (1991). For a reasonable expectation of privacy we look at (1) whether the individual has manifested a subjective expectation of privacy in the object of the search, and (2) whether society is willing to recognize that expectation to be reasonable. Commonwealth v. Montanez, supra at 301. Factors considered include the nature of the location, if the individual owned or had property rights in the area, and if the area was freely accessible to others. Commonwealth v. Williams, 453 Mass. 203, 208 (2009).

The landlord, who owns the building, has a reasonable expectation of privacy as well as the tenants. Although all have access to the cellar, it is critical to note that there is no evidence that the public was granted access, nor the public used the area. The cellar is not a public hallway. Contrast Commonwealth v. Montanez, supra. This is not that much different than a common living room, where it may

be shared by others, it is not shared with the public; and as such, a person has a reasonable expectation of privacy in this common area. It is certainly reasonable to expect someone, who owns or rents, a location that is not given access to the public and is in an enclosed space like the cellar of building where folks use and store items that they would also have an expectation of privacy free from third parties. Cf. Commonwealth v. Mubdi, supra at 394. (expectation of privacy in a closed center console in a car).

Accordingly, as at least one person had an expectation of privacy in the cellar, Mr. DeJesus may challenge the constitutionality of the search. Commonwealth v. Mubdi, supra at 393.

Probate Cause and Exigent Circumstances

The Commonwealth must now justify the warrantless entry by showing the presence of both probable cause and existence of exigent circumstances. Commonwealth v. Molina, 439 Mass. 206, 209 (2003), Commonwealth v. Forde, 376 Mass. 798, 800 (1975), Commonwealth v. Figueroa, 468 Mass. 203, 213 (2014). Here the police did not have probable cause to enter the building. The police had no idea where the firearms were

located, did not know if any of the persons had firearms, and no crime was observed. (Tr(M). 47-51). (R. 24-25).

No crime was committed at the time the police arrived nor were they in hot pursuit of any of the folks seen at the location. Commonwealth v. Alexis, supra, at 101, Commonwealth v. Molina, supra at 210-211. The crime in question happened a day earlier. Commonwealth v. Alexis, supra, Commonwealth v. Molina, supra. (Tr(II). 181, 190-192). Officer Mendes saw the video at around 4:00 P.M., decided not to secure a warrant and instead decided to descend on 14 Downing Street at 10:30 P.M. with about nine police officers for the purposes of conducting additional surveillance. (Tr(II). 181, 190-192, 226-227), (Tr(III). 54). There was no showing that it was impracticable to secure a warrant prior to the arrival at nighttime. Commonwealth v. Alexis, supra at 100. Commonwealth v. Molina, supra at 209.

This case is really no different than the case of Commonwealth v. Alexis, where the police did not have exigent circumstances prior to coming to the venue and any exigent circumstances that might have been created was a result of the police's own actions. Id. at 100-

101. As in Commonwealth v Alexis, where the police do not have exigent circumstances prior their arrival, the police cannot avail themselves of any exigent circumstances which are reasonably foreseeable to be the result of their actions, even if the police were acting lawfully. Commonwealth v. Alexis, supra at 100, Commonwealth v. Molina, supra at 210, Commonwealth v. Forde, supra at 803.

Error Not Harmless

The error was not harmless. The only evidence that ties Mr. DeJesus to the crimes charged is the firearm seized as a result of the search.

II. MR. DEJESUS'S CONVICTION FOR POSSESSION OF A LARGE FEEDING DEVICE SHOULD BE REVERSED WHERE THE MOTION JUDGE ERRED IN DENYING HIS MOTION TO SUPPRESS AS THE COMMONWEALTH FAILED TO ARTICULATE THE PRESENT OF PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES TO JUSTIFY THE WARRANTLESS SEARCH OF 14 DOWNING STREET

Possession is an element of the charge of possession of a large feeding device. As there is no evidence that Mr. DeJesus was in possession of a firearm, he cannot be guilty of possession of the attached feeding device.

III. THE TRIAL JUDGE ERRED IN DENYING MR DEJESUS'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY WITH RESPECT TO THE CHARGE OF POSSESSION OF A FIREARM WITHOUT A LICENSE WHERE HE ONLY HAD MOMENTARY POSSESSION OF THE FIREARM

As Mr. DeJesus was not in possession of the firearm, either actual or constructive, at the time of the search, we are left with just the video evidence. The issue is that Mr. DeJesus only had momentary possession of the firearm, which is not illegal. Commonwealth v. Atencio, 245 Mass. 627, 631 (1963), Commonwealth v. Seay, 376 Mass. 735, 737 (1978).

In Commonwealth v. Atencio, supra at 631, the Supreme Judicial Court held that temporary possession of a firearm is not carrying [possession] a firearm within the meaning of G.L. c. 269 sec. 10(a).³ There needs to be a showing that a defendant knowingly had more than momentary possession of a working firearm to be guilty under the statute. Commonwealth v. Seay, supra at 737 and cases cited. Commonwealth v. Brown, 10 Mass. App. Ct. 935, (1980) (no possession as firearm was held for police). In the instant case, one does not know if Mr. DeJesus brought the gun to the

³ The element of movement of a firearm was eliminated from the law effective January 2, 1991. See St. 1990, C.511.

location to participate in the video or he was playing with the gun which belonged to another individual. It should be noted that at least two persons handled the firearm, Mr. DeJesus and Mr. Hunt. Also, when the gun was found, it was not found on Mr. DeJesus's person, nor in his home, nor near anything items that belonged to him. (Tr(III). 108). This only buttresses the point that no one knows who owned the gun or can be inferred who maintained possession of the gun. Any thought otherwise is per speculation.

The Commonwealth case lacks any additional evidence which would support an inference of more than momentary possession of a firearm and that a person intended to possess the firearm. Contrast Commonwealth v. Seay, supra at 737 (firearm possessed prior to entering a foyer), Commonwealth v. Ashley, 16 Mass. App. Ct. 983 (1983) (brought gun to a card game), Commonwealth v. Stallions, 9 Mass. App. Ct. 23 (1980) (defendant took firearm from another walked over to a fence and then returned the firearm), Commonwealth v. McCauley, 11 Mass. App. Ct. 780 (1981) (possession as defendant kept dropping gun to floor).

What separates these cases from the instant case is evidence that the defendants either had the gun on

his person, and therefore no one else had given it to him, or there is an inference that he had the gun on this person and brought it to the location, or there was inference he was going to use the firearm and therefore intended to possess it. Any of which could support an inference that one intended to possess the gun for more than just a momentary period and for the purpose of a firearm. In another words, an intent to exercise dominion and control over the firearm. There is no such evidence in the instant matter. No witness testified to any of the above circumstances.

This case is no different than one who uses a firearm to play Russian Roulette. With Russian Roulette a person only momentarily possesses the firearm for the act of playing a game, and does not intend to possess the firearm as a firearm.

Commonwealth v. Atencio, supra. Here, all we have is one posturing with a gun for the purposes of a taking a video and not to possess the firearm as a firearm.

The Appeals Court takes the position that since there was a change in the law, the removal of the movement element (See Fn. 3), the case law which predates the change is not on point. That is simply not the case as we are dealing with proof of

possession, which is still present in the law. And the case law cited, insofar as case law relates to what constitutes possession, is still valid. In the end, if one is not deemed to exercise sufficient dominion and control over an item to be deemed to have possessed the item, then there is no possession.⁴

Simply put, the best that we have is an individual who is in the privacy of another's home posturing with gun for the purposes of making a video and nothing else, and there are no other ties to him and the firearm.

IV. THE TRIAL JUDGE ERRED IN DENYING MR DEJESUS'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY WITH RESPECT TO THE CHARGE OF POSSESSION OF A LARGE CAPACITY FEEDING DEVICE WHEN HE ONLY HAD MOMENTARY POSSESSION OF THE FIREARM WHICH HELD THE DEVICE

Possession is an element of this charge and as there is no evidence that Mr. DeJesus was in possession of a firearm, he cannot be guilty of possession of the attached feeding device.

⁴ The Appeals Court cites two cases, Commonwealth v. Hall, 80 Mass. App. Ct. 317 (2011) and Commonwealth v. Harvard, 356 Mass. 452 (1969), to support a point that even a short period of time can constitute possession. In both those cases the individual intended to use the items for the items purpose, drugs to be sold (Harvard) and pornography (Hall); and as such, there is an inference to exercise dominion and control, which is not the case with someone using a gun for a short period of time for a game or a prop.

CONCLUSION

For the foregoing reasons, Mr. DeJesus's
Application for Further Appellate Review should be
allowed.

Respectfully submitted,
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