COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 20-P-1160

SUFFOLK, ss.

ERICKSON DAVEIGA, DEFENDANT/APPELLANT

V.

COMMONWEALTH OF MASSACHUSETTS, APPELLEE

On Appeal From a Judgement of

the Suffolk Superior Court

APPELLANTS BRIEF

Date: February, 2021

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2. Whether the Trial Judge erred in permitting the Commonwealth to introduce evidence regarding Daveiga's prior interaction with the Boston Police. The evidence amounted to propensity evidence and prejudiced Daveiga's right to a fair trial.

3. Whether the Trial Judge erred in denying Daveiga's Motion for a Required Finding of Not Guilty of Carrying a Firearm. Other than Daveiga's presence in the vehicle and his proximity to the firearm, there was no evidence that he intended to possess the firearm.

STATEMENT OF THE CASE

Erickson Daveiga was indicted by a Suffolk County Grand Jury on October 4, 2017 on three counts, including: Carrying a Firearm (G.L. c. 269, Section 10(a))(No. 1784CR0719-1); Carrying a Loaded Firearm (G.L. c. 269, Section 10(h))(1784CR0719-2); and Possession of Ammunition (G.L. c. 269, Section 10(h)(1))(1784CR0719-3).[1] (R./5)

An evidentiary Motion to Suppress hearing was held before the Honorable Michael Ricciuti on July 9, 2018. (R./10; R.26-30) Judge Ricciuti denied the motion on July 10, 2018. (R./11; R./31-36; Add./43-48)

A jury trial commenced before the Honorable Robert Ullmann on October 29, 2018, and concluded on November 1, 2018. (R.13-15) Daveiga was convicted of Count One Carrying a Firearm. (R./15) He was acquitted

[1] Citations to the Record Appendix will be made as (R./page). Reference to the Addendum shall be (Add./page number). There are five volumes of record transcripts. Appellant will refer to the transcripts as follows: to (Tr.1A/page) for the Motion to Suppress hearing held on July 19, 2018; to (Tr.1/page) for the trial proceedings held on October 30, 2018; to (Tr.2/page) for the trial proceedings held on October 31, 2018; to (Tr.3/page) for the trial proceedings held on November 1, 2018; and to (Tr.4/page to the trial proceedings held on November 5, 2018.

of Counts 2 and 3, Possession of a Loaded Firearm and Possession of Ammunition. (R./15)

On November 5, 2018, Daveiga plead guilty to so much of Count One of the indictment which alleged that he was an Armed Career Offender, and he was sentenced to eight years in State Prison. (R./16-17)

A timely notice of appeal was filed on November 5, 2018. (R./17) The matter was docketed in the Massachusetts Appeals Court on October 9, 2020. (R./19)

STATEMENT OF THE FACTS

I. Motion to Suppress Hearing.

The Motion Judge made the following findings of fact: "Boston Police Officer Joseph McDonough, an officer with 12 years of experience, testified for the Commonwealth. I fully credit his testimony. On August 6, 2017, McDonough and his partner, Officer Christopher Stevens, were on patrol in the B-2 district of Boston, comprised of Roxbury, Dorchester and part of Mission Hill. McDonough and Stevens were in an unmarked Ford Explorer and in plain clothes. McDonough has worked in the B-2 district for some 12

years, and has been partnered with Stevens for years. The area, particularly on and around Monadnock Street, was known to McDonough as one rife with criminal gang and firearm activity, and McDonough had made multiple firearms arrests in that vicinity.

Erickson Daveiga was well-known to McDonough. McDonough had interacted with him at least 30 times over the years and had arrested him at least three times, once in July 2016 for a firearm offense. Despite the arrests, the two had developed something of a cordial relationship. Daveiga nicknamed McDonough, who is bald, "Baldy".

On August 6, 2017, McDonough saw Daveiga walking down the street. They acknowledged one another in the normal manner. Later, at about 4 AM on August 6, 2017, McDonough and Stevens were driving down Monadnock Street and reached a curve in the road near 41 Monadnock Street. The road is on-way at that point. McDonough saw a Chrysler Pacifica double-parked in front of 41 Monadnock Street, largely blocking the roadway. McDonough only had inches between his car and the other car, and he squeezed

through, pulling up on the passenger side of the Pacifica.

There were four men in the Pacifica. McDonough had seen the driver in the area before but did not know him. He was later identified as Milton Canudo. McDonough knew the passenger, a man named Kevin Roka, whom McDonough had cited for possession of ammunition sometime previously. A man named "Smith" was in the back seat on the passenger side, whom McDonough did not know. Daveiga was in the back seat on the driver's side. The windows of the Pacifica were open.

It is against Boston traffic rules to unnecessarily obstruct a roadway. Boston Traffic Rules and Regulations, Article VI, Section 7 ("No person shall drive in such a manner as to obstruct unnecessarily the normal movement of traffic on any street or highway.") McDonough told the driver that "you guys are blocking the street". All four said they were waiting for a friend. For his part, Daveiga stared straight ahead, which McDonough found to be odd and inconsistent with his usual demeanor towards him. McDonough asked Daveiga if he was "OK".

Daveiga, in an uncharacteristically low tone, said that he was. The driver said he would move the car and park in one of the open parking spots a short distance ahead on the left of Monadnock Street. McDonough indicated to him that doing so was fine and backed up to let him do so. McDonough did not then intend to issue a traffic citation for the double-parking offense.

The Pacifica passed multiple, open parking spots, drove down Monadnock Street, and took a left and not a right. Taking a right would have been a far more direct route to return to 41 Monadnock Street to pick someone up. When that occurred, McDonough and Stevens concluded that something was amiss. McDonough then changed his mind about stopping the Pacifica for the traffic violation and decided to pull the car over for that infraction. Ten to fifteen seconds later, he did so. The Pacifica committed no other traffic or other violations from the moment it left the spot where McDonough first saw the car and the moment it was pulled over.

McDonough approached the driver and asked for his license and registration. While he was waiting for

the driver to produce the documents, Daveiga engaged McDonough in conversation. McDonough stepped back to speak with him. Daveiga asked McDonough: "Baldy, what are you doing? Why are you doing this? Are you really going to do this now?" McDonough told him it was a motor vehicle stop. At the same time, Stevens was on the passenger side of the car, looking into the back seat with a flashlight. Before the driver produced his license and registration, Stevens called out to McDonough, saying "hey, Joe", and began walking quickly over to the driver's side of the car where McDonough was standing. McDonough, who knew Stevens well, understood Steven's reaction suggested he had seen something worrying, such as a gun. (McDonough testified Stevens would not have acted in this manner had he seen drugs, and would not have called out that he had seen a gun for fear of triggering violence). McDonough thereupon ordered Daveiga out of the car. Stevens told McDonough to handcuff Daveiga, which he did. A gun was found at Daveiga's feet, which Stevens told McDonough he had seen Daveiga trying to conceal by pushing it and the car's carpet under the driver's seat. McDonough knew that Daveiga did not have a license to carry.

McDonough did not issue a traffic ticket to the driver of the Pacifica, and was not sure he had a ticket book with him that night or whether Stevens issued him a ticket. No ticket was produced in evidence. If McDonough did not have a ticket book, he could have had another officer deliver one to him." (Add./43-46; R./31-34)

II. Trial

On August 6, 2017, at 3:50 AM, Boston Police Officer Christopher Stevens, (hereinafter referred to as "Stevens"), and his partner, Officer Joseph McDonough (hereinafter referred to as "McDonough"), were in plain clothes and on patrol in an unmarked Ford Explorer on Monadnock Street. (Tr.1/136-139,164-165; Tr.2/38-40) The street is one-way, in a residential area and cars were parked on both sides of the street. (Tr.1/140; Tr.2/40,59) The officers came upon a Chrysler Pacifica SUV blocking a driveway, and the vehicle was also obstructing the roadway. (Tr.1/140; Tr.2/40-41,60) The vehicle was occupied by four, young, Cape Verdean men. (Tr.1/169; Tr.2/59) The officers pulled up, and advised the vehicle's occupants that they were blocking the

street. (Tr.1/142,168; Tr.2/41) The officers recognized two of the vehicle's four occupants: Kevin Rocha, the driver, and Erickson Daveiga, the rear seat passenger. (Tr.1/142,169; Tr.2/42) When informed that they were blocking the driveway, the men responded that they were waiting for a friend. (Tr.1/170) Officer McDonough spoke with the driver, who responded that he would park further up the street. (Tr.1/145-146; Tr.2/50) The officers backed up their vehicle so the Pacifica could pull further out into the street. (Tr.1/147,171; Tr.2/50) Rather than park in the available open spaces, the Pacifica proceeded down the street, turning left on Dudley Street. (Tr.1/147; Tr.2/51) The officers decided to stop the vehicle for the traffic violation they had observed earlier. (Tr.1/147-148) The Pacifica was pulled over on Dudley Street. (Tr.1/149,178) Both officers approached the Pacifica, Stevens on the passenger side, McDonough on the driver's side. (Tr.1/149)

According to Officer Stevens, Officer McDonough requested the driver's license and registration. (Tr.1/149-150,182-183) Stevens stood on the passenger side, using his flashlight to illuminate the stopped

vehicle's interior. (Tr.1/150; Tr.2/8) McDonough returned to the police vehicle and ran the driver, Nilton Canuda's, information through the CJIS. (Tr.1/150,183) When McDonough returned to the driver's window, Stevens observed Daveiga twisting his body to talk to McDonough through the driver's side rear window. (Tr.1/153) Stevens observed slight motioning of Daveiga's feet, and it appeared that the floor mat was moved. (Tr.1/154-155; Tr.2/9) When Stevens angled his flashlight, he observed what he believed to be the barrel and front sight post of a firearm. (Tr.1/157-158; Tr.2/9) Stevens signaled McDonough over the roof of the car about his observations. (Tr.1/161; Tr.2/9-10) Daveiga and the other occupants of the vehicle were removed. (Tr.1/161; Tr.2/57) A loaded firearm was recovered on the floor, under the front seat (Tr.1/163; Tr.2/13,21-23,57) Daveiga told police he did not have a license to carry a firearm. (Tr.1/161-162)

Boston Police Officer Joseph McDonough testified that he had interacted with Erickson Daveiga "roughly 30 times" prior to the motor vehicle stop on August 6, 2017. (Tr.2/45) McDonough described the prior

interactions as mostly "cordial". (Tr.2/45) Daveiga called McDonough by the nickname "Baldy". (Tr.2/45) The two men saw each other on the previous day, August 5th, and Daveiga nodded and gestured. (Tr.2/46) However, at the time of the stop of the Pacifica, Daveiga stared straight ahead, did not make eye contact, and said nothing. (Tr.2/47-48) When McDonough said: "How about you Buddy? Are you okay? Is everything alright with you?", Daveiga responded in a low, monotone, "Yeah, I'm cool". (Tr.2/48)

McDonough testified that he could have ticketed the driver, but the driver was in the car, and had offered to pull up and park. (Tr.2/61-62) McDonough noted that as the men drove away, there were available parking spots, including one close by. (Tr.2/49) McDonough recalled that after the Pacifica was stopped, he asked for the driver's license and registration, but claimed he never received it because he became involved in a conversation with Daveiga, who was seated behind the driver. (Tr.2/53) Daveiga asked McDonough: "Hey, What's up Baldy? What are we doing here? We're really going to do this?". (Tr.2/53-55,67) McDonough responded that it was a motor vehicle stop,

when Officer Stevens came running around the back of the car, alerting him there was a firearm on the floor. (Tr.2/55-56,70)

The firearm was an operable semi-automatic firearm. (Tr.2/106-107) No DNA or fingerprints were recovered from the weapon. (Tr.2/32,91-93)

SUMMARY OF THE ARGUMENT

1. The Motion Judge erred in denying Daveiga's motion to suppress. Although the Commonwealth argued that the traffic violation justified the stop, the police officers had already permitted the driver to leave after having an interaction over the violation. The Commonwealth's witness admitted that the reason the officer's stopped the vehicle was that the driver did not park in one of the available spaces and took a left on Dudley Street, both actions not justifying a stop of the vehicle. (Pages 19 - 29)
2. The Trial Judge should not have permitted the Commonwealth to elicit the testimony that Officer McDonough interacted with Daveiga at least thirty times prior to the motor vehicle stop. While the failure to engage the officer on the night of the

arrest may have been out of the ordinary, Daveiga was under no legal obligation to interact with police. The evidence put the jury on notice that Daveiga had frequent police interaction, and amounted to propensity evidence. (Pages 29 - 35)

3. Daveiga's motion for a required finding of not guilty should have been allowed where all of the evidence, and all reasonable inferences drawn therefrom, could not have permitted a reasonable trier of fact to conclude that Daveiga knew the firearm was present and had the ability and intention to exercise dominion and control over the weapon. (Pages 35 - 40)

ARGUMENT

1. **The Motion Judge erred in denying Daveiga's motion to suppress where Boston Police did not have probable cause to stop the vehicle in which he was a passenger.**

When reviewing a ruling on a motion to suppress, an appellate court will accept the motion judge's findings of fact absent clear error. See Commonwealth v. Franklin, 456 Mass. 818,820(2010). In addition, the motion judge, who heard and saw the witnesses,

determines the weight and credibility of the evidence. See Commonwealth v. Gomes, 453 Mass. 506,509(2009). With respect to legal questions, however, the appellate court will "conduct an independent review of [the] ultimate findings and conclusions of law." Commonwealth v. Jones-Pannell, 472 Mass. 429,431 (2015), quoting, Commonwealth v. Ramos, 470 Mass. 740,742 (2015). The Commonwealth bears the burden of demonstrating that the police officers acted lawfully in pursuing and seizing Daveiga. See Commonwealth v. Shields, 402 Mass. 162,164(1988).

Article 14, like the Fourth Amendment to the United States Constitution, guarantees "a right to be secure from all unreasonable searches and seizures." Commonwealth v. Buckley, 478 Mass. 861,865 (2018). Because "[a] police stop of a moving automobile constitutes a seizure, Commonwealth v. Rodriguez, 472 Mass. 767,773(2015), that stop must be reasonable in order to be valid under the Fourth Amendment and art.14. A passenger in a vehicle may challenge the constitutionality of a stop. Commonwealth v. Quintos Q, 457 Mass. 107,110 (2010).

The Motion Judge properly noted that this case "tests the limits of what are known as "pretext" car stops. (Add./46; R./34) The Motion Judge noted that it was undisputed that McDonough had observed a traffic violation. (Add./46;R./34) The question presented was whether the officer initially deciding not to take action, could later change his mind and enforce the violation. (Add./46; R./34) Relying on Commonwealth v. Santana, 420 Mass. 205,207 (1995), the Court denied the motion to suppress. (Add./46-48;R./35-36)

In Commonwealth v. Santana, supra. at 209, the Supreme Judicial Court articulated the current State constitutional standard for evaluating the validity of a traffic stop. Under that rule, called the authorization approach, a traffic stop is reasonable for article 14 purposes "so long as the police are doing no more than they are legally permitted and objectively authorized to do," regardless of the underlying intent or motivations of the officers involved. Id., quoting, United States v. Trigg, 878 F.2d 1037,1041(7th Cir. 1989). Under the authorization test, a stop is reasonable under article 14 as long as there is a legal justification for it. An observed

traffic violation is one such justification. Commonwealth v. Buckley, supra. at 866.

In Buckley, the Court explained that Santana is "predicated on the general constitutional principle, reflected in both article 14 and Fourth Amendment jurisprudence, that "police conduct is to be judged 'under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.'" Id. at 867, citing Santana at 208, quoting, Commonwealth v. Ceria, 13 Mass.App.Ct. 230,235 (1982). The authorization test avoids the "often-speculative probing of the police's "true" motives, while at the same time providing an administrable rule to be applied by both law enforcement in the field as well as reviewing courts. Id. at 868. "Therefore, the fact that a traffic law has been violated is, generally speaking, a legally sufficient basis to justify stopping a vehicle, irrespective of any additional suspicions held by the officer(s) conducting the stop". Id. at 869. (Emphasis added). In a concurring opinion, Justice Budd, wrote that while striking down the authorization rule articulated in Santana was "unworkable", she believed

it important to "highlight how pretextual stops disproportionately affect people of color…". Id. at 876.

However, in Commonwealth v. Long, 485 Mass. 711, 737-758 (2020), Justice Budd, in her dissent, cited the effects of the practice of racially discriminatory motor vehicle stops as "profoundly harmful to persons and communities of color". She wrote that the authorization test under Santana and Buckley , "permit[] police to perform pretextual motor vehicle stops, i.e., stops ostensibly made on the basis of a motor vehicle violation, but actually made for the purpose of investigating suspicions of unrelated criminal activity." Id.at 738.(Citations omitted). Justice Budd further wrote that the authorization test "strips away" art. 14 protections because it substitutes reasonable suspicion of a traffic violation for reasonable suspicion of the separate criminal conduct that the officer seeks to investigate." Id. at 741-742. " If art. 14 is meant to protect individuals against the arbitrary exercise of power by agents of the Commonwealth, pretextual investigatory stops are in direct conflict with this

objective. As the authorization test creates a gaping hole in the foundational principle that a stop must be backed by reasonable suspicion, I would abandon it." Id. at. 744-745. Instead, Justice Budd proposed the "would have" test wherein a pretextual stop is valid only if a reasonable police officer "would have" made the stop in the absence of an ulterior motive; that is a reasonable officer would have made the stop solely to enforce the motor vehicle infraction. Id. at 745.

Here, assuming the initial traffic stop, that is the initial interaction between police and Officer McDonough was lawful, the officers exceeded the permissible scope of the traffic stop when they permitted the driver to leave, and then subsequently decided to stop the vehicle without a lawful basis.

This case illustrates that analysis of events in motor vehicle stops is not only "fact intensive and time dependent, but also interconnected and dynamic." Commonwealth v. Ciaramitaro, 51 Mass.App.Ct. 638,642(2001). The nature of the stop defines the scope of the initial inquiry. Commonwealth v. Bartlett, 41 Mass.App.Ct. 468,470-471(1996). It is a "'settled principle that '[a] justifiable threshold

inquiry permits a limited restraint of the individuals involved as long as their detention is commensurate with the purpose of the stop.'" Commonwealth v. Feyenord, 445 Mass. 72,77 (2005), quoting, Commonwealth v. Torres, 424 Mass. 153,162 (1997). The stop is valid "so long as the police are doing not more than they are legally permitted and objectively authorized to do. Id.

The investigative detention must be temporary and last no longer than reasonably necessary to effectuate the purpose of the stop. Commonwealth v. Laaman, 25 Mass.App.Ct. 354,364(1988). Police actions must be reasonable in time, space and the degree of force employed. Ciaramitaro, supra, at 644. A routine traffic stop may not last longer than "reasonably necessary to effectuate the purpose of the stop" (citation omitted). "It is well settled that a police inquiry in a routine traffic stop must end [when the purpose of the stop is accomplished] unless the police have grounds for inferring that 'either the operator or his passengers were involved in the commission of a crime . . . or engaged in other suspicious conduct'" (citation omitted). Torres, supra., at 158.

See, Commonwealth v. Gonsalves, 429 Mass. 658 , 663 (1999) ("Citizens do not expect that police officers handling a routine traffic violation will engage . . . in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime").

Here, the Motion Judge correctly concluded that there was no reasonable suspicion to justify the stop of the vehicle in the absence of the traffic violation. (Add./47; R./35) The Motion Judge observed that "Although McDonough was in a high-crime area, knew Daveiga from prior arrests, found Daveiga's demeanor unusual, and found the driver's actions inconsistent with the story the four men told of waiting for a friend on Monodnock Street, these facts did not amount to reasonable, articulable facts to believe that criminal activity was afoot prior to the car stop. See, Commonwealth v. Lyons, 409 Mass. 16,19 (1990). (Add./; R./35) See also, Commonwealth v. Evelyn, 485 Mass. 691, 709 (2020)(nervous or evasive behavior by an African-American male during a police

encounter was "significantly discount[ed]"); Commonwealth v. Lewis, 84 Mass.App.Ct. 1114 (2013)(Unpublished Opinion)(a defendant's uncharacteristic reluctance to engage in conversation was not reasonable suspicion that he was engaged in criminal activity); Commonwealth v. Nieves, 94 Mass.App.Ct. 1112 (2018)(Unpublished Opinion) (nervousness, coupled with turning his body when stopped by police in a high crime area does not support reasonable suspicion that defendant possessed a firearm).

In this case, Officer McDonough pulled his vehicle forward to within inches of the Pacifica. (Tr.1A/7,11) Effectively, the driver was unable to proceed and was effectively seized. Neither officer got out of the police cruiser. (Tr.1A/41) After conversation, Officer McDonough backed up his cruiser, allowing the Pacifica to drive away. (Tr.1A/11,29) Importantly, Officer McDonough did not order the driver to pull up and park, the driver merely offered to do so. (Tr.1A/28-29) Officer McDonough testified that he did not ticket the driver "at the initial stop", because he "figured, problem solved".

(Tr.1A/31) As the seizure had concluded, a reasonable person would have felt free to leave.

The courts have "long held that '[p]olice have seized a person in the constitutional sense only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he [or she] was not free to leave'". Commonwealth v. Matta, 483 Mass. 357,360(2019), quoting, Commonwealth v. Barros, 435 Mass. 171,173-174 (2001). The inquiry must be whether, in the circumstances, a reasonable person would believe that an officer would compel him or her to stay. Id. at 363. "[T]he…pertinent question is whether an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." Id. at 362. See, Commonwealth v. Cordero, 477 Mass. 237,247(2017) (A traffic stop may go no further than investigating the alleged traffic violation unless that investigation leads to information to support reasonable suspicion of a crime).

Here, the police effectively seized the Pacifica when he pulled the police cruiser within inches of the vehicle. The driver would not have believed he was

free to leave. After questioning the occupants, the police backed up the cruiser, allowing the occupants to proceed, thereby ending the seizure. A reasonable person in those circumstances would have believed that the seizure had concluded and they were free to leave. There was no subsequent, independent illegality that justified the stop of the car.

For the foregoing reasons, this Court should find that the motor vehicle stop effected by police was beyond the scope of the initial traffic stop in violation of the Fourth Amendment and art. 14, and reverse the denial of the defendant's motion to suppress.

2. The Trial Judge erred in permitting the Commonwealth to introduce evidence regarding Daveiga's prior interaction with the Boston Police. The evidence amounted to propensity evidence and prejudiced Daveiga's right to a fair trial.

The Commonwealth filed a motion in limine, seeking to admit the prior interactions between Officer McDonough and Daveiga. (Tr.1/120-121;R./24-25) Daveiga challenges the introduction

of that testimony which can only be regarded as evidence of prior bad acts, to which there was an objection at trial.

Where the error is properly preserved, as here, review of a judge's decision to allow the introduction of prior bad act evidence is for an abuse of discretion. Commonwealth v. Facella, 478 Mass. 393,407(2017).

"It is a fundamental rule that the prosecution may not introduce evidence that a defendant has misbehaved, indictably or not, for the purpose of showing his bad character or propensity to commit the crime charged". Commonwealth v. Butler, 62 Mass.App.Ct. 836,842 (2005), quoting, Commonwealth v. Trapp, 396 Mass. 202,206(1985). "The rule exists because [s]uch evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the [issue] immediately before [them]." Id. at 842-843. The inherent danger in improperly admitted evidence of a defendant's prior bad acts, is that it diverts the attention of the

jury from the crime immediately before it and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him". Commonwealth v. Baker, 440 Mass. 519,530(2003), citing, See Commonwealth v. Jackson, 132 Mass. 16,20-21(1882).

An exception to this general rule may be when the evidence is admissible for other relevant purposes. Commonwealth v. Chalifoux, 362 Mass. 811, 815-816(1973), and where the danger of prejudice does not outweigh the probative value of the evidence. Commonwealth v. Tobin, 392 Mass. 604,613-614(1984). "To be admissible, evidence of uncharged conduct must usually be related in time, place, and/or form to the charges being tried. There must be, in other words, a sufficient nexus to render the conduct relevant and probative". Butler, supra. at 843. The Commonwealth is required to demonstrate that the probative value of the evidence is not outweighed by the risk of unfair prejudice to the defendant. Commonwealth v. Crayton, 470 Mass. 228,249(2014).

Prior to the start of the trial, the Commonwealth sought the Trial Court's ruling on the admissibility of evidence that Officer McDonough had interacted with Daveiga on approximately thirty or more occasions. The defendant objected and requested that the evidence be excluded.

The Court ruled that the evidence was admissible, relying in part, on Commonwealth v. Rodriguez-Diaz, 92 Mass.App.Ct. 1126 (2018) (Unpublished Opinion). (Tr.1/120; Add./60-63)

Officer McDonough testified that he was familiar with Daveiga as part of his work with the Boston Police Department. (Tr.2/43) McDonough went on to detail that he had interacted with him on at least thirty different occasions, the "majority" of them "pretty cordial". (Tr.2/45)

The Commonwealth argued that Daveiga had interacted with Officer McDonough "numerous times" in its opening. (Tr.1/130) In its closing, the Commonwealth again argued that Daveiga and Officer McDonough "interacted" numerous times. (Tr.3/24)

Prior misconduct of a defendant is admissible to prove the existence of a larger plan or to complete the story of the crime at trial by placing it in the context of nearby or nearly contemporaneous events, as by showing that the prior bad acts and the crime are inextricably intertwined. Commonwealth v. Bradshaw, 385 Mass. 244,268-270 (1982). However, that theory cannot be applied where the circumstances of the alleged crime are not rendered "unintelligible if the references to the [earlier incident] are omitted". Commonwealth v. Brown, 389 Mass. 382,385(1983); See Commonwealth v. Anderson, 48 Mass.App.Ct. 508,513(2000). Here, the evidence added little, if anything, to the proof of the matters on trial.

In this case, the prejudice to the defendant of the prior bad act evidence far outweighed any relevancy to the crime charged, and merely showed Daveiga's propensity to commit the crime charged. Any doubt which may have been created regarding the defendant's innocence was likely overborne by the impact of that evidence.

Here, defense counsel declined a contemporaneous limiting instruction. (Tr.2/44) The error was not mitigated because the trial judge did not give a contemporaneous instruction on the proper use of prior bad act evidence. See, Commonwealth v. Bryant, 482 Mass. 731,737(2019) (noting that the best practice would be to give a limiting instruction at the time the defendant's drug dealing history was admitted into evidence).

"An appellate court's review of a trial judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result. But "no conscientious judge standard" is so deferential that, if actually applied, an abuse of discretion would be as rare as flying pigs. When an appellate court concludes that a judge abused his or her discretion, the court is not, in fact, finding that the judge was not conscientious or, for that matter, not intelligent or honest. Borrowing from other courts, we think it more accurate to say that a judge's discretionary

decision constitutes an abuse of discretion where we conclude the judge made "a clear error of judgement in weighing" the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives. L.L., A Juvenile v. Commonwealth, 470 Mass. 169 N. 27 (2014) (citations omitted).

The improper admission of the aforesaid character evidence was error, and Daveiga's conviction should be reversed.

3. **The Trial Judge erred in denying Daveiga's Motion for a Required Finding of Not Guilty of Carrying a Firearm. Other than Daveiga's presence in the vehicle and his proximity to the firearm, there was no evidence that he intended to possess the firearm.**

It is a fundamental principle that a defendant may not be convicted of a crime except by proof beyond a reasonable doubt. This right is guaranteed by the Fourteenth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. Francis v. Franklin, 471 U.S. 307,313 (1985), citing, In Re Winship, 397 U.S. 358,364(1970);

Commonwealth v. Latimore, 378 Mass.671,677(1979). Findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice. Commonwealth v. Joyner, 467 Mass. 176,180(2014).

At the conclusion of the Commonwealth's case, the defendant moved, pursuant to Massachusetts Rule of Criminal Procedure 25(a), for a required finding of not guilty. (R./37; Tr.2/112) The motion was denied. (Tr.2/112) After the defense rested, the defendant again moved for a required finding of not guilty. (R./38; Tr.2/116) The trial judge again denied the motion. (Tr.2/116)

The essential question in evaluating a motion for a required finding is whether the evidence received, viewed in the light most favorable to the Commonwealth, is sufficient so that the [factfinder] "might properly draw inferences, not too remote in the ordinary course of events, or forbidden by any rule of law, and conclude upon all the established circumstances and warranted inferences that the guilt of the defendant was proved beyond a reasonable

doubt". Commonwealth v. Clary, 388 Mass. 583,588-589(1983), quoting, Commonwealth v. Vellucci, 284 Mass. 443,445(1933).

Massachusetts General Laws, Chapter 269, Section 10(a) criminalizes the unlicensed carrying of a firearm. Because there was no evidence that the defendant actually possessed the firearm, the Commonwealth was required to prove that the defendant constructively possessed the handgun. See, Commonwealth v. Sespedes, 442 Mass. 95, 99(2004). To prove constructive possession, the Commonwealth must prove that the defendant had "knowledge coupled with the ability and intention to exercise dominion and control." Id., quoting, Commonwealth v. Brzezinski, 405 Mass. 401,409(1989). Presence alone cannot show the requisite knowledge, power, or intention to exercise control over the firearm. Commonwealth v. Brown, 401 Mass. 745,747(1988). See, Commonwealth v. Booker, 31 Mass.App.Ct. 435,437-438 (1991) (Mere presence in vicinity of contraband, even if one knows it is there, does not amount to possession. Nor is possession proved simply through the defendant's association with a person who controlled the

contraband or by sharing premises where contraband is found).

Here, the evidence presented at trial is that Daveiga was the backseat passenger in a motor vehicle that was stopped by Boston Police. (Tr.1/153) Daveiga was known to Officer McDonough, and his demeanor was different that evening. (Tr.2/48-49) When McDonough was speaking with the driver, Daveiga twisted his body to speak out of the window. (Tr.1/153) Officer Stevens observed Daveiga's feet were moving, in a kicking motion, moving the floormat. (Tr.1/154-157;Tr.2/9) A firearm was recovered on the floor.(Tr.1/161) No DNA testing was done on the firearm, and no fingerprints were recovered. (Tr.2/32,91-93)

In this case, the evidence that Daveiga intended to control the firearm was insufficient. Possession of a firearm alone is not a crime. "The issue of intention is quite as important as the issue of power. Someone might have effective power over [the contraband] simply because they were located within reach while their true owner was temporarily absent; but if such a person had power over the [contraband] (say, as a temporary visitor to the room in which they

were located) but had no intention to exercise that power, there might still be no crime". United States v. Maldonado, 23 F.3d 4,8 (1st Cir. 1994).

Although the Commonwealth presented some proof as to the essential elements of knowledge and ability to control, it presented no proof as to Daveiga's intent to control the firearm. "It is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense". Commonwealth v. Latimore, 378 Mass.671,677(1979). Nor may a conviction rest upon the piling of inference upon inference or conjecture and speculation. Commonwealth v. Ferguson, 384 Mass. 13,18(1981).

The defendant was deprived of due process of law, under the Fourteenth Amendment to the United States Constitution when the trial court denied his motion for a required finding of not guilty at the close of the Commonwealth's case. See, Jackson v. Virginia, 443 U.S. 307,318-319(1979); Commonwealth v. Latimore, 378 Mass.671,677-678(1979). Where, as here, the evidence in the light most favorable to the Commonwealth was insufficient to persuade any rational and reasonable

trier of fact beyond a reasonable doubt of each essential element of the crime charged, the motion should have been allowed.

Additionally, because State Law, as codified in Massachusetts Rule Criminal Procedure 25(a), entitled the defendant to a required finding at the close of the Commonwealth's case upon his timely motion therefor, the denial of the motion at that juncture also deprived him of Fourteenth Amendment Due Process by failing to accord him a State-created liberty interest. Hicks v. Oklahoma, 447 U.S. 343,346(1980).

CONCLUSION

The trial court's ruling on the motion to suppress and the motion in limine should be reversed, and the matter should be remanded for a new trial. In the alternative, the denial of Daveiga's motion for a required finding should be reversed, the defendant's conviction should be vacated, and a judgement of not guilty should enter.

Respectfully submitted,

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Date: February, 2021

Addendum Table of Contents

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 17-719

COMMONWEALTH

vs.

ERICKSON DAVEIGA

MEMORANDUM DEFENDANT'S MOTION TO SUPPRESS

The defendant, Erickson Daveiga, is charged with firearm offenses arising from a firearm seized during a car stop performed by Boston Police. He moves to supress the firearm. A hearing on defendant's motion was conducted on July 9, 2018.

In light of the arguments made by counsel and the facts presented, and for the reasons stated below, the defendant's motion is **DENIED.**

FINDINGS OF FACT

Boston Police Officer Joseph McDonough, an officer with 12 years of experience, testified for the Commonwealth. I fully credit his testimony.

On August 6, 2017, McDonough and his partner, Officer Christopher Stevens, were on patrol in the B-2 district of Boston, comprised of Roxbury, Dorchester, and part of Mission Hill. McDonough and Stevens were in an unmarked Ford Explorer and in plain clothes. McDonough has worked in the B-2 district for some 12 years, and had been partnered with Stevens for years. The area, particularly on and around Monadnock Street, was known to McDonough as one rife with criminal gang and firearm activity, and McDonough had made multiple firearms arrests in that vicinity.

Erickson Daveiga was well-known to McDonough. McDonough had interacted with him at least 30 times over the years and had arrested him at least three times, once in July 2016 for a

firearm offense. Despite the arrests, the two had developed something of a cordial relationship. Daveiga nicknamed McDonough, who is bald, "Baldy."

On August 6, 2017, McDonough saw Daveiga walking down the street. They acknowledged one another in the normal manner. Later, at about 4 AM on August 6, 2017, McDonough and Stevens were driving down Monadnock Street and reached a curve in the road near 41 Monadnock Street. The road is a one-way at that point. McDonough saw a Chrysler Pacifica double-parked in front of 41 Monadnock Street, largely blocking the roadway. McDonough had only inches between his car and the other car, and he squeezed through, pulling up on the passenger side of the Pacifica.

There were four men in the Pacifica. McDonough had seen the driver in the area before but did not know him. He was later identified as Milton Canudo. McDonough knew the passenger, a man named Kevin Roka, whom McDonough had cited for possession of ammunition sometime previously. A man named "Smith" was in the back on the passenger side, whom McDonough did not know. Daveiga was in the back seat on the driver's side. The windows of the Pacifica were open.

It is against Boston traffic rules to unnecessarily obstruct a roadway. Boston Traffic Rules and Regulations, Art. VI, §7 ("No person shall drive in such a manner as to obstruct unnecessarily the normal movement of traffic on any street or highway."). McDonough told the driver that "you guys are blocking the street." All four said they were waiting for a friend. For his part, Daveiga stared straight ahead, which McDonough found to be odd and inconsistent with his usual demeanor toward him. McDonough asked Daveiga if he was "OK." Daveiga, in an uncharacteristically low tone, said that he was. The driver said he would move the car and park in one of the open parking spots a short distance ahead on the left on Monadnock Street.

McDonough indicated to him that doing so was fine and backed up to let him do so. McDonough did not then intend to issue a traffic citation for the double-parking offense.

The Pacifica passed multiple, open parking spots, drove down Monadnock Street to Dudley Street, and took a left and not a right. Taking a right would have been a far more direct route to return to 41 Monadnock to pick someone up. When that occurred, McDonough and Stevens concluded that something was amiss. McDonough then changed his mind about stopping the Pacifica for the traffic violation and decided to pull the car over for that infraction. Ten to fifteen seconds later, he did so. The Pacifica committed no other traffic or other violations from the moment it left the spot where McDonough first saw the car and the moment it was pulled over.

McDonough approached the driver and asked for his license and registration. While he was waiting for the driver to produce the documents, Daveiga engaged McDonough in conversation. McDonough stepped back to speak with him. Daveiga asked McDonough: "Baldy, what are you doing? Why are you doing this? Are you really doing this now?" McDonough told him it was a motor vehicle stop. At the same time, Stevens was on the passenger side of the car, looking into the back seat with a flashlight. Before the driver produced his license or registration, Stevens called out to McDonough, saying "hey, Joe," and began walking quickly over to the driver's side of the car where McDonough was standing. McDonough, who knew Stevens well, understood Stevens' reaction suggested he had seen something worrying, such as a gun (McDonough testified Stevens would not have acted in this manner had he seen drugs, and would not have called out that he had seen a gun for fear of triggering violence). McDonough thereupon ordered Daveiga out of the car. Stevens told McDonough to handcuff Daveiga, which he did. A gun was found at Daveiga's feet, which

Stevens told McDonough he had seen Daveiga trying to conceal by pushing it and the car's carpet under the driver's seat. McDonough knew that Daveiga did not have a license to carry.

McDonough did not issue a traffic ticket to the driver of the Pacifica, and was not sure he had a ticket book with him that night or whether Stevens issued him a ticket. No ticket was produced in evidence. If McDonough did not have a ticket book, he could have had another officer deliver one to him.

CONCLUSIONS OF LAW

This case tests the limits of what are known as "pretext" car stops. Neither side disputes the core facts: The driver of the Pacifica had plainly committed a traffic violation, blocking the road, in violation of Boston Traffic Rules and Regulations. See Art. VI, §7 ("No person shall drive in such a manner as to obstruct unnecessarily the normal movement of traffic on any street or highway."). The police initially decided not to take action because of that offense, and the driver said he would pull over to an open parking spot and continue waiting for a friend, which was the reason he and the other three men gave for double-parking in the first place. But the driver did not do that – he passed several open spots and took a route that showed it was unlikely he had been waiting for someone on Monadnock Street and planned to return to continue doing so. That, coupled with the officers familiarity with Daveiga and his past involvement in criminal offenses, including a gun offense, and his unusual demeanor in the car led McDonough to change his mind and decide to enforce the traffic violation. The question is, under these facts, can he?

The answer does not turn on McDonough's actual motivation. "[T]he law is that the officers' motive for stopping the vehicle is irrelevant, and all that need be shown is that they had a reasonable suspicion that the driver...had violated" traffic laws. Commonwealth v. Avellar, 70 Mass. App. Ct. 608, 613 (2007). Here, McDonough candidly acknowledged that he was

effecting a traffic stop for the double-parking violation, but was motivated to do so because he had concern for what was going on in the car.[1] But the undisputed fact remains that McDonough had observed a traffic violation. "Where the police have observed a traffic violation, they are warranted in stopping a vehicle." Commonwealth v. Santana, 420 Mass. 205, 207 (1995) (citation omitted); Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 840 n.5 (2010) (where probable cause exists that a traffic violation has been committed, a traffic stop is justified). The defense argues that the police had "waived off" the offense by telling the driver to move along, but no principle of law supports the argument that probable cause to believe a traffic violation has occurred dissipates because the police initially decide not to take enforcement action. Indeed, the "waive off" argument is another way to argue pretext – that the waiving off shows that the real motivation for this stop was not for traffic enforcement. But the police officer's actual motivation is irrelevant – so long as the police officer objectively had reasonable suspicion to believe the car had committed a traffic violation, and where the stop occurred promptly upon seeing that violation (here, 15 seconds or so), the officer's actual motivation does not make the

1 The Commonwealth argued in the alternative that the facts established reasonable suspicion to justify a Terry stop, but they do not. Although McDonough was in a high-crime area, knew Daveiga from prior arrests, found Daveiga's demeanor unusual, and found the driver's actions inconsistent with the story the four men told of waiting for a friend on Monadnock Street, these facts did not amount to reasonable, articulable facts to believe that criminal activity was afoot prior to the car stop. See Commonwealth v. Lyons, 409 Mass. 16,19 (1990) ("An investigatory automobile stop requires that the Commonwealth prove that the officer 'has a reasonable suspicion that the occupants have committed, are committing, or are about to commit a crime.'"); Commonwealth v. Wright, 48 Mass. App. Ct. 912, 913 (1999) (no "reasonable grounds or suspicion to justify a Terry detention" existed where "[t]here had been no report of a crime or of a weapon. The officers had observed no motion suggestive of drug dealing or other crime. The defendant's evasion of the police by walking away did not by itself suffice to create articulable suspicion. ... Viewed objectively, nothing more happened in this case than that a youth in a high crime area put his hand in his pocket and walked away upon seeing the police. More is needed to create an articulable suspicion. We think the youth's ignoring the direction to stop cannot be treated as affecting the analysis without empowering the police to create articulable suspicion where none existed before") (citations omitted).

stop unconstitutional. So it is here. McDonough had a sufficient basis to effect a traffic stop and lawfully did so.

Since the stop was lawful, Stevens was entitled to use his flashlight to observe what was in plain view in the car, as he did. See Commonwealth v. Santos, 91 Mass. App. Ct. 1121, review denied, 477 Mass. 1108 (2017) (seizure of a handgun following a car stop constitutionally valid because gun came into plain view as officer shown a flashlight into the front passenger seat area). Once Stevens saw the gun, the officers were entitled to order everyone out of the car. Commonwealth v. Hubbard, No. 17-P-249, 2018 WL 3194421, at *3 (Mass. App. Ct. June 29, 2018) (citation omitted) ("There must be specific and articulable facts to support an exit order, however, 'it does not take much for a police officer to establish a reasonable basis to justify an exit order or search based on safety concerns'"); Commonwealth v. Gonsalves, 429 Mass. 658, 661–662 (1999) ("[T]o determine whether [an exit] order was justified, we ask 'whether a reasonably prudent man in the policeman's position would be warranted in the belief that the safety of the police or that of other persons was in danger.'") (citations omitted). The subsequent seizure of the handgun was therefore constitutional.

ORDER

For the foregoing reasons, defendant's motion to suppress is **DENIED**.

_____

Justice of the Superior Court

Date: July 10, 2018

UNITED STATES CONSTITUTION

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS DECLARATION OF RIGHTS

ARTICLE 14

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Massachusetts General Laws Annotated Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280) Title I. Crimes and Punishments (Ch. 263-274) Chapter 269. Crimes Against Public Peace (Refs & Annos)

M.G.L.A. 269 § 10

§ 10. Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

Effective: January 1, 2015 to December 31, 2020
Currentness

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

(b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches, or a slung shot, blowgun, blackjack, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed starlike object intended to injure a person when thrown, or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance or a cestus or similar material weighted with metal or other substance and worn on the hand, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a), shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

Add. 51

(c) Whoever, except as provided by law, possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty; or whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle, a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of paragraph (a).

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any person so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

(e) Upon conviction of a violation of this section, the firearm or other article shall, unless otherwise ordered by the court, be confiscated by the commonwealth. The firearm or article so confiscated shall, by the authority of the written order of the court be forwarded by common carrier to the colonel of the state police, who, upon receipt of the same, shall notify said court or justice thereof. Said colonel may sell or destroy the same, except that any firearm which may not be lawfully sold in the commonwealth shall be destroyed, and in the case of a sale, after paying the cost of forwarding the article, shall pay over the net proceeds to the commonwealth.

(f) The court shall, if the firearm or other article was lost by or stolen from the person lawfully in possession of it, order its return to such person.

(g) Whoever, within this commonwealth, produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty, shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars.

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 2 ½ years or in state prison for not more than 5 years.

Add. 52

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle, shotgun or machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty, unless an appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

(j) For the purposes of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged.

Whoever, not being a law enforcement officer and notwithstanding any license obtained by the person pursuant to chapter 140, carries on the person a firearm, loaded or unloaded, or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of the elementary or secondary school, college or university shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 2 years or both. A law enforcement officer may arrest without a warrant and detain a person found carrying a firearm in violation of this paragraph.

Any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university that fails to report a violation of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than $500.

<[There is no paragraph (k).]>

(*l*) The provisions of this section shall be fully applicable to any person proceeded against under section seventy-five of chapter one hundred and nineteen and convicted under section eighty-three of chapter one hundred and nineteen, provided, however, that nothing contained in this section shall impair, impede, or affect the power granted any court by chapter one hundred and nineteen to adjudicate a person a delinquent child, including the power so granted under section eighty-three of said chapter one hundred and nineteen.

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

Add. 53

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2 ½ years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

(*o*) For purposes of this section, "loaded" shall mean that ammunition is contained in the weapon or within a feeding device attached thereto.

For purposes of this section, "ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun.

Credits

Amended by St.1935, c. 290; St.1936, c. 227, § 1; St.1937, c. 250, § 1; St.1955, c. 160; St.1956, c. 172; St.1957, c. 688, § 23; St.1968, c. 737, §§ 11 to 14; St.1969, c. 441; St.1969, c. 799, §§ 14 to 16; St.1971, c. 456, §§ 5, 6; St.1972, c. 312, § 5; St.1973, c. 588; St.1974, c. 649, § 2; St.1975, c. 113, §§ 2, 3; St.1975, c. 585, § 1; St.1978, c. 175, §§ 1, 2; St.1982, c. 254; St.1983, c. 516, §§ 2, 3; St.1985, c. 349; St.1986, c. 481, § 3; St.1986, c. 581, § 1; St.1987, c. 150, §§ 1, 2; St.1989, c. 648; St.1990, c. 511, §§ 2, 3; St.1996, c. 20; St.1996, c. 151, §§ 487, 488; St.1998, c. 180, §§ 68 to 70; St.2006, c. 48, §§ 5 to 7, eff. Mar. 30, 2006; St.2014, c. 284, §§ 89, 92, eff. Aug. 13, 2014; St.2014, c. 284, § 90, eff. Jan. 1, 2015.

Notes of Decisions (530)

M.G.L.A. 269 § 10, MA ST 269 § 10
Current through Chapter 134 of the 2019 1st Annual Session

End of Document

Add. 54

Commonwealth v. Lewis

Appeals Court of Massachusetts

October 9, 2013, Entered

12-P-985

Reporter
2013 Mass. App. Unpub. LEXIS 971 *; 84 Mass. App. Ct. 1114; 994 N.E.2d 819; 2013 WL 5538451

COMMONWEALTH vs. DOMINIQUE LEWIS.

Subsequent History: Appeal denied by Commonwealth v. Lewis, 466 Mass. 1109, 998 N.E.2d 342, 2013 Mass. LEXIS 939 (Mass., Nov. 21, 2013)

Core Terms

reasonable suspicion, armed, shield, conversation, carrying, firearm, door, officer's testimony, police witness, right side, give rise, endorsement, officers', backpack, credible, mirrored, probable, suppress, matters, nervous, porch, drop

Judges: [*1] Green, Grainger & Fecteau, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from his convictions on charges of carrying a firearm without a license and carrying a loaded firearm, the defendant claims error in the denial of his pretrial motion to suppress evidence seized from him as a consequence of a police stop and search of his person. We reverse.

The motion judge explained his order denying the motion in a margin endorsement stating the following: "After hearing and argument the motion is DENIED. I find based on the credible evidence offered by the police witnesses that probable cause existed to approach and detain the defendant. I find the experience and training of the police witness as to the characteristics of an armed individual mirrored the actions of the defendant, giving rise to reasonable suspicion that a crime was being committed by the defendant."[1] The testimony upon which the judge apparently based his finding was that of Officer Traft, who explained that armed gunmen will "shield their body, . . . shield [their] weapon away from someone," and that he developed the belief that the defendant was armed when the defendant (who was standing on the porch of a residence, [*2] "banging" on the front door in an effort to be allowed entry) turned his body so as to shield his right side from the officer. The motion judge's conclusion that the defendant's actions furnished reasonable suspicion to justify a stop was incorrect. Put simply, the mere fact that the defendant turned his right side away from the officers, while knocking on the door in his attempt to be allowed entry to the residence,

[1]The motion judge's endorsement did not otherwise explain the basis for his conclusion [*4] that probable cause, rather than reasonable suspicion, existed to stop the defendant. Beyond finding that the defendant's actions mirrored those described by the officer's testimony as characteristic of an armed individual, the judge made no additional findings of fact.

does not furnish reasonable suspicion that the defendant "had committed, was committing, or was about to commit a crime." Commonwealth v. Willis, 415 Mass. 814, 817, 616 N.E.2d 62 (1993). Contrast Commonwealth v. DePeiza, 449 Mass. 367, 371-372, 868 N.E.2d 90 (2007) (defendant's "straight arm" walk, together with nervous behavior and shielding of bulge in jacket pocket that appeared to hold a heavy object, at midnight in area of recent escalation in firearm violence, furnished reasonable suspicion to conduct a patfrisk). As we have observed, see note 1, supra, the findings of fact entered by the motion judge were remarkably sparse. However, we discern from the record no purpose to be gained by remanding the matter for the entry of supplemental findings, because even were we to assume that the motion [*3] judge would find credible all of the testimony by the officers who testified at the motion hearing, their testimony as to matters not incorporated in the judge's findings still does not give rise to reasonable suspicion. Those additional matters include (i) that the encounter took place in a high crime area; (ii) that the defendant, with whom they were familiar and typically found to be willing to engage with them in friendly conversation, declined the officers' efforts at cordial conversation on this particular occasion, explaining only that he needed to drop off a PlayStation he claimed to be carrying in a backpack; (iii) that the defendant appeared nervous; and (iv) that the defendant dropped the backpack which he claimed to contain the PlayStation. At most, the officers' observations, including the defendant's uncharacteristic reluctance to engage in conversation, supported a hunch that he was up to no good, rather than reasonable suspicion that he was engaged in criminal activity. See Commonwealth v. Thibeau, 384 Mass. 762, 763-764, 429 N.E.2d 1009 (1981). See also Commonwealth v. Stoute, 422 Mass. 782, 788, 665 N.E.2d 93 (1996).[2]

The judgments are reversed, and the verdicts are set aside. The order denying the defendant's motion to suppress is reversed, and a new order shall enter allowing the motion.

So ordered.

By the Court (Green, Grainger & Fecteau, JJ.),

Entered: October 9, 2013.

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[2]Our view of the case obviates any need to consider whether the officers were justified in reaching through the threshold of the door to grab the defendant and drag him back out onto the porch.

Commonwealth v. Nieves

Appeals Court of Massachusetts

December 5, 2018, Entered

18-P-216

Reporter
2018 Mass. App. Unpub. LEXIS 891 *; 94 Mass. App. Ct. 1112; 2018 WL 6332243

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

COMMONWEALTH *vs.* BENNY W. NIEVES.

Core Terms

firearm, pocket, reasonable suspicion, suppress, outstanding, cruiser

Judges: Milkey, Henry & Englander, JJ. [*1]

Opinion

A District Court jury convicted the defendant of unlawful possession of a firearm and unlawful possession of a loaded firearm. The firearm in question was found in the pocket of a coat he was wearing during a patfrisk performed by a Worcester police officer. On appeal, the defendant challenges the denial of his motion to suppress the firearm.[1] Because we agree with the defendant that the police did not have justification to conduct the patfrisk, we reverse the defendant's convictions and order that the complaint be dismissed.

Background. The factual recitation that follows is drawn from the judge's findings, none of which the defendant has shown to be clearly erroneous. See *Commonwealth v. Meas*, 467 Mass. 434, 440, 5 N.E.3d 864 (2014) ("In reviewing a decision on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the judge's] ultimate findings and conclusions of law" [quotations omitted]).

On September 12, 2014, at approximately 12:40 A.M., Officer Peter Roberge, a Worcester police officer, was on routine traffic patrol in the Kelly Square area. "[T]here have been many robberies, stabbing[s] and shootings" [*2] in Kelly Square, and it "is considered a high crime area of the city." Officer Roberge spotted the defendant and another man walking slowly toward a gas station (where, according to the officer's testimony, he observed the defendant purchase something). The officer knew the defendant from an arrest the year before, and he had some reason to believe that the defendant had a warrant outstanding for his arrest. In fact, there was no outstanding warrant, something that Officer Roberge could have learned had someone run the defendant's name through the warrant management system.[2] In lieu of radioing the station

[1]The defendant additionally argues that the trial judge erred in denying his motion to dismiss the criminal complaint based on police failure to preserve an article of clothing in which the firearm had been wrapped. We need not reach that argument.

[2]Three months earlier, the defendant had been the victim of a shooting. Officer Roberge was aware that there had been an arrest warrant

for such assistance, Officer Roberge decided to stop the defendant to make inquiry of him. As the judge expressly found, "Officer Roberge admitted that the defendant was not doing anything unusual when he observed him walking, that he did not observe any furtive movements during that time, and that he had no reasonable suspicion that the defendant had committed any crime, but that he knew the defendant and wanted to inquire about the existence of the warrant."

Officer Roberge pulled his marked cruiser alongside the defendant while the defendant was crossing the street, and stopped [*3] him while he was standing on a traffic island. The officer told the defendant "he wanted to talk with him." At this point, Officer Roberge was joined by two other officers (whom he had radioed for backup) in a separate cruiser. Officer Roberge did not activate his cruiser's lights or siren (and there was no evidence that the other officers did do so either). The defendant and his companion meanwhile had been joined by a third person, so that there were three officers and three civilians.

Officer Roberge asked the defendant to remove his hands from his coat pockets, and the defendant complied by slowly withdrawing his hands, which he then kept by his side and near his pockets. The defendant also turned his body "so that he shielded the left side of his body from Officer Roberge."[3] Officer Roberge noticed that the defendant appeared nervous during this encounter and would not look him in the eye. "Believing that the defendant was in possession of a weapon," Officer Roberge ordered the defendant to place his hands on the roof of a cruiser and pat frisked him. During this, Officer Roberge discovered the loaded firearm in the defendant's coat pocket.

Discussion. For purposes of our analysis, [*4] we assume that the defendant was not seized when the police initiated their conversation with him, or even when the police ordered him to remove his hands from his pockets. See *Commonwealth v. Fraser*, 410 Mass. 541, 544, 573 N.E.2d 979 (1991). As the Commonwealth acknowledges, however, the defendant plainly was seized by the time Officer Roberge ordered the defendant to place his hands on the cruiser so that he could pat frisk him. The question, then, is whether at that point the police had "reasonable suspicion that [the defendant] ha[d] committed, [was] committing, or [was] about to commit a criminal offense *and* [was] armed and dangerous." See *Commonwealth v. Narcisse*, 457 Mass. 1, 9, 927 N.E.2d 439 (2010).

At the motion hearing (and on appeal) the Commonwealth sought to justify the patfrisk based only on the theory that Officer Roberge had gained reasonable suspicion from their interactions that day that the defendant was in unlawful possession of a firearm.[4] To support this theory, the Commonwealth relies principally on *Commonwealth v. DePeiza*, 449 Mass. 367, 868 N.E.2d 90 (2007), a case that the prosecutor characterized at the motion hearing as being "directly on point" and as involving facts "almost identical to the facts before us today." To be sure, there are some basic similarities between the facts here and those in *DePeiza*: both defendants were stopped in a [*5] high crime area, appeared nervous, and turned part of their bodies away from the police. *Id.* at 368-369. However, in *DePeiza* — a case that the Supreme Judicial Court itself characterized as "a close one" — there was significantly more evidence to support a reasonable belief that the defendant was unlawfully in possession of a firearm. *Id.* at 371. For example, the defendant in *DePeiza* had been seen walking with a stiff, "'straight arm' gait," which an officer with training on the subject testified was characteristic of someone walking with a concealed firearm. *Id.* at 368. Further, the police in *DePeiza* specifically observed that a pocket on the side that the defendant was shielding from the police appeared to have been weighted down by a heavy object.[5] *Id.* at 368. In light of the significant difference in the quantity and quality of evidence between *DePeiza* and the case before us, the

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pending for the defendant at that time, and he testified at the suppression hearing that the warrant was for "[a]ssault and battery and destruction of property." Further, although Officer Roberge had not checked the warrant management system the day of the stop to see whether the earlier warrant was still outstanding, he had not seen the defendant's name on the daily list of warrants issued, something he regularly checked. He also testified that he had not seen the defendant's name in any of the booking records, which indicated to him that the warrant was still active. In fact, the warrant in question had been cleared five days prior to the defendant's being stopped.

[3]The judge's finding on this point is not clearly erroneous, and Officer Roberge himself referred to the defendant's actions as "shielding" the left side of his body. However, it bears noting that on cross-examination, Officer Roberge agreed with defense counsel's characterization that the defendant "turned his body slightly away," and "just turned a slight turn."

[4]It appears uncontested that Officer Roberge had ample time at the scene to radio to have someone check the warrant management system to confirm whether the old arrest warrant remained outstanding. In any event, the Commonwealth does not argue, on the facts here, that Officer Roberge could seize and pat frisk the defendant based on a mistaken but good faith belief that there was an outstanding warrant. In fact, as the judge noted, citing *Commonwealth v. Maingrette*, 86 Mass. App. Ct. 691, 20 N.E.3d 626 (2014), the Commonwealth affirmatively forswore making such an argument.

[5]In holding that the police officer had sufficient reasonable suspicion to pat frisk the defendant, the court noted that the "most significant[]" evidence was that the defendant's right pocket "appeared to hold a heavy object" and that the defendant was shielding that side of his body from the police. *DePeiza*, 449 Mass. at 371-372.

comparison between the cases is not helpful to the Commonwealth.

We conclude that the defendant's nervousness when stopped by the police in a high crime area, coupled with his turning his body slightly away from the police, does not support reasonable suspicion that the defendant was illegally in possession of a firearm.[6] The police here [*6] had a hunch that the defendant may have been concealing an unlicensed firearm, but "[a] mere 'hunch' is not enough" to establish reasonable suspicion. *Commonwealth v. Silva*, 366 Mass. 402, 406, 318 N.E.2d 895 (1974). The motion to suppress should have been allowed.

Finally, in the unusual circumstances where it is beyond dispute that the defendant could not be retried if the firearm is suppressed, we order not only that his convictions be reversed, but that the complaint be dismissed. See *Commonwealth v. Gentile*, 466 Mass. 817, 832, 2 N.E.3d 873 (2014) (case remanded for dismissal where judge erred in failing to suppress certain evidence and the Commonwealth necessarily could not retry the defendant without such evidence).

Conclusion. The judgments are reversed, the verdicts are set aside, and an order shall enter dismissing the complaint.

So ordered.

By the Court (Milkey, Henry & Englander, JJ.[7]),

Entered: December 5, 2018.

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[6] Even if the defendant's turning his body is seen as his not wanting the police to see something on that side of his body, it hardly follows that the thing he was trying to hide was an illegal firearm.

[7] The panelists are listed in order of seniority.

Commonwealth v. Rodriguez-Diaz

Appeals Court of Massachusetts

February 5, 2018, Entered

16-P-371

Reporter
2018 Mass. App. Unpub. LEXIS 113 *; 92 Mass. App. Ct. 1126; 102 N.E.3d 1030; 2018 WL 708822

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

COMMONWEALTH *vs.* GILBERT RODRIGUEZ-DIAZ.

Subsequent History: Appeal denied by *Commonwealth v. Rodriguez-Diaz, 479 Mass. 1106, 2018 Mass. LEXIS 290 (Mass., May 4, 2018)*

Disposition: Judgments affirmed.

Core Terms

chair, firearm, gun, parking lot, arrest, reasonable expectation of privacy, constructive possession, possessing, drinking, revolver, loaded, searched, privacy, drugs, infer

Judges: Wolohojian, Kinder & Englander, JJ. [*1]

Opinion

The defendant was convicted by a Boston Municipal Court jury of (1) possession of a firearm without a license, and (2) unlawfully possessing a loaded firearm. The gun in question was found under the cushion and in the corner of a large, weathered chair, located outdoors in a private parking lot at 576-580 Blue Hill Avenue in the Dorchester section of Boston, and on which the defendant had been seated until the police arrived and arrested him. The defendant claims that the search that yielded the gun violated the *Fourth Amendment to the United States Constitution* and *art. 14 of the Massachusetts Declaration of Rights*, and that even if the search was valid, the evidence presented at trial was insufficient to convict him of possessing the firearm. For the following reasons, we affirm.

1. *Facts*. We summarize the facts found by the motion judge after an evidentiary hearing, and supplement where necessary with undisputed testimony credited by the judge. See *Commonwealth v. Powell, 459 Mass. 572, 574 n.7, 946 N.E.2d 114 (2011)*, cert. denied sub nom. *Powell v. Massachusetts, 565 U.S. 1262, 132 S. Ct. 1739, 182 L. Ed. 2d 534 (2012)*.

On September 8, 2014, at approximately 1:30 A.M., Boston police Officer James O'Loughlin[1]

and his partner, Officer Edward Dervan, were on patrol when they pulled into a large parking lot adjacent to the apartment buildings located at 576, 578, [*2] and 580 Blue Hill Avenue. The parking lot was "open for vehicles to pull in and for people to walk in and out of." No one monitored the area and there were no signs prohibiting trespassing or loitering.

Officer O'Loughlin was familiar with this area because he had responded numerous times to the parking lot, including assisting another officer with a firearm arrest, responding to a report of shots fired, and trying to halt a spate of break-ins to the basement of one of the adjacent apartment buildings.

[1] Officer O'Loughlin was the only witness at the evidentiary hearing.

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Because of the high level of criminal activity in this area, Officer O'Loughlin patrolled the parking lot often.

On the evening in question, when Officer O'Loughlin entered the parking lot he saw the defendant, whom he knew, seated on a large, weathered brown chair; another male, Elvin Pena, sitting on the left arm of that chair; and a third male sitting on a milk crate on the other side of the chair from Pena. Officer Dervan told Officer O'Loughlin that he saw Pena "flick[] something" to the ground, and the two officers stopped their vehicle and got out. Officer Dervan went to the area where Pena had flicked the object and recovered a plastic bag of white powder. Officer O'Loughlin approached [*3] the defendant.

The defendant had a bottle of rum with the top askew between his feet. Officer O'Loughlin testified that he understood there is a Boston city ordinance that prohibits open containers of alcohol "on public ways where the public has [the] right of access and even on private property without the owner's permission." Based on his understanding of this ordinance, Officer O'Loughlin ordered the defendant to "get up off the chair" so he could "do a search incident to arrest."

The defendant complied but upon standing, he twice tried to reach into his right pants' pocket. Officer O'Loughlin twice commanded him not to do so, and then began a patfrisk. Immediately Officer O'Loughlin felt a small packet that he described as consistent with heroin or crack cocaine. The defendant then stated, "it's personal use." Officer O'Loughlin retrieved the item, which he testified appeared to be a bag of heroin. The defendant then took off his coat and handed it to Officer O'Loughlin, telling him to check the coat. Officer O'Loughlin did so, finding nothing further. The defendant then voluntarily pulled off his sneakers and handed them to Officer O'Loughlin, saying, "[G]o ahead, look, nothing. It's [*4] personal."[2]

While this search was ongoing, Pena slid into the chair where the defendant had been sitting. Officer O'Loughlin asked Pena to step out of the chair, and when he stood, Officer O'Loughlin lifted the seat cushion and saw a sock placed in the corner of the chair. Officer O'Loughlin felt the sock and detected a firearm. The object was a fully loaded .22 caliber revolver. Both Pena and the defendant were placed under arrest.

The defendant filed a pretrial motion to suppress, inter alia, the firearm. After an evidentiary hearing, the motion judge denied the motion. Most importantly, the judge ruled that the defendant did not establish a reasonable expectation of privacy in the parking lot chair, so the search of the chair violated no *Fourth Amendment* or art. 14 interests.

The defendant thereafter stood trial, inter alia, on charges of (1) possessing a firearm without a license, and (2) unlawfully carrying a loaded firearm. The jury returned a guilty verdict on both charges on September 30, 2015.[3]

Discussion. 1. *The search and seizure issues*. We first address whether the search of the chair, which yielded the gun, violated the *Fourth Amendment* or art. 14. As the Supreme Judicial Court has made clear, art. 14 and [*5] the *Fourth Amendment* protect privacy interests, so any challenge under these provisions must show an infringement of a person's privacy. See, e.g., *Commonwealth v. Rice, 441 Mass. 291, 295, 805 N.E.2d 26 (2004)*; *Commonwealth v. Rodriguez, 456 Mass. 578, 590 n.12, 925 N.E.2d 21 (2010)*, citing *Commonwealth v. Mubdi, 456 Mass. 385, 393, 923 N.E.2d 1004 (2010)*. The key issue thus is whether the defendant established any "reasonable expectation of privacy" in the chair. See *Commonwealth v. Mubdi, 456 Mass. at 391*. We hold that no such interest was shown on the record.

At the outset, we note that our conclusion does not turn on whether the defendant established "standing" to mount a challenge to the search. Our case law is clear that a person has "automatic standing" to contest the lawfulness of a warrantless search where, as here, "possession of the seized evidence . . . is an essential element of guilt." *Commonwealth v. Amendola, 406 Mass. 592, 601, 550 N.E.2d 121 (1990)*. But having automatic standing does not necessarily establish a reasonable expectation of privacy in the place searched. As the Supreme Judicial Court explained in *Commonwealth v. Mubdi, 456 Mass. at 392-393*, the automatic standing cases do not relieve a criminal defendant of the need to show that *someone* had a protectable privacy interest:

> "Where the defendant has automatic standing, the defendant need not show that *he* has a reasonable

[2] The defendant was charged at the time not only with gun and ammunition possession charges, but also with public drinking, and possession of illegal drugs. The drug charge was dismissed prior to trial, and the trial judge granted judgment notwithstanding the jury verdict on the subsequent public drinking conviction. Because the drug and public drinking charges are not before us on appeal, we do not address the search and seizure issues with respect to the alleged drugs, and specifically we do not confirm that the "arrest" for public drinking was appropriate. We include these facts, however, as they are an integral part of the entire factual narrative.

[3] The jury also found the defendant guilty of violating the Boston ordinance prohibiting public drinking, and of unlawful possession of ammunition. The judge entered judgment notwithstanding the verdict as to the public drinking charge, and the Commonwealth dismissed the possession of ammunition charge at sentencing.

> expectation of privacy in the place searched.
>
> ". . .
>
> "The defendant, however, still must show that there was a search in the constitutional sense, [*6] that is, that *someone* had a reasonable expectation of privacy in the place searched, because only then would probable cause, reasonable suspicion, or consent be required to justify the search."

(Emphasis in original).

The defendant failed to show an expectation of privacy here. The chair in question was outdoors, in a parking area that was unguarded, unrestricted, and frequented by residents and nonresidents alike. The evidence was that the weathered chair had been outside for a long time, in the same location. The chair was not in a home or building, or associated with a home or building, and for all that appears in the record it was abandoned. As *Mubdi* holds, the defendant had the burden to show that *someone* had a reasonable expectation of privacy in the chair, and no such evidence was adduced. *Id. at 392*. See *Commonwealth v. Montanez, 410 Mass. 290, 301-303, 571 N.E.2d 1372 (1991)*.

Since there was no reasonable expectation of privacy in the chair, it follows that there was no *Fourth Amendment* or *art. 14* violation in searching it, and no basis for suppressing the firearm found in it.[4]

2. *Sufficiency of evidence*. The defendant also challenges the jury verdict, claiming that there was insufficient evidence to establish his possession of the gun.[5]

In evaluating sufficiency, this court [*7] determines whether, after viewing the evidence in the light most favorable to the Commonwealth, "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' (emphasis in original)." *Commonwealth v. Latimore, 378 Mass. 671, 677, 393 N.E.2d 370 (1979)*, quoting from *Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. Accord *Commonwealth v. Blevins, 56 Mass. App. Ct. 206, 211, 775 N.E.2d 1259 (2002)*. "Circumstantial evidence is competent to establish guilt beyond a reasonable doubt," and in evaluating the evidence we will consider not only direct evidence but also the "reasonable and possible" inferences, provided they are "not too remote in the ordinary course of events, or forbidden by any rule of law." *Commonwealth v. Cotto, 69 Mass. App. Ct. 589, 591-592, 870 N.E.2d 109 (2007)* (quotations omitted).

Here the case against the defendant was not based upon actual possession, but upon constructive possession. The defendant was never observed in actual possession of the gun. Nor was there any fingerprint or deoxyribonucleic acid evidence. Our case law has addressed constructive possession on many occasions, in varying fact patterns. To prove constructive possession, it is not sufficient merely to show the defendant was located near the item in question — e.g., illegal drugs or a firearm. As we said in *Cotto, 69 Mass. App. Ct. at 592* (quotation omitted): "Presence alone cannot show the requisite knowledge, power, or intention to exercise [*8] control over the contraband, but presence supplemented by other incriminating evidence, will serve to tip the scale in favor of sufficiency."

Here there was sufficient evidence for the jury to find the defendant guilty of possessing the firearm, although we acknowledge the question is a close one. When he was encountered, the defendant was seated on the chair in which the gun was located, and although the gun was not in his actual possession he could easily have reached it, as it was within reach of his left hand. It was 1:30 A.M. in a parking lot frequented by a variety of people, including five other individuals that evening. While proximity to the gun alone is not enough, it can still be powerful evidence, and the jury could readily infer that in those circumstances, the person who possessed the gun likely would stay very close to it, and would not leave it to be found by someone else.

And here, proximity was not the only evidence of possession. The jury also heard about the defendant's behavior when he was arrested. The defendant voluntarily took off his coat, and showed it to the officer. He then voluntarily took off his shoes, although he was in an asphalt parking lot littered [*9] with debris. He also "inched" away from the chair, ultimately moving an estimated five feet away. Finally, the jury were told that the arresting officer had interacted with the defendant before the night in question, and that whereas

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[4] The defendant does not appear to argue, nor could he, that even if there is no reasonable expectation of privacy in the chair, the gun should nevertheless be suppressed as the fruit of the prior, allegedly unlawful, arrest. Here the gun was secreted in the chair before the police took any action that evening. See *Commonwealth v. Rodriguez, 456 Mass. at 587* (no fruit of poisonous tree issue if drugs had been dropped on ground in public park before police stopped defendant). See also *Commonwealth v. Porter P., 456 Mass. 254, 259, 923 N.E.2d 36 (2010)* ("If no one has a reasonable expectation of privacy in the place searched, the police are free to search that place without a warrant and without probable cause, as often as they wish").

[5] The facts adduced at trial were very similar to those adduced at the suppression hearing. At trial, the judge struck testimony that the defendant had drugs on his person, and also struck the statement, "it's personal use." However, the jury heard testimony that Officer O'Loughlin found an "item" in the defendant's coat.

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previously the defendant had been "very calm," on this night he was "very nervous and very fidgety."[6]

On this evidence the jury could have drawn reasonable inferences that the defendant's behavior coupled with the location of the gun showed the elements of constructive possession — knowledge of the firearm and the ability and intent to control it. The jury could have inferred that the defendant's behavior — particularly the voluntary removal of his shoes while he moved away from the chair — was intended to distract the officer's attention from the chair and the gun. They could have concluded that the totality of the defendant's actions, including his voluntary removal of the clothing that he offered to the officer and his evident nervousness, showed consciousness of guilt.[7]

In short, there was sufficient evidence here, in addition to the defendant's proximity to the weapon, for the jury to find guilt beyond a reasonable doubt.

*Judgments affirmed [*10]* .

By the Court (Wolohojian, Kinder & Englander, JJ.[8]

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Entered: February 5, 2018.

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[6] The defendant also argues on appeal that Officer O'Loughlin's testimony at trial regarding prior interactions with the defendant brought in improper evidence of "prior bad acts." The contention is without merit, because the trial judge properly limited the officer's testimony so that he gave no evidence of a prior arrest — merely prior "interactions." There was thus no prior bad acts evidence admitted at trial.

[7] The defendant argues that the evidence points equally to Pena, and cites cases for the proposition that "[w]hen the evidence tends equally to sustain either of two *inconsistent* positions, neither of them can be said to have been established by legitimate proof" (emphasis supplied). *Commonwealth v. Carbello, 33 Mass. App. Ct. 616, 619, 602 N.E.2d 1110 (1990)*. We think the principle inapplicable here, in the context of review of a jury verdict and where, in any event, the propositions are not necessarily inconsistent, as the law would allow the conclusion that *both* the defendant and Pena were in constructive possession of the gun. See *Commonwealth v. Elysee, 77 Mass. App. Ct. 833, 847-849, 934 N.E.2d 837 (2010)* (finding evidence sufficient to support finding of constructive possession of firearm by two defendants).

As to the defendant's argument that there was insufficient evidence of the firearm being loaded, we note that the firearm in question was a revolver, that there was testimony the revolver was loaded when seized, and that a photograph of the revolver as seized was introduced in evidence, as was the revolver itself. "Where, as here, the firearm was a revolver . . . , a rational jury could infer that those who possessed the firearm knew that it was loaded with ammunition." *Commonwealth v. Jefferson, 461 Mass. 821, 828 n.7, 965 N.E.2d 800 (2012)*.

[8] The panelists are listed in order of seniority.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Susan E. Taylor, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, characters per inch, and contains 34, total non-excluded pages.

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on February 10, 2021, I have made service of this Brief and Appendix upon the attorney of record for each party, by the Electronic Filing System on:

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