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SJC-13171

COMMONWEALTH vs. CHRISTOPHER DeJESUS.

Bristol. December 6, 2021. - March 15, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

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

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

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

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Thomas E. Hagar for the defendant.  
Shoshana Stern, Assistant District Attorney, for the Commonwealth.  
Patrick Levin, Committee for Public Counsel Services, & Katharine Naples-Mitchell, for Committee for Public Counsel Services & another, amici curiae, submitted a brief.

LOWY, J. The defendant was convicted of possessing a firearm without a license and possessing a large capacity feeding device. He contends on appeal that the firearm and the attached large capacity feeding device should have been suppressed as the fruits of a warrantless search and that there was insufficient evidence that he possessed the firearm or the feeding device. We affirm.<sup>1</sup>

We also take this opportunity to abolish the separate standing requirement in the search and seizure context and clarify that under art. 14 of the Massachusetts Declaration of Rights, as under the Fourth Amendment to the United States Constitution, a defendant need show only a reasonable expectation of privacy in the place searched to contest a search or seizure. In almost all situations, a defendant contesting a search or seizure will need to show his or her own reasonable expectation of privacy in the place searched. In one situation, however, a defendant will be deemed to have another's reasonable expectation of privacy: where the defendant has been charged with possessing contraband at the time of the search and, also at the time of the search, the property was in the actual

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<sup>1</sup> We acknowledge the amicus brief submitted by the Committee for Public Counsel Services and the Charles Hamilton Houston Institute for Race and Justice.

possession of a codefendant<sup>2</sup> or in a place where the codefendant had a reasonable expectation of privacy, the defendant may assert the same reasonable expectation of privacy as the codefendant.

Nothing in this opinion should be read to impede a defendant's ability to litigate his or her own reasonable expectation of privacy or to restrict the reach of such an expectation of privacy as it exists under our current case law.<sup>3,4</sup>

Background. The evidence at trial and at the hearing on the motion to suppress was as follows.<sup>5</sup>

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<sup>2</sup> The term "codefendant" refers in this context to anyone who has been or may be charged with the same possessory offense with which the defendant was charged.

<sup>3</sup> By way of example only, our elimination of the separate standing requirement does not change our current jurisprudence regarding the reasonable expectation of privacy of overnight guests, see, e.g., Commonwealth v. Morrison, 429 Mass. 511, 513-514 (1999), or vehicle passengers, see, e.g., Commonwealth v. Podgurski, 386 Mass. 385, 389-391 (1982), cert. denied, 459 U.S. 1222 (1983).

<sup>4</sup> Additionally, defendants who before this opinion did not have to present a reasonable expectation of privacy in his or her affidavit pursuant to Mass. R. Crim. P. 13, as appearing in 442 Mass. 1516 (2004), but who now will have to present a reasonable expectation of privacy in such an affidavit, may not be impeached with that affidavit at trial.

<sup>5</sup> Regarding the motion to suppress, we supplement the judge's factual findings with "uncontroverted testimony implicitly or explicitly credited by the judge[] in support of" the findings. Commonwealth v. Barillas, 484 Mass. 250, 251

A police officer saw video recordings (videos) on a social media platform that showed the defendant brandishing a firearm with an extended magazine.<sup>6</sup> The videos led officers to a multifamily dwelling that was not the defendant's home, where they found the defendant and others. Officers went through a partially open door in the rear of the house leading to a basement that appeared to be where the videos had been filmed. There they found a firearm with an extended magazine inside an open backpack. The firearm appeared to be the same one that the defendant had been holding in the videos. The defendant was arrested at the scene.

Before trial, the defendant moved to suppress the firearm on the ground that it was obtained pursuant to an unlawful warrantless entry. The judge (motion judge) denied the motion after an evidentiary hearing. At the close of the Commonwealth's case at trial, the defendant moved for a required finding of not guilty. The trial judge, who was different from the motion judge, denied the motion as to the charges of possessing a firearm and possessing a large capacity feeding device. A jury then found the defendant guilty of those

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(2020), quoting Commonwealth v. Vasquez, 482 Mass. 850, 852 (2019).

<sup>6</sup> The defendant does not challenge the police officer's use of social media for an investigatory purpose.

charges.<sup>7</sup> The defendant appealed, and the Appeals Court affirmed. Commonwealth v. DeJesus, 99 Mass. App. Ct. 275, 283 (2021). We granted the defendant's application for further appellate review.

Discussion. 1. Motion to suppress. The defendant contends that the evidence found in the basement should have been suppressed as the fruit of a warrantless search. We conclude that the motion judge did not err in denying the defendant's motion to suppress because the defendant did not have a reasonable expectation of privacy in the basement.<sup>8</sup>

a. Abolishing separate standing requirement. "Article 14 and the Fourth Amendment protect individuals from unreasonable, governmental searches and seizures." Commonwealth v. Delgado-Rivera, 487 Mass. 551, 554 (2021), cert. denied, 142 S. Ct. 908 (2022). Under the Fourth Amendment, a defendant may contest a search or seizure that violated his or her reasonable expectation of privacy. Id. at 556, citing Rakas v. Illinois, 439 U.S. 128, 139 (1978). The art. 14 analysis, in contrast,

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<sup>7</sup> The trial judge sentenced the defendant to from two and one-half to five years in State prison on each indictment, to run concurrently.

<sup>8</sup> Like us, the motion judge concluded that the defendant did not have a reasonable expectation of privacy in the place searched. Unlike us, the motion judge also decided that the defendant did not have standing to challenge the search. As discussed infra, we abolish the standing requirement in this opinion.

has a separate standing requirement. Under our current art. 14 jurisprudence, "we determine initially whether the defendant has standing to contest the search and then whether she [or he] had an expectation of privacy in the area searched." Delgado-Rivera, supra at 555, quoting Commonwealth v. Williams, 453 Mass. 203, 207-208 (2009). A defendant, therefore, generally may challenge the constitutionality of a search or seizure under our current art. 14 jurisprudence only if he or she has both standing and a reasonable expectation of privacy. Pursuant to this current framework, a defendant "has standing to challenge a government search [under art. 14] either [(1)] if he or she has a possessory interest in the place searched or in the property seized or [(2)] if he or she was present when the search occurred" (alterations omitted). Delgado-Rivera, supra at 555-556, quoting Williams, supra at 208.

Article 14's separate standing requirement poses a potential constitutional dilemma, as it "might lead to the untenable result that the Massachusetts Declaration of Rights does not protect rights guaranteed by the Federal Constitution (i.e., where a defendant has no possessory interest in the area or item searched, but does have a reasonable expectation of privacy in it)." Delgado-Rivera, 487 Mass. at 559. Such a situation is most likely to arise in the context of electronic data. A defendant with a reasonable expectation of privacy in

such data might have a difficult time asserting possession of it or presence at the time of the search. See id. at 558-559.

"For example, a defendant could send a text message using an encrypted messaging service, where the message subsequently was acquired from the recipient device by law enforcement. Assuming that the defendant could establish a reasonable expectation of privacy based on the use of the encryption technology employed, the defendant would have standing under the Fourth Amendment to contest the search that yielded the text message. Using the two-part analysis under art. 14, however, the defendant likely would be unable to establish standing if he or she had no possessory interest in the recipient device and was not present during the search. This discrepancy cannot stand." Id. at 558 n.6.

Because the Massachusetts Constitution may not provide less protection to defendants than the Federal Constitution, we hereby abandon the separate standing requirement and conclude that under art. 14, as under the Fourth Amendment, a defendant need show only a reasonable expectation of privacy in the place searched to contest a search or seizure. See Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 *Suffolk U. L. Rev.* 887, 889 (1980) ("The state court is bound by federal requirements and may invoke the state constitution only

to provide greater safeguards"). Cf. Commonwealth v. Torres-Pagan, 484 Mass. 34, 36-39 (2020) (clarifying standard for patfrisks to ensure Massachusetts Constitution does not provide less protection than Federal Constitution).

In doing so, we follow in the footsteps of the United States Supreme Court, which formally abandoned the separate standing analysis over four decades ago. See Rakas, 439 U.S. at 139 ("the better analysis forth-rightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing"). See also Minnesota v. Carter, 525 U.S. 83, 87 (1998) (United States Supreme Court in Rakas case "expressly rejected" "the rubric of 'standing' doctrine").<sup>9</sup>

b. Reasonable expectation of privacy. In almost all situations, a defendant contesting a search or seizure will need to show his or her own reasonable expectation of privacy in the place searched. See Delgado-Rivera, 487 Mass. at 554 (rights

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<sup>9</sup> "[S]ince Rakas[,] . . . the United States Supreme Court has largely abandoned use of the word 'standing' in its Fourth Amendment analyses. . . . In the future, to avoid confusion with the federal high court's terminology, mention of 'standing' should be avoided when analyzing a Fourth Amendment claim." People v. Ayala, 23 Cal. 4th 225, 254 n.3 (2000), cert. denied, 532 U.S. 908 (2001). The term "standing" also should be avoided from now on when addressing claims under art. 14 of the Massachusetts Declaration of Rights.



secured by art. 14 and Fourth Amendment "are specific to the individual"). In one limited situation, however, a defendant may rely on another's reasonable expectation of privacy: where the defendant has been charged with possessing contraband at the time of the search and, also at the time of the search, the property was in the actual possession of a codefendant or in a place where the codefendant had a reasonable expectation of privacy, the defendant may assert the same reasonable expectation of privacy as the codefendant. Commonwealth v. Carter, 424 Mass. 409, 410-411 (1997). Commonwealth v. Gomes, 59 Mass. App. Ct. 332, 336 (2003). See Commonwealth v. Ware, 75 Mass. App. Ct. 220, 229-230 (2009) (defendant did not need to show personal expectation of privacy in codefendant's home). "Such a defendant and his confederate are treated, in effect, as one for the purpose of deciding whether there was a reasonable expectation of privacy, otherwise the person who carried the contraband might go free (because of suppression of the evidence) and the defendant confederate would not." Carter, supra at 411.<sup>10</sup>

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<sup>10</sup> To the extent that we suggested in dicta in Commonwealth v. Mubdi, 456 Mass 385, 392-393 (2010), that a defendant charged with illegally possessing drugs or firearms that were seized during a search without constitutional justification could succeed in suppressing evidence as long as "someone had a reasonable expectation of privacy in the place searched," we now clarify that, consistent with our holding in Carter, 424 Mass.

c. Application to the present case. Because the defendant here did not have a reasonable expectation of privacy in the basement, his motion to suppress properly was denied.

As a preliminary matter, the defendant must assert his own reasonable expectation of privacy. As the trial judge made clear in his final jury instructions, the defendant was not charged with possessing the firearm and magazine at the time of the search, but rather when the videos were filmed.<sup>11</sup> And although it seems that another individual was charged in connection with the videos that resulted in the charges against the defendant, there is no evidence that the codefendant actually possessed, at the time of the search, the firearm that the defendant was charged with possessing. Nor is there any suggestion that the codefendant had a reasonable expectation of

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at 410-411, the defendant generally must assert his or her own reasonable expectation of privacy. We reiterate that there is one exception to this principle -- where the defendant has been charged with possessing contraband at the time of the search and, also at the time of the search, the property was in the actual possession of a codefendant or in a place where the codefendant had a reasonable expectation of privacy, the defendant may assert the same reasonable expectation of privacy as the codefendant.

<sup>11</sup> The trial judge instructed that "the [d]efendant is not charged with possession of a firearm and a large-capacity feeding device at the time the police entered the basement and seized certain objects. The [d]efendant is charged with possession of a firearm and large-capacity feeding device at the time the video recording was made."

privacy in the basement. The defendant must, therefore, rely on his own reasonable expectation of privacy in the place searched.

"To establish a reasonable expectation of privacy, a defendant must prove both a subjective and an objective expectation of privacy. . . . The defendant bears the burden of demonstrating that he or she personally has an expectation of privacy in the place searched, and that this expectation is reasonable . . ." (quotation, citation, and alterations omitted). Delgado-Rivera, 487 Mass. at 556. The only record evidence here of a connection between the defendant and the basement is that the defendant was in the basement when the videos were filmed. Thus, any subjective expectation of privacy that the defendant had in the basement was unreasonable. See Williams, 453 Mass. at 209 ("mere presence on the property does not create a reasonable expectation of privacy").

Because the defendant did not have a reasonable expectation of privacy in the basement, the motion to suppress the evidence properly was denied.

2. Sufficiency of the evidence. The defendant argues that the trial judge should have allowed his motion for a required finding of not guilty because he had only momentary possession of the firearm and attached large capacity feeding device. We disagree.

"To sustain a conviction under G. L. c. 269, § 10 (a), the Commonwealth must prove[, among other elements,] that the defendant knowingly possessed a firearm . . . ." Commonwealth v. White, 452 Mass. 133, 136 (2008). "[P]ossession does not depend on the duration of time elapsing after one has an object under his [or her] control so long as, at the time of contact with the object, the person has the control and the power to do with it what he or she wills." Commonwealth v. Hall, 80 Mass. App. Ct. 317, 330 (2011), citing Commonwealth v. Harvard, 356 Mass. 452, 457-458 (1969).

Here, as the Appeals Court observed, the videos showed "the defendant holding the firearm and posturing with it, pointedly displaying the attached feeding device, and mimicking the action of aiming and firing the weapon." DeJesus, 99 Mass. App. Ct. at 282-283. This evidence was sufficient to show that the defendant had the power to handle the firearm, with its attached magazine, as he wished. Cf. Harvard, 356 Mass. at 458 (sufficient evidence of possession of illegal narcotics where "[a]t the moment the defendant received the drug he had the control and power to do with it what he willed. In this case he chose to hand it immediately to [a third party] rather than hold it longer, keep it himself, or otherwise deal with it").

The defendant points to cases interpreting an earlier version of G. L. c. 269, § 10 (a), which penalized carrying,

rather than possessing, a firearm. See Commonwealth v. Harris, 481 Mass. 767, 776 n.12 (2019), citing St. 1990, c. 511, §§ 2, 3 (describing change in statutory language). These cases are inapposite, because the crime of carrying requires movement and "more than momentary possession." Commonwealth v. Seay, 376 Mass. 735, 737 (1978). See Commonwealth v. Wood, 398 Mass. 135, 137 (1986) (recognizing distinction between "carrying" and "possession" of firearm). There was sufficient evidence here that the defendant possessed the firearm in question, regardless of whether there was sufficient evidence that he carried it.<sup>12</sup>

Conclusion. Because the defendant's arguments are without merit, we affirm the judgments.

So ordered.

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<sup>12</sup> The defendant also argues that there was insufficient evidence that he intended to exercise dominion and control over the firearm "as a firearm" rather than as a movie prop. This argument fails, as the statute does not consider the purpose for which an individual possesses a firearm.