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 PROCEEDINGS[1]

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

[1] The 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 trough 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 volution 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 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 in 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,
CHRISTOPHER D DEJESUS
by his Attorney,

Thomas E. Hagar
BBO #632933
345D Boston Post Road
Sudbury, MA 01776
(508) 358-2063

May 11, 2021

19-P-1431 Appeals Court

COMMONWEALTH vs. CHRISTOPHER DeJESUS.

No. 19-P-1431.

Bristol. November 17, 2020. - March 1, 2021.

Present: Kinder, Shin, & Hand, JJ.

Firearms. Constitutional Law, Search and seizure, Standing to question constitutionality, Privacy. Search and Seizure, Standing to object, Expectation of privacy. Privacy. Evidence, Firearm. Practice, Criminal, Motion to suppress, Motion for a required finding.

Indictments found and returned in the Superior Court Department on September 6, 2018.

A pretrial motion to suppress evidence was heard by Renee P. Dupuis, J., and the cases were tried before Thomas F. McGuire, Jr., J.

Thomas E. Hagar for the defendant.
Tara L. Johnston, Assistant District Attorney, for the Commonwealth.

HAND, J. The defendant, Christopher DeJesus, was indicted in the Superior Court on three counts -- (1) unlawful possession of a firearm without a license, G. L. c. 269, § 10 (a); (2)

unlawful possession of a large capacity feeding device, G. L. c. 269, § 10 (m); and (3) unlawful possession of ammunition, G. L. c. 260, § 10 (h).[1] He was charged after police identified him in several Snapchat[2] videos posing with a firearm. As we discuss in greater detail, infra, the firearm was one of several items recovered in the course of a warrantless search of the basement of a multifamily home that had also been depicted in some of the Snapchat videos.

Prior to trial, the defendant filed a motion to suppress evidence recovered during the search. Following an evidentiary hearing, a judge (motion judge) concluded that the defendant had neither standing to contest the search nor a reasonable expectation of privacy in the area searched, and denied the motion.

After a jury trial, the defendant was convicted of two charges -- unlawful possession of both a firearm and a large capacity feeding device -- and acquitted of the remaining

---

[1] He was also charged as an armed career criminal in connection with the first and third indictments. G. L. c. 269, § 10G (a).

[2] "Snapchat is a social media application that allows users to send or post still images or videos. . . . A user may post images or videos to their 'story,' which allows all those individuals with whom the user is 'friends' to view them on the user's Snapchat page, but they remain available for viewing only for twenty-four hours." Commonwealth v. Watkins, 98 Mass. App. Ct. 419, 420 (2020).

charges in the indictments.[3] The trial judge sentenced the defendant to concurrent terms of from two and one-half years to five years in State prison.

On appeal, the defendant argues that the motion judge erred in denying his motion to suppress evidence obtained in the course of the warrantless search of the basement of a multifamily home, and that the trial judge erred in denying his motion for a required finding of not guilty of possession of the firearm at issue and the large capacity feeding device attached to it. We conclude that the defendant did not have standing to challenge the search, and that even if he did, he had no reasonable expectation of privacy in the area searched. We are also satisfied that the evidence was sufficient to prove the defendant's possession of the firearm and the large capacity feeding device. Accordingly, we affirm the judgments.

Discussion. 1. Motion to suppress. "In reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" Commonwealth v. Medina, 485 Mass. 296, 299-300 (2020), quoting

[3] The trial judge allowed the defendant's motion for a required finding of not guilty on the indictment for illegal possession of ammunition and, after a jury-waived trial, found the defendant not guilty of the armed career criminal enhancements.

Commonwealth v. Cawthron, 479 Mass. 612, 616 (2018). The defendant does not challenge the motion judge's factual findings as erroneous, and we summarize them here, supplementing as necessary with uncontroverted testimony from the motion hearing.

In the summer of 2018, following a series of shootings in Fall River, the Fall River police department organized a task force to address growing violence within the city. As part of this task force, Detective Matthew Mendes, a member of the department's gang unit, monitored the social media accounts of various individuals suspected of contributing to the violence. On July 26, 2018, Mendes was monitoring the Snapchat account of Darius Hunt, an individual known to Mendes as a member of a gang with a presence in Fall River. Mendes observed a number of videos on Hunt's Snapchat account (videos), which he identified as being taken within twenty-four hours prior to his having viewed them. These videos depicted Hunt, the defendant, and a third individual. In several of the videos, the defendant was "holding a black semi-automatic pistol with an extended magazine and a distinct tan/cream colored grip"; the videos also depicted a basement area and the outside of a three-family dwelling at 14 Downing Street in Fall River (the premises).[4]

[4] As we note, infra, the defendant did not live at the premises and does not claim that he was an overnight guest there.

Mendes and several other officers traveled to the premises, intending to conduct further investigation. On arrival, the officers observed a number of individuals, including Hunt and the defendant, standing outside on the premises; when the police approached, the individuals dispersed. Some of the individuals ran to the back yard while the defendant walked down the sidewalk toward the home of his girlfriend and her mother, at 4 Downing Street. Mendes ran around to the back of the premises, chasing Hunt. Although the back yard was empty when he arrived, Mendes observed that the rear door to the basement was ajar, and he heard people running in the basement.

Mendes and two other officers followed the footsteps and entered the basement through the open door. The basement, a common area utilized by the residents of the apartments on the premises, had no locks on the doors leading into it. Once inside the basement, the officers observed a firearm in plain view in an open bag placed on a table; the firearm appeared to be the same one the police saw in the videos being handled by Hunt and the defendant. The police "seized the scene," obtained a search warrant, and later took possession of the bag containing the firearm and other items. The defendant was arrested on the sidewalk between 14 Downing Street and 4 Downing Street.

The defendant moved to suppress evidence seized from the basement of the premises, including the firearm and ammunition, arguing that the evidence was discovered in the course of an improper warrantless search of the basement.[5] The motion judge denied the motion, concluding that the defendant lacked both standing to challenge the search of the basement at the premises and a reasonable expectation of privacy in the area searched.

On appeal, the defendant argues that the motion judge erred in these conclusions; more specifically, he contends that he was entitled to automatic standing to challenge the search under art. 14 of the Massachusetts Declaration of Rights and the cases stemming from the Supreme Judicial Court's ruling in Commonwealth v. Amendola, 406 Mass. 592, 600-601 (1990). We are not persuaded.

The automatic standing rule, set forth by the United States Supreme Court in Jones v. United States, 362 U.S. 257 (1960), provides that "defendants charged with crimes of possession have standing to challenge the search."[6] Commonwealth v. Frazier, 410

[5] We glean this from the motion judge's detailed memorandum of decision denying the motion to suppress. The record does not include a copy of the defendant's motion.

[6] Although the rule was abandoned by the Federal courts in United States v. Salvucci, 448 U.S. 83 (1980), it continues to be recognized under Massachusetts State law. See Commonwealth v. Amendola, 406 Mass. at 601 ("we hold today that the automatic standing rule survives in Massachusetts as a matter of State constitutional law"). See, e.g., Commonwealth v. Mubdi, 456

Mass. 235, 241 (1991), citing Jones, supra at 263. It applies where "possession of the seized evidence at the time of the contested search is an essential element of guilt."[7] Frazier, supra at 243, quoting Amendola, 406 Mass. at 601.

"Under the Fourth Amendment to the United States Constitution, the question whether the defendant has standing to challenge the constitutionality of a search or seizure is merged with the determination whether the defendant had a reasonable expectation of privacy in the place searched," and therefore, "a defendant has no standing if he has no reasonable expectation of privacy in the place searched." Commonwealth v. Mubdi, 456 Mass. 385, 391 (2010), citing Rakas v. Illinois, 439 U.S. 128, 138-139 (1978). Under art. 14, "the question of standing remains separate from the question of reasonable expectation of privacy." Mubdi, supra. See Commonwealth v. Williams, 453 Mass. 203, 208 (2009) ("Although the two concepts [of standing

---

Mass. 385, 390 (2010); Commonwealth v. Frazier, 410 Mass. 235, 241 (1991); Commonwealth v. Ware, 75 Mass. App. Ct. 220, 227 (2009).

[7] It is immaterial whether the defendant is charged with possession on a theory of constructive possession or actual possession, so long as he or she is charged with possession at the time of the search or seizure. See, e.g., Commonwealth v. Carter, 424 Mass. 409, 410-411 (1997) ("We have granted a defendant automatic standing to challenge the seizure of property in the possession of another at the time of the search, if the defendant has been charged with the constructive possession of that property at that time").

and expectation of privacy] are interrelated, [under art. 14] we consider them separately"). Thus, using an art. 14 analysis, where automatic standing applies, the defendant need not demonstrate his or her own personal privacy interest, see Mubdi, supra at 392; instead, a defendant with automatic standing need only "show that there was a search in the constitutional sense, that is, that someone had a reasonable expectation of privacy in the place searched." Id. at 393.

a. Standing. It is undisputed that the defendant was not in possession -- actual or constructive -- of the firearm at the time of the search.[8] Thus, automatic standing does not apply on the basis of the defendant's possession. Cf. Commonwealth v. Ware, 75 Mass. App. Ct. 220, 227 (2009), quoting Amendola, 406 Mass. at 601 ("[w]hen a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing to contest the legality of the search and the seizure of that evidence" [emphasis added]).[9]

[8] This distinction was later made clear to the jury through the trial judge's instructions that "the [d]efendant is not charged with possession of a firearm . . . at the time the police entered the basement and seized certain objects. The [d]efendant is charged with possession of a firearm . . . at the time the video recording was made."

[9] To the extent the defendant argues that he is entitled to automatic standing as a consequence of his presence on the premises at the time of the search, we note the motion judge's

The defendant has not met his burden of demonstrating his automatic standing to challenge the search of the premises.[10]

b. Expectation of privacy. Even had the defendant shown that he had automatic standing to challenge the search, his entitlement to protection under the automatic standing rule falters on his inability to demonstrate that he, or anyone else, had a reasonable expectation of privacy in the area searched, and thus, that a search in the constitutional sense had taken place. See Mubdi, 456 Mass. at 393 ("that someone had a reasonable expectation of privacy in the place searched"). See also Commonwealth v. Johnson, 481 Mass. 710, 715, cert. denied, 140 S. Ct. 247 (2019) (defendant bears burden of demonstrating violation of reasonable expectation of privacy); Commonwealth v. Rice, 441 Mass. 291, 295 (2004) (same). Relevant to this determination is the character of the location involved, whether the defendant owned or had access to the area, and the area's accessibility to others. See Williams, 453 Mass. at 208, citing Commonwealth v. Welch, 420 Mass. 646, 653-654 (1995).

---

finding that the defendant was no longer on the premises at the time of the officers' search.

[10] Because the defendant has failed to demonstrate either "a possessory interest in the place searched or in the property seized," or that he was "present when the search occurred," he has not otherwise demonstrated his standing. Williams, 453 Mass. at 208.

The search was conducted in the basement of a home that the defendant concedes he does not own or occupy; the defendant does not claim to have been a guest in the home. Even if we were to conclude that the defendant had a subjective expectation of privacy in the basement -- which we do not -- given the nature of access to the area and that the defendant neither owned nor controlled the area, that expectation would have been unreasonable. See Commonwealth v. Carter, 39 Mass. App. Ct. 439, 442 (1995), S.C., 424 Mass. 409 (1997) (expectation of privacy not objectively reasonable where "defendant did not own the place involved, was not a tenant, and was not an invitee of the . . . apartment dweller"). See also Sullivan v. District Court of Hampshire, 384 Mass. 736, 742 (1981) ("an individual can have only a very limited expectation of privacy with respect to an area used routinely by others").

Assessing the defendant's showing of an objective expectation of privacy -- that is, whether anyone had a reasonable expectation of privacy in the items and area searched -- we consider whether "(i) [an] individual has 'manifested a subjective expectation of privacy in the object of the search,' and (ii) 'society is willing to recognize that expectation as reasonable' (citation omitted)." Johnson, 481 Mass. at 715, quoting Commonwealth v. Augustine, 467 Mass. 230, 242 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015). "This

determination turns on whether the police conduct has intruded on a constitutionally protected reasonable expectation of privacy." Commonwealth v. Montanez, 410 Mass. 290, 301 (1991). Here, neither consideration is present.

Generally, tenants in a multiunit home do not have a reasonable expectation of privacy in common areas. See Williams, 453 Mass. at 209 (no reasonable expectation of privacy in basement common area accessed by unlocked door); Montanez, 410 Mass. at 302 (no reasonable expectation of privacy, and therefore no constitutional search, in "common area, accessible to the public, that was freely and frequently used by people other than the defendant"). See also Commonwealth v. Sorenson, 98 Mass. App. Ct. 789, 792 (2020), quoting Commonwealth v. Escalera, 462 Mass. 636, 648 (2012) (curtilage "applied narrowly to multiunit apartment buildings"). Nor do we find authority to suggest that landlords have a reasonable expectation of privacy in the areas freely accessible to their tenants. The basement searched in the present case was readily available to use by all tenants in the building, as well as their invitees and the landlord, and none exerted exclusive control. Additionally, none of the doors leading into the area had locks. Thus, in this case, "the relevant criteria and pertinent case law would appear to place [the area] beyond any constitutionally protected

privacy zone." Commonwealth v. Dora, 57 Mass. App. Ct. 141, 145 (2003).

Absent a constitutionally protected reasonable expectation of privacy held by anyone, the motion judge properly denied the motion to suppress.[11]

2. Sufficiency of the evidence. The defendant moved for a required finding of not guilty on all counts at the close of the Commonwealth's case, arguing that the evidence was insufficient to allow the jury to find that the gun at issue qualified as a "firearm" for the purposes of G. L. c. 140, § 121; the motion was renewed when the defendant rested.[12] The trial judge allowed the motion as to the indictment for unlawful possession of ammunition,[13] but denied it as to the firearm and the large capacity feeding device. On appeal, the defendant changes tack, arguing instead that the evidence was insufficient to prove that the defendant's brief handling of the firearm as depicted in the

[11] In light of our conclusion that the defendant did not have a reasonable expectation of privacy over the premises or standing to challenge the entry and search of the premises, we need not reach the defendant's challenges to the existence of probable cause or exigent circumstances justifying the search.

[12] The defendant cross-examined the Commonwealth's witnesses; as was his right, he chose not to put on evidence of his own.

[13] The trial judge's ruling was based on his determination that the ammunition was not visible in the videos.

videos amounted to his "possession" of the gun.[14] We are not persuaded.

A motion for a required finding of not guilty is a challenge to the sufficiency of the evidence, see, e.g., Commonwealth v. Jones, 432 Mass. 623, 625 (2000), and we review the judge's ruling under the Latimore standard, "viewing the evidence in the light most favorable to the Commonwealth and ask[ing] whether the evidence and inferences reasonably drawn therefrom were 'sufficient to persuade a rational jury beyond a reasonable doubt of the existence of every element of the crime charged.'" Commonwealth v. Squires, 476 Mass. 703, 708 (2017), quoting Commonwealth v. Lao, 443 Mass. 770, 779 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011). See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979).

Under G. L. c. 269, § 10 (a), the Commonwealth must prove the defendant knowingly possessed an item that meets the legal definition of a firearm. See Commonwealth v. White, 452 Mass. 133, 136 (2008); Commonwealth v. Watkins, 98 Mass. App. Ct. 419,

---

[14] Although this argument is raised for the first time on appeal, "a conviction premised on legally insufficient evidence always creates a substantial risk of a miscarriage of justice." Commonwealth v. Kurko, 95 Mass. App. Ct. 719, 722 (2019), quoting Commonwealth v. Montes, 49 Mass. App. Ct. 789, 792 n.4 (2000). We review any error against that standard. See Commonwealth v. Silvelo, 96 Mass. App. Ct. 85, 104 n.13 (2019) (Shin, J., dissenting).

421-422 (2020). "[P]ossession does not depend on the duration of time elapsing after one has an object under his control so long as, at the time of contact with the object, the person has the control and the power to do with it what he or she wills." Commonwealth v. Hall, 80 Mass. App. Ct. 317, 330 (2011), citing Commonwealth v. Harvard, 356 Mass. 452, 457-458 (1969).

The defendant argues that it is not possible to determine from the video evidence whether he owned the firearm or was temporarily holding it and that, if he only had momentary possession of the firearm, it would not be sufficient to sustain a finding of possession.

We are satisfied that the evidence in this case was sufficient to prove the defendant had possession of the firearm and the large capacity feeding device at the time of the videos, which clearly show the defendant holding the firearm and posturing with it, pointedly displaying the attached feeding device, and mimicking the action of aiming and firing the weapon.[15] See Commonwealth v. Seay, 376 Mass. 735, 737-738

[15] The defendant offers an analogy to Commonwealth v. Atencio, 345 Mass. 627, 628, 631 (1963), in which participants in a game of "Russian roulette" were found to have only temporary possession of a firearm, having each held the gun and pulled the trigger once. The basis of the court's determination in Atencio was that the defendants did not carry the firearm within the meaning of G. L. c. 269, § 10, as it existed at the time, where "[t]he idea conveyed by the statute is that of movement, [that the defendant] 'carries on his person or under his control in a vehicle.'" Atencio, supra at 631. Since that

(1978) (defendant handling gun in foyer and stairway area of his apartment building prior to sale more than momentary); Commonwealth v. Stallions, 9 Mass. App. Ct. 23, 25 (1980) (defendant's taking gun, walking fifteen to twenty feet, and returning gun within one to two minutes of having taken it "far more than momentary"). We are satisfied that at the time of the videos' recording, the defendant had control and power over the firearm and large capacity feeding device such that a rational jury could have concluded that the defendant was in possession of them for that period of time. We discern no error in the judge's denial of the motion for a required finding of not guilty.

Conclusion. The defendant failed to demonstrate that he had standing to challenge the warrantless search of the common area in which the firearm and other contraband were found, or that anyone had a reasonable expectation of privacy in the contraband left there. Accordingly, the motion to suppress was properly denied. Because the evidence was sufficient to

---

time, and as the defendant acknowledges, the statute has been amended; the requirement that the Commonwealth show that the defendant "carrie[d] [the firearm] on his person" has been eliminated. Commonwealth v. Duncan, 71 Mass. App. Ct. 150, 153 n.4 (2008) ("the cases relied upon by the defendant all predate the 1990 amendment to G. L. c. 269, § 10 [a], which eliminated the words 'carries on his person' from § 10 [a]. See St. 1990, c. 511, § 2. Since the time of that amendment, § 10 [a] has simply prohibited the knowing possession of a firearm without a license").

establish the defendant's possession of the firearm at issue and the large capacity feeding device, there was no error in the denial of the motion for a required finding.

Judgments affirmed.