



# LEGAL UPDATE

## LACK OF A VALID LICENSE TO CARRY IS AN ELEMENT OF THE OFFENSE OF UNLAWFUL POSSESSION OF A FIREARM

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Commonwealth v. Carlos Guardado, SJC (April 13, 2023).

### RELEVANT FACTS

The defendant was arrested after officers found a loaded 9-millimeter Smith & Wesson and a 15-round magazine with 10 rounds of ammunition inside the glove box of his car that was parked outside his place of employment. The defendant did not have a valid license to carry (LTC). The defendant was charged with unlawful possession of a firearm (MGL c 269 § 10(a)); illegal possession of large capacity feeding devices (MGL c 269 § 10(m)); illegal possession of ammunition (MGL c 269 § 10(h)); and illegal possession of a loaded firearm (MGL c 269 § 10(n)).

The defendant appealed the conviction. In its decision, the SJC considered certain affirmative defenses raised by the defendant at trial.

### DISCUSSION

MGL c 269 § 10(a) makes it a criminal offense for individuals to knowingly possess a firearm or to knowingly have a firearm under their control in a vehicle unless they are properly licensed. The statute has an exception if the individual is present in or on their residence or place of business.

#### Place of Business

The defendant argued that the parking lot where his car was parked was his place of business. The court has not previously interpreted the statute as to what “place of business” means; however, it has interpreted “residence” to mean only the areas over which the occupant retains exclusive control.

**For specific guidance on the application of this case or any law, please consult your supervisor or your department’s legal advisor.**

“The residence exception, therefore, does not apply where a defendant possesses or controls a firearm in the public streets, sidewalks, or common areas of an apartment building to which occupants of multiple dwellings have access.”

The court adopted a similar interpretation for “place of business” finding that a parking lot will be considered the place of business for the purposes of the exception only if the parking lot is within the exclusive control of the business.

If a defendant is claiming the vehicle was at their place of business, that is an affirmative defense that the defendant can raise at trial. The Commonwealth does not have to prove the defendant was not at their place of business unless and until the defendant has sufficiently raised the issue.

In this case the defendant was an employee of the business. The Commonwealth argued that the place of business exception only applied to business owners. The court did not reach this issue because it found that the defendant had failed to establish that the parking lot where his car was parked was within the exclusive control of his employer.

#### Valid LTC

The defendant also argued that the burden was on the Commonwealth to prove that he did not have a valid LTC. Prior to this case, possession of a valid LTC was an affirmative defense. This meant that the Commonwealth did not have to prove the defendant did not have a valid LTC unless the defendant sufficiently raised the issue at trial.

Based upon the United States Supreme Court ruling last summer in New York State Rifle & Pistol Ass’n v. Bruen, 142 S.Ct. 2111 (2022), the SJC determined that this is no longer an affirmative defense.

“We therefore conclude that the absence of a license is an essential element of the offense of unlawful possession of a firearm pursuant to MGL c. 269 § 10(a).

In this case the defendant was entitled to a new trial on the possession of a firearm charge and the possession of ammunition charge because the Commonwealth did not prove he was not properly licensed. The court affirmed his conviction for unlawfully possessing a large capacity feeding device because it found that the Bruen decision did not affect our laws with respect to weapons not typically possessed by law-abiding citizens for lawful purposes.

#### PRACTICE TIPS

##### Report Writing

When charging a defendant with a § 10(a) or § 10(h) offense, officers should include information in their reports that the defendant was not properly licensed. If this information is not included, the court could refuse to issue the complaint or dismiss the complaint for failure to allege all of the elements of the offense.

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### Demand LTC

Officers can demand to see an LTC or an FID card when they find someone with a firearm. MGL c 140 § 129C states in relevant part:

Any person who, while not being within the limits of his own property or residence, or such person whose property or residence is under lawful search, and who is not exempt under this section, shall on demand of a police officer or other law enforcement officer, exhibit his license to carry firearms, or his firearm identification card or receipt for fee paid for such card, or ... a valid hunting license...

Miranda rights are not required when an officer demands production of an LTC pursuant to MGL c 140 § 129C. The statute requires a person to produce something, not to provide testimonial evidence that can be used against them.

“The police, therefore, need not administer Miranda warnings before demanding that a suspect in custody produce one of the documents listed in § 129C.” Commonwealth v. Haskell, 438 Mass. 790, 796 (2003).

Keep in mind that demanding to see someone’s LTC is different than asking them if they have an LTC. In Haskell, the defendant was asked whether he had an LTC. His response was suppressed because he was in custody at the time he was asked the question and had not been given his Miranda warnings.