

**Commonwealth v. Hillman**

Appeals Court of Massachusetts

November 4, 2016, Entered

15-P-1314

**Reporter**

2016 Mass. App. Unpub. LEXIS 1063 \*; 90 Mass. App. Ct. 1114; 63 N.E.3d 64

COMMONWEALTH vs. DANIELLE HILLMAN

**Notice:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

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**Subsequent History:** Appeal denied by *Commonwealth v. Hillman*, 476 Mass. 1107, 2016 Mass. LEXIS 962, 65 N.E.3d 662 (Mass., Dec. 22, 2016)

**Disposition:** Judgment affirmed.

**Judges:** [\*1] Kafker, C.J., Cypher, Agnes, Maldonado & Desmond, JJ.

**Opinion**

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*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

After a jury trial in the District Court, the defendant was found guilty of possession or control of a firearm in a motor vehicle without a license, and found not guilty of possession or control of a loaded firearm in a motor vehicle without a license. On appeal, she argues that the trial judge's denial of her motion for a required finding of not guilty was error and that the judge's jury instruction regarding intent contained an error that created a substantial risk of a miscarriage of justice. We affirm.

1. *Background.* The defendant was the passenger in a car that she had rented when the car was stopped for speeding by Springfield police officers. The officers determined that the driver of the vehicle was not validly licensed, and approached the vehicle to place him under arrest. As they approached, the officers viewed the driver and the defendant "fidgeting" with a bag the driver had picked up from the back seat. The driver was removed from the vehicle and placed under arrest, while the defendant remained in the passenger seat with that bag between her feet. Despite repeated police commands to keep [\*2] her hands up, the defendant continually reached toward the floor where the bag sat.<sup>1</sup> When she was eventually ordered to exit the car, the bag was removed from the passenger foot-well and the barrel of a revolver was seen protruding slightly from beneath the passenger seat.

2. *Sufficiency of the evidence.* Possession of a firearm without a license is prohibited by G. L. c. 269, § 10(a), which requires that the Commonwealth prove: (1) the defendant possessed a firearm; (2) the firearm fit the legal definition of a firearm; and (3) the defendant knew that she possessed a firearm or had a firearm under her control. In the event, such as this, that a firearm is not found on a defendant's person, the Commonwealth must prove the third element on a theory of constructive possession of the firearm: that she knew of the firearm "coupled with the ability and intention to exercise dominion and control" over it. *Commonwealth v. Romero*, 464 Mass. 648, 653, 984 N.E.2d 853 (2013) (quotation omitted). Constructive possession can be proven with circumstantial evidence and resulting reasonable inferences. *Commonwealth v. Brzezinski*, 405 Mass. 401, 409, 540 N.E.2d 1325 (1989). "While presence in an area where [\*3] contraband is found 'alone cannot show the requisite knowledge, power, or intention to exercise control over the [contraband], . . . presence, supplemented by other incriminating evidence, 'will serve to tip the scale in favor of sufficiency.'" *Id.* at 409-410, quoting from *Commonwealth v. Albano*, 373 Mass. 132, 134, 365 N.E.2d 808 (1977).

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<sup>1</sup> One officer testified that while she could not estimate the number of times she told the defendant to keep her hands up, the number was more than five.

The defendant argues that there was insufficient evidence presented at trial to establish that she constructively possessed the firearm. As such, she argues that the trial judge erred in denying her motion for a required finding of not guilty. We disagree.

We review the judge's denial of that motion to determine whether, when viewing the evidence in the light most favorable to the Commonwealth, "the evidence . . . is sufficient so that the jury '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. Cotto*, 69 Mass. App. Ct. 589, 591, 870 N.E.2d 109 (2007), quoting from *Commonwealth v. Pope*, 406 Mass. 581, 584, 549 N.E.2d 1120 (1990).

It is well established that mere knowledge of a firearm is insufficient to find constructive possession. See *Albano*, 373 Mass. at 134. There must also be evidence that the defendant "had the ability and intention to exercise dominion [\*4] and control over the weapon." *Commonwealth v. Sadberry*, 44 Mass. App. Ct. 934, 936, 692 N.E.2d 103 (1998). There was sufficient evidence presented at trial to allow a rational trier of fact to conclude that the elements of knowledge and control were proved beyond a reasonable doubt. The defendant's close proximity to the firearm and her constant fidgeting with the bag covering it sufficiently established her knowledge of and ability to control the firearm. See *Romero*, 464 Mass. at 654. Knowledge can be proved by circumstantial evidence, so long as "the evidence warrants a reasonable inference to that effect." *Cotto*, 69 Mass. App. Ct. at 592. Finally, "[e]vidence such as . . . attempts to conceal or dispose of contraband . . . permit an inference of unlawful possession." *Commonwealth v. Whitlock*, 39 Mass. App. Ct. 514, 519, 658 N.E.2d 182 (1995).

This case is analogous to *Cotto, supra*, where this court upheld the denial of a motion for a required finding of not guilty. In *Cotto*, following a motor vehicle stop, officers smelled burnt marijuana, noted that the defendant was acting in an alarmed manner, and witnessed him "shoving his feet underneath the front passenger seat, where [a] firearm was recovered." *Id.* at 593. This court held that those facts, coupled with the firearm being found directly under the seat where the passenger was kicking his feet, were sufficient to establish constructive possession. [\*5] *Ibid.* It was further noted that the defendant's actions of shoving his feet under the passenger seat "allowed the jury to infer a 'personal connection' between the defendant and the firearm." *Id.* at 594, quoting from *Commonwealth v. Delarosa*, 50 Mass. App. Ct. 623, 628, 740 N.E.2d 1014 (2000). In this case, as in *Cotto*, the defendant, in defiance of police orders, continued to reach down

toward the exact area of the vehicle where the firearm was discovered. It was reasonable for a jury to conclude that the defendant was actively concealing the firearm. See *Whitlock*, 39 Mass. App. Ct. at 519 (attempts to conceal contraband permit an inference of possession). As such, there was no error in the denial of the defendant's motion for a required finding of not guilty.

3. *Jury Instruction*. The defendant further argues that the trial judge's instructions to the jury blended specific intent with general intent. This argument was not preserved at trial. "The standard of review for unpreserved errors in noncapital murder cases is whether there was a substantial risk of a miscarriage of justice." *Commonwealth v. Lavoie*, 464 Mass. 83, 89, 981 N.E.2d 192 (2013), citing *Commonwealth v. Freeman*, 352 Mass. 556, 564, 227 N.E.2d 3 (1967). "[W]hen reviewing a judge's instructions to a jury, we do not consider phrases in isolation, but rather '[w]e evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the [\*6] judge's words.'" *Commonwealth v. Glacken*, 451 Mass. 163, 168-169, 883 N.E.2d 1228 (2008), quoting from *Commonwealth v. Niemic*, 427 Mass. 718, 720, 696 N.E.2d 117 (1998). In other words, the sufficiency of jury instructions should be "determined in light of their over-all impact on the jury." *Niemic*, 427 Mass. at 720, quoting from *Commonwealth v. Galford*, 413 Mass. 364, 371-372, 597 N.E.2d 410 (1992).

The defendant's argument concerns the following statement by the judge during his jury instructions: "You should give this word 'intention' its ordinary meaning of acting voluntarily and deliberately, not out of some accident or negligence. It's not necessary that the defendant knew that she was breaking the law, but it is necessary that she intended the act to occur which constitutes this offense." It is true that this excerpt aligns with the Criminal Model Jury Instructions for general intent. See Criminal Model Jury Instructions for use in the District Court, Instruction 3.120 (2009). However, as we review jury instructions as a whole for their impact on a jury, we conclude that the judge's instructions did not create a substantial risk of a miscarriage of justice.

Throughout the jury instructions, the judge was direct about the requisite elements of the charged offense. For example, the judge twice instructed the jury that the burden was on the Commonwealth to prove that the Defendant was aware she had a firearm [\*7] under her control or possessed a firearm. When taken as a whole, the jury instruction effectively informed the jury of the required elements of the crime. See *Commonwealth v. Gladney*, 34 Mass. App. Ct. 151, 158, 607 N.E.2d 750 (1993). There was no substantial risk of a miscarriage of justice.

*Judgment affirmed.*

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By the Court (Kafker, C.J., Cypher, Agnes, Maldonado & Desmond, JJ.).

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