

SJC to tackle proof for constructive possession

by Alex G. Philipson

Published: July 19th, 2012



The Supreme Judicial Court's summer hiatus from hearing oral arguments is well under way, and with it comes the anticipation of cases cued up for the next term.

One case, taken on further appellate review, stands out for the unusual way it was resolved by the Appeals Court and for the wide-ranging impact it may have on fundamental aspects of criminal law.

The case is *Commonwealth v. Romero*, 80 Mass. App. Ct. 791 (2011). The defendant was convicted of illegally carrying a firearm in an automobile, on a constructive possession theory.

On appeal, he argues, among other things, that the evidence was insufficient to support his conviction.

Although the facts are relatively straightforward, their interpretation sharply divided the Appeals Court.

The facts

The commonwealth's case consisted of the following evidence:

Late one night in April 2008, a Waltham police sergeant on routine patrol noticed a BMW coupe with four occupants parked on a side street off Moody Street. As the officer drove past in his cruiser, the BMW's interior light turned on for a couple of seconds and then off; the side street was darker than Moody Street. The occupants were slouched in their seats listening to music.

The officer returned within a couple of minutes and parked some distance behind the BMW. He approached the car on foot, noticing a rear passenger reach through the space between the front seats. The driver (the defendant) looked from side to side.

When the officer reached the BMW, he shined a flashlight in the car, asked what was going on and saw the front passenger drop something in his lap, which turned out to be a handgun.

The officer ordered the occupants out of the car. The gun was not loaded, nor was any ammunition found in the car or on any of the occupants.

During questioning, the defendant, who owned the BMW, said that the passenger with the gun — a brother of the defendant's girlfriend — had showed the defendant a gun several hours earlier when the defendant picked up his girlfriend to take her out to dinner. He denied knowing that the gun was in the car.

The defendant testified at trial. He said that when he arrived at his girlfriend's home to pick her up (at the same location where the officer later encountered the BMW), one of her brothers approached the car and showed the defendant a gun. The defendant and his girlfriend then went to dinner.

When they returned later that evening, the girlfriend's two brothers greeted them and asked for a ride. The defendant drove them around for a while and then returned to his girlfriend's home. Shortly thereafter, the officer confronted them.

Appeals Court's decision

The Appeals Court affirmed the defendant's conviction of constructively possessing the gun, but only after a 2-1 panel preliminarily reversed it.

For the first time in a decade in a criminal matter, the outcome changed after the original majority and dissenting opinions were circulated to the entire Appeals Court. A majority of the full court agreed with the dissent, and so, pursuant to *Sciaba Constr. Corp. v. City of Boston*, 35 Mass. App. Ct. 181, 181 n.2 (1993), the dissent became the majority opinion.

Dividing the court were two issues.

First, whether the evidence was sufficient to prove the defendant had the requisite intent to exercise dominion and control over the gun (the judges all agreed that the evidence was sufficient to show the defendant's knowledge of and ability to control the gun).

The second ground of disagreement concerned the continued vitality of the principle that when the evidence tends equally to support two inconsistent propositions, neither has been proved beyond a reasonable doubt. See *Commonwealth v. O'Brien*, 305 Mass. 393, 400 (1940).

Concerning the question of intent, the majority focused on the defendant's presence in the car and his (disputed) knowledge of the gun, as well as four "plus factors."

Those factors were that the defendant (1) owned and (2) operated the car (the majority called these "primary" factors), (3) the defendant's proximity to the gun, and (4) such other details as his and his passengers' behavior (their slouched posture and the defendant's looking from side to side), and the late hour and darkness of the location.

The majority stressed the first two factors, stating: "If the owner and operator of the car chooses not to exclude a passenger who he knows has a weapon, it is a reasonable inference that the owner and operator also has the intent to exercise dominion and control over the firearm as he does over the car itself." *Romero*, 80 Mass. App. Ct. at 796.

The dissent disagreed that merely "tolerating the presence" of a weapon or contraband in or on one's property shows intent to control it. *Id.* at 807.

The result may be different, the dissent acknowledged, when a defendant is alone in his car or premises — i.e., where he has exclusive access or control over an item — or when additional incriminating evidence exists. But those were not the circumstances here.

The dissent denied that the third or fourth "plus factors" helped prove the defendant's intent, reasoning that comparable precedent shows those factors, absent more inculpatory ones, at most relate to a defendant's knowledge and ability rather than his intent.

As for the "equal and inconsistent evidence" principle, the majority claimed that the concept has fallen out of favor in federal jurisdictions and that it conflicts with *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); and *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979).

The dissent countered that the principle continues valuably to guard against convictions based on a "leap of conjecture with respect to the essential elements of the crime charged" and ensures that the commonwealth must adduce more than "some record evidence, however slight," to prove each element beyond a reasonable doubt. *Romero*, 80 Mass. App. Ct. at 812 (citations omitted).

Reflections on the case

Although constructive possession cases are highly fact specific, prior decisions provide a rough spectrum of scenarios involving relatively stronger and weaker evidence.

The commonwealth's proof in *Romero* lies at the weaker end of the spectrum.

Under caselaw cited by both the Appeals Court majority and dissent, evidence typically probative of a defendant's intent to control a weapon outside his actual possession consists of accompanying criminal behavior or at least pointedly suspicious activity far more damning than that involved here. Absent those conditions, the majority relied heavily on the defendant's ownership and operation of the BMW.

But no comparable case suggests that a defendant's ownership or control of the place where a weapon is found (at least when the defendant is not alone) can substitute for a dearth of inculpatory evidence demonstrative of the defendant's intent. To put such emphasis on a defendant's relationship

to a place risks allowing a jury to find guilt by association.

The crucial question in *Romero* is whether the jury could properly infer from the relatively mild circumstances (basic facts) that the defendant intended to control the gun (an ultimate fact) — i.e., that he, as against his passenger, engaged in a crime.

To be sure, a jury may draw reasonable and possible inferences in weighing the evidence. See, e.g., Mass. G. Evid. §301(b) and §302(b) (2012), and accompanying notes.

But just because the jury here drew the inference that the defendant intended to control the gun does not mean that the evidence was necessarily sufficient to support the inference.

On the contrary: The jury's finding of guilt begs the question whether the inference was permissible. It is the court's job to determine whether the jury made a "leap of conjecture" over an evidentiary gap, i.e., whether the inference was simply too remote.

That question implicates the "equal and inconsistent evidence" principle because the principle is meant to guard against a jury's employing guesswork in drawing inferences from circumstantial evidence to ultimate facts. See *O'Brien*, 305 Mass. at 400-401, citing, inter alia, *Smith v. First Natl. Bank*, 99 Mass. 605, 612 (1868).

As for the continued utility of the concept, an amicus brief filed by the Committee for Public Counsel Services assembles a wealth of authority, both federal and state, indicating that the maxim remains alive and well.

When it comes to deciding *Romero*, what may strike one judge as a reasonable inference may strike another as speculation or surmise.

But the SJC will not decide the case in a vacuum: Other constructive possession decisions provide a context. Compared to the evidence in those cases, it seems that a jury could not infer the defendant's intent to control the gun held by his passenger without making a guess based on the lukewarm surrounding circumstances.

However the SJC resolves the case, the court has the opportunity to clarify the commonly used but fuzzy theory of constructive possession.

Alex G. Philipson is founder of the appellate boutique Philipson Legal in Newton Centre.