17-P-603 Appeals Court

COMMONWEALTH vs. LUIS SANTOS.

No. 17-P-603.

Suffolk. September 6, 2018. - August 26, 2019.

Present: Vuono, Agnes, & Henry, JJ.

Firearms. Waiver. Practice, Criminal, Motion to suppress. Evidence, Firearm, Constructive possession. Motor Vehicle, Firearms.

Indictments found and returned in the Superior Court Department on March 27, 2014.

A pretrial motion to suppress evidence was heard by Charles J. Hely, J., and the cases were tried before Raffi N. Yessayan, J.

Daniel N. Marx for the defendant.
Ian MacLean, Assistant District Attorney (L. Adrian Bispham, Assistant District Attorney, also present) for the Commonwealth.

AGNES, J. The defendant, Luis Santos, appeals from his convictions, after a trial by jury, of possession of a sawed-off shotgun in violation of G. L. c. 269, § 10 (c), and possession of a loaded firearm without a license in violation of G. L.

c. 269, § 10 (n).[1] The charges arose out of the stop of the defendant as he alighted from a vehicle and the subsequent seizure of firearms from inside the vehicle. The defendant raises two issues. First, he argues that the motion judge, who heard his pretrial motion to suppress evidence, erred in ruling that the police had reasonable suspicion to conduct a threshold inquiry. Second, he argues that the Commonwealth's trial evidence was not sufficient to prove beyond a reasonable doubt that he had constructive possession of the sawed-off shotgun found in the back seat of the vehicle, and that he knew the shotgun was loaded. We affirm.

Background. The motion judge conducted an evidentiary hearing on the defendant's motion to suppress.[2] The motion judge credited the testimony of Boston Police Officer Jarrod Gero, the only witness.[3]

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[1] The defendant also was charged with, and found not guilty of, assault with a dangerous weapon (two counts), carrying a firearm without a license, and one other count of possession of a loaded firearm without a license.

[2] Here we consider only the evidence offered at the hearing on the defendant's pretrial motion to suppress. We detail any relevant trial evidence infra.

[3] Officer Gero was a ten-year veteran of the Boston Police Department assigned to the citywide drug control unit, had made more than one hundred arrests for firearm offenses, and had received specialized training in how to identify armed persons.

Around 9:45 A.M. on January 10, 2014, Officer Gero was in plainclothes, in an unmarked police vehicle. He heard an all points police radio broadcast (all points broadcast) for a "robbery involving a shotgun."[4] The all points broadcast informed him that the suspects fled from the scene in a white Toyota Corolla station wagon. The dispatcher gave "Blue Hill Ave. and Dudley Street" as the location of the crime, but did not broadcast information about the direction in which the vehicle was headed.

When he first heard the all points broadcast, Officer Gero was in the Grove Hall neighborhood of the Dorchester section of Boston, about one and one-half miles from the location of the reported armed robbery. He was familiar with the area, having made numerous arrests there over the years. Within several minutes, Officer Gero spotted a white Toyota Corolla station wagon pass his vehicle, heading in the opposite direction, away from Blue Hill Avenue. He had observed white Toyota Corolla vehicles in that area in the past, but never a station wagon. He saw two male occupants in the vehicle, a driver and a front seat passenger. Suspecting that this could be the getaway car, he turned his vehicle around and informed dispatch that he was

[4] According to Officer Gero, an all points broadcast is a broadcast over every police channel that is preceded by an audible tone and that interrupts any other communication that is underway at the time.

following a white Toyota Corolla station wagon. Officer Gero followed the vehicle for three to five minutes, over "Geneva[,] . . . Bowdoin[,] . . . Greenbrier, . . . Dakota, . . . Washington[,] . . . and School Street[s]. After turning onto School Street, Officer Gero observed the vehicle turn into the driveway of a multifamily house and drive toward the rear of the home.

After notifying police dispatch of his location and his intention to pursue the vehicle on foot, Officer Gero got out of his vehicle and followed the white Toyota Corolla station wagon down the driveway. He saw it park, and as he approached, the driver's side door opened. As the operator, later identified as the defendant, stepped out, Officer Gero, who had drawn his weapon, instructed the defendant to show his hands and not to move. Officer Gero could see into the vehicle, and he observed the front seat passenger trying to stuff a silver handgun between the seat and the door. Officer Gero took control of the defendant, positioning the defendant between the passenger and him. At this point, other officers arrived. Officer Gero informed the arriving officers of the handgun, and then put the defendant on the ground and handcuffed him. At some point, Officer Gero realized that there was a third male, in the rear seat of the vehicle. Other officers removed the front and rear seat passengers from the vehicle and arrested them. The handgun

was recovered under the front passenger seat. Officer Gero also observed the barrel of a shotgun in the rear seat, underneath some clothing.

The motion judge ruled that the stop and detention of the defendant was a valid threshold inquiry based on the all points broadcast of an armed robbery heard by Officer Gero and his subsequent observations, and that given the nature of the suspected crime, it was a reasonable safety precaution to handcuff the defendant as he got out of the vehicle. He also rejected the defendant's argument that Officer Gero's entry into the driveway where the white Toyota Corolla station wagon stopped was unlawful.

Discussion. 1. Denial of motion to suppress. a. Standard of review. The defendant's argument, raised for the first time on appeal, is that the motion judge erred by relying on Officer Gero's testimony about the contents of the all points broadcast without any foundation evidence regarding the source of the broadcast and its basis of knowledge.

At the hearing on the defendant's motion, the defendant did not object when the Commonwealth offered and the motion judge admitted in evidence the multiple "turret" tape recordings relating to the crime in question, although subsequently the motion judge excluded the exhibit. Defense counsel stated that his motion was limited to the proposition that the police had

intruded into an area where the defendant had an expectation of privacy, namely, the defendant's driveway. In particular, defense counsel told the judge, "My argument is that there was not probable cause at this point or at any point. . . . Number two, my argument is that there's an entry into a dwelling without a warrant." In fact, defense counsel made a concession regarding the existence of reasonable suspicion based on the all points broadcast and Officer Gero's observations: "I think it really boils down to the issue that there's absolutely no probable cause here; that reasonable suspicion, sure. I mean, . . . I don't think there's any problem with that" (emphasis added). The Commonwealth's position was that Officer Gero had reasonable suspicion to enter the open driveway to conduct a threshold inquiry, which then evolved into probable cause and exigent circumstances for the arrests and the search of the vehicle.

For the first time on appeal, the defendant argues that the motion judge erred when he considered the contents of the all points broadcast without evidence demonstrating the source's reliability and basis of knowledge. See Commonwealth v. Pinto, 476 Mass. 361, 364 (2017); Commonwealth v. Lyons, 409 Mass. 16, 19-20 (1990). The Commonwealth is correct that the defendant has waived this issue because it was not raised in his motion to suppress, see Mass. R. Crim. P. 13 (a) (2), as appearing in 442

Mass. 1516 (2004),[5] or at the hearing on the defendant's motion to suppress.[6] The issue presented is whether we should review the alleged error for a substantial risk of a miscarriage of justice.

The governing law is that waived claims, no less than preserved claims, are reviewed on appeal. The "waiver doctrine is inapplicable where an error below would create a substantial risk of a miscarriage of justice." Commonwealth v. Vuthy Seng, 436 Mass. 537, 550, cert. denied, 537 U.S. 942 (2002), S.C., 456 Mass. 490 (2010). Accord Commonwealth v. Randolph, 438 Mass. 290, 294-295 (2002). The difference between our review of a waived claim versus a preserved claim "lies in the standard of

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[5] Rule 13 (a) (2) provides as follows: "A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached."

[6] It is a long-standing rule of practice that the defendant "is not permitted to raise an issue before the trial court on a specific ground, and then to present that issue to [the appellate] court on a different ground." Commonwealth v. Flynn, 362 Mass. 455, 472 (1972). See, e.g., Commonwealth v. Ramos, 402 Mass. 209, 211 (1988); Commonwealth v. Dane Entertainment Servs., Inc., 18 Mass. App. Ct. 446, 453 (1984).

review that we apply when we consider the merits of an unpreserved claim." Id. at 293-294.[7] Appellate review of a waived claim may result in one of following outcomes: (1) if the record is incomplete or otherwise not adequate to permit review on the merits, the defendant, who has the burden of producing a record that is adequate to permit review, is left to pursue a remedy, if any, in the trial court and appellate relief is denied, or (2) if the record permits review on the merits and (a) there is no error, then there is no risk of a miscarriage of justice and appellate relief is denied, or (b) there is error, we review the record as a whole to determine whether the error created a substantial risk of a miscarriage of justice.

The proposition that we review both waived claims and preserved claims is exemplified by the opinion in Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).[8] See Commonwealth v.

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[7] The substantial risk of a miscarriage of justice standard is distinctly different from the standard of review we apply in the case of preserved error. Relief under the substantial risk of a miscarriage of justice standard is rare, and it is reserved for those cases where "the error was patent and prejudicial." Commonwealth v. Freeman, 352 Mass. 556, 563 (1967). See Randolph, 438 Mass. at 297 ("Errors of this magnitude are extraordinary events and relief is seldom granted"). See also Commonwealth v. Simmons, 448 Mass. 687, 691 (2007).

[8] In Alphas, four of the justices joined an opinion by Justice Ireland that reviewed a claim, raised by the defendant for the first time on appeal, that the judge incorrectly instructed the jury. The court stated that "[b]ecause the defendant did not object to the jury instructions, we must determine whether the error created a substantial risk of a

LaChance, 469 Mass. 854, 857-858 (2014), cert. denied, 136 S. Ct. 317 (2015) (acknowledging that waiver doctrine protects society's interest in finality and promotes judicial efficiency, but nevertheless reiterating that appellate courts review unpreserved errors to determine whether there has been substantial risk of miscarriage of justice).

The most recent statement by the Supreme Judicial Court regarding our duty to examine claims not included in a defendant's pretrial motion to suppress and raised for the first time on appeal is found in Commonwealth v. Dew, 478 Mass. 304, 309-310 (2017), citing Commonwealth v. Arzola, 470 Mass. 809, 814 (2015), cert. denied, 136 S. Ct. 792 (2016). In Dew, the

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miscarriage of justice." 430 Mass. at 13. In a concurring opinion, Justice Greaney explained that the substantial risk of a miscarriage of justice standard is an exception to the doctrine of finality. Id. at 22 (Greaney, J., concurring). "The substantial risk of a miscarriage of justice test is based on the settled rule that errors not raised or preserved by a defendant at trial will not be considered on appeal. . . . The substantial risk of a miscarriage of justice test constitutes our exception to this aspect of the finality rule." Id. at 21-22. Justice Fried, by contrast, in a concurring opinion joined by one other justice, advocated a different approach that would give finality to waived claims unless the defendant could demonstrate actual innocence. Id. at 27 (Fried, J., concurring). "The formulation of miscarriage of justice the court today promulgates not only threatens the concept of waiver, and with it the finality of error-free trial court proceedings (error-free in the sense that no objections were improperly denied), it makes no sense when fitted into the rest of our body of criminal jurisprudence. The court's formulation, in effect, makes G. L. c. 278, § 33E, review available in every criminal case." Id. at 25.

court acknowledged that the defendant failed to comply with Mass. R. Crim. P. 13 (a) (2), and was raising the issue of an unnecessarily suggestive police show-up identification procedure for the first time on appeal. Dew, 478 Mass. at 309. The court stated that "[b]ecause the defendant did not raise this issue before the motion judge, he has waived the argument. . . . We nonetheless review to determine whether there was a substantial risk of a miscarriage of justice." Id. at 309-310.

This is the approach most consistently applied when the defendant raises a claim for the first time on appeal that should have been included in a pretrial motion to suppress. See Commonwealth v. Vardinski, 438 Mass. 444, 449 n.9 (2003) (identification issue not included in pretrial motion to suppress and raised for first time on appeal); Vuthy Seng, 436 Mass. at 550 (regarding unlawful search issues not included in defendant's pretrial motion to suppress, "waiver doctrine is inapplicable where an error below would create a substantial risk of a miscarriage of justice"); Commonwealth v. Rivera, 429 Mass. 620, 623 (1999) ("waiver doctrine precludes" defendant from raising unlawful search issue for first time on appeal; court nonetheless reached issue and concluded there was no error); Commonwealth v. Scala, 380 Mass. 500, 510 (1980) ("Because these contentions were never presented to the trial judge, they are not technically before us, except under the

standard of a substantial risk of miscarriage of justice"); Commonwealth v. Brown, 57 Mass. App. Ct. 326, 330 (2003) (because Miranda question not included in pretrial motion to suppress and raised for first time on appeal, "our standard of review is whether there was a substantial risk of a miscarriage of justice"); Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 402 (1999) (identification issue not included in pretrial motion to suppress and raised for first time on appeal; court reviewed "the error, if any, under the standard of a substantial risk of a miscarriage of justice"). See also E.B. Cypher, Criminal Practice and Procedure § 25.6, at 376-377 (4th ed. 2014) ("The waiver rule is inapplicable if the reviewing court deems the error below creates a substantial risk of a miscarriage of justice").[9]

[9] We acknowledge that there are cases that may be read as support for a more limited view of the scope of the substantial risk of a miscarriage of justice doctrine. In Commonwealth v. Silva, 440 Mass. 772, 781-783 (2004), the court applied the waiver doctrine to preclude a defendant from raising an argument on appeal that had not been raised below. In that case, the defendant claimed, for the first time on appeal, that his motion to suppress should have been allowed because the police violated the requirement that they "knock and announce" before entering a dwelling to execute an arrest warrant. Id. at 781. The court declined to consider the issue and did not conduct a review to determine whether any error created a substantial risk of a miscarriage of justice. Id. at 783. However, the result in Silva may be explained by the inadequacy of the record. As the court explained, "There is no reason for the Commonwealth to extend unnecessarily the length of the suppression hearing by presenting evidence on issues not raised by the defense. When a defendant attempts to raise a new issue after the completion of

b. Adequacy of record to permit review of waived claim. An examination of the waived claim the defendant raises for the first time on appeal in the present case leads to the conclusion that the record is inadequate to permit us to reach the merits. Here, not only did the defendant fail to raise the claim below, but he affirmatively conceded that the police had reasonable suspicion for an investigative stop based on the all points broadcast heard by Officer Gero and his observations. Whether we characterize this set of facts as invited error,[10] or simply regard the record before us as incomplete and inadequate because the Commonwealth was not put on notice that it needed to present evidence concerning the reliability and the basis of knowledge of the all points broadcast to Officer Gero by the police dispatcher, the result is the same. In these circumstances, the correct result on appeal is to decline to reach the merits of the issue raised for the first time on appeal because it depends on the development of facts not in the record before us. As in

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the hearing's evidentiary phase, the evidence on that issue is likely to be 'scant' or nonexistent" (citation omitted). Id. at 781. See Arzola, 470 Mass. at 814 (in case involving waived claim arising out of motion to suppress, court stated that it would "exercise [its] discretion to consider the claim, in order to determine whether there was an error that created a substantial risk of a miscarriage of justice").

[10] See, e.g., Commonwealth v. Roderiques, 78 Mass. App. Ct. 515, 519 (2011), S.C., 462 Mass. 415 (2012); Commonwealth v. Knight, 37 Mass. App. Ct. 92, 99-100 (1994).

Commonwealth v. Johnston, 60 Mass. App. Ct. 13, 20 (2003), we conclude that "the motion judge did not err in denying the defendant's motion to suppress on the grounds that were presented to him."

2. Sufficiency of evidence at trial. At the close of the Commonwealth's case, the defendant moved for required findings of not guilty, which the trial judge denied. When we review the denial of a motion for a required finding of not guilty, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). "The inferences that support a conviction 'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016), quoting Commonwealth v. Woods, 466 Mass. 707, 713, cert. denied, 573 U.S. 937 (2014).

a. Evidence presented at trial. In addition to the trial testimony of Officer Gero, which was consistent with the testimony he gave at the suppression hearing, the jury heard testimony from the victim that, on the morning of January 10, 2014, he returned to his home where he observed a white Toyota Corolla station wagon parked nearby on the street. A man emerged from the vehicle. The back seat passenger, later

identified as Kelvin Vargas, was pointing a sawed-off shotgun at the victim. The victim "took off running." A second person, wearing a black North Face jacket, also emerged from the vehicle, wielding a chrome handgun. The victim managed to escape, and the assailants got back into the white Toyota Corolla station wagon and drove off. The victim then returned to his car and began to follow the assailants while calling 911 and reporting the incident to the police. The victim continued to follow the station wagon until he saw police cars following it.

The Commonwealth introduced evidence tying the defendant and the other occupants of the car to the duct tape found on the sawed-off shotgun, which was on the rear seat of the defendant's vehicle under a gray North Face jacket and on top of a North Face backpack. Specifically, there was duct tape wrapped around the breech of the shotgun to hold it closed. There were two shotgun shells loaded into the weapon. An expert witness testified that despite the duct tape holding closed the shotgun breech, it was a functional firearm. Three rolls of duct tape were found inside the backpack on top of which the shotgun was found. The duct tape removed from the breech of the shotgun was chemically consistent with tape from one of the three rolls of duct tape found in the backpack (identified as roll A). The other two rolls of duct tape found in the backpack, identified

as rolls B and C, still had their manufacturer edges intact, meaning they had not been used. The manufacturer edge was not present on roll A, and it had less tape remaining on the roll than rolls B and C, indicating that it had been used. A single latent print was lifted from the duct tape on the shotgun. That print was found to be a match to the prints of Vargas, the back seat passenger of the vehicle. There was video recorded evidence that the defendant, along with Vargas and the third occupant of the vehicle, Julio Soto, had visited a hardware store earlier that morning. The three left the store at approximately 9:15 A.M., apparently without making any purchases. The jury could have inferred that they stole the duct tape.

The white Toyota Corolla station wagon in which the three were traveling was registered to the defendant's mother. After leaving the victim's house, the defendant drove, under surveillance by the victim and then by Officer Gero, to 12 School Street, where he parked the car and was ultimately arrested. The victim was brought to the scene where the defendant was taken into custody. The victim identified the defendant, Soto, and Vargas as the three individuals who had the weapons.[11] In the video recorded interview of the defendant,

[11] The victim identified the defendant as the person who got out of the front passenger seat and waved the handgun at him.

which was played for the jury in the Commonwealth's case, the defendant claimed that he was apprehended as he was getting into the white Toyota Corolla station wagon, not after parking the car. The defendant also claimed he never left his residence on the morning of January 10, 2014.

b. Constructive possession of sawed-off shotgun. In order to prove that the defendant had constructive possession of the sawed-off shotgun, the Commonwealth was required to present evidence that would permit the jury to infer that the defendant had knowledge of the presence of the firearm in the vehicle and both the ability and the intention to exercise control over it. See Commonwealth v. Jefferson, 461 Mass. 821, 827 (2012). The Commonwealth is not required to prove that the defendant's possession was exclusive; more than one person may constructively possess an item such as a firearm. See id. at 827-828. Merely being present in a vehicle in which a firearm is located is not sufficient. See, e.g., Commonwealth v. Romero, 464 Mass. 648, 653-659 (2013). However, the presence of the defendant inside the same vehicle where a firearm is located, "supplemented by other incriminating evidence, . . . may suffice." Commonwealth v. Sinforoso, 434 Mass. 320, 327

The victim identified Vargas as the person who got out of the back seat holding the shotgun. The victim identified Soto as the person who was in the driver's seat when the car was parked in front of his house.

(2001), quoting Commonwealth v. Garcia, 409 Mass. 675, 686-687 (1991). As the Supreme Judicial Court noted in Commonwealth v. Albano, 373 Mass. 132, 134 (1977), a jury are permitted to infer that a defendant had knowledge of the presence of a firearm in a vehicle and the intent and ability to exercise control over it even though the evidence does not compel such findings. "It is enough if the inferences drawn from the circumstances be reasonable and possible. . . . The weight of the evidence is for the jury" (citation omitted). Id.

In the present case, there was ample evidence beyond the defendant's presence in the vehicle to warrant the jury finding the required elements for constructive possession. First, the jury were warranted in finding that the white Toyota Corolla station wagon was registered to the defendant's mother and controlled by the defendant at all relevant times. Second, the jury were warranted in finding that the defendant participated with his companions in stealing duct tape from a store on the morning in question to tape the shotgun breech so that the shotgun was operable. Third, the jury were warranted in finding that the shotgun was partially in plain view inside the vehicle with its handle within the reach of the defendant.[12] Fourth, the

[12] A person's easy access to a weapon inside a vehicle is a factor that contributes to a finding that the person had knowledge of its presence. See Commonwealth v. Barbosa, 77

jury were warranted in finding that the defendant used his jacket to partially cover the shotgun.[13] And, fifth, the defendant gave false information to the police about his whereabouts and conduct on the day in question.[14] Taken together, these inferences support the jury's determination that the defendant had constructive possession of the shotgun.

c. Knowledge that shotgun was loaded. In addition to sufficient proof of constructive possession of the shotgun, the Commonwealth also was required to prove that the defendant had knowledge that the shotgun was loaded. See Commonwealth v. Brown, 479 Mass. 600, 601 (2018). The circumstantial evidence in this case is stronger than the evidence in Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200–201 (2018), where we concluded that the evidence was sufficient to permit the jury to infer knowledge that the firearm was loaded. In the present case, as noted above, the jury were warranted in finding that on the morning of the offense, the defendant and his companions

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Mass. App. Ct. 340, 343 (2010), S.C., 461 Mass. 431 (2012); Commonwealth v. Blevins, 56 Mass. App. Ct. 206, 212 (2002).

[13] Attempting to conceal an item contributes to an inference that the person had the ability and capacity to exercise control over it. See Commonwealth v. Whitlock, 39 Mass. App. Ct. 514, 519 (1995).

[14] Consciousness of guilt evidence may contribute to a finding of constructive possession of a firearm. See Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 553 (2015).

took steps to ensure that the shotgun would be operable by wrapping it with duct tape, and that the defendant then participated with the shotgun-wielding member of the trio to assault the victim shortly before the defendant's vehicle was stopped by Officer Gero. It is certainly a reasonable inference from that evidence that a person who plans and participates with others in an assault on a victim by means of a handgun and a sawed-off shotgun would know whether the firearms were loaded before carrying out the assault. See id. at 200 (inferences need only be reasonable and possible, and "defendant's knowledge that a firearm is loaded can be inferred from circumstantial evidence").

Judgments affirmed.

VUONO, J. (concurring). I concur with the result reached by the majority, but I write separately because I question whether we are required to review a waived claim to determine whether any error created a substantial risk of a miscarriage of justice where the defendant's argument on appeal was not raised in a motion to suppress and was conceded at the suppression hearing.

The majority states that "[t]he governing law is that waived claims, no less than preserved claims, are reviewed on appeal." Ante at . According to the majority, all claims, even those raised on appeal but not below in a motion to suppress, are reviewed for whether any error created a substantial risk of a miscarriage of justice. To be sure, there is ample authority to support this assertion. See, e.g., Commonwealth v. Dew, 478 Mass. 304, 309-310 (2017); Commonwealth v. Vuthy Seng, 436 Mass. 537, 550, cert. denied, 537 U.S. 942 (2002), S.C., 456 Mass. 490 (2010), and other cases cited by the majority. On the other hand, as the majority acknowledges, in some instances, grounds not raised below in a motion to suppress have been deemed waived without conducting a review to determine whether any error created a substantial risk of a miscarriage of justice. Commonwealth v. Silva, 440 Mass. 772, 781-783 (2004), cited by the majority, is one such example. Indeed, we previously have recognized a lack of clarity in the numerous

decisions applying the waiver doctrine to arguments raised on appeal but not in a motion to suppress. See Commonwealth v. Johnston, 60 Mass. App. Ct. 13, 21 n.7 (2003).

More recently, in Commonwealth v. Arzola, 470 Mass. 809, 814 (2015), cert. denied, 136 S. Ct. 792 (2016), the court held that the defendant waived his right to raise for the first time on appeal the argument that a separate search warrant was required to authorize a deoxyribonucleic acid analysis of a bloodstain on his shirt because he did not raise it in his motion to suppress. The court proceeded to consider the claim anyway, explaining that "ordinarily" the issue would be waived, citing Silva, 440 Mass. at 781-782, but nonetheless exercising its discretion to consider the argument "in order to determine whether there was an error that created a substantial risk of a miscarriage of justice," citing Vuthy Seng, 436 Mass. at 550. Thus, in my view, we are not always obliged to consider grounds argued on appeal but not raised in a motion to suppress under a substantial risk of a miscarriage of justice standard. Rather, such review should be conducted only when we exercise our discretion to do so. I would not exercise that discretion here, where the defendant did not include the argument in his suppression motion and conceded the issue at the motion hearing.