COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-864

COMMONWEALTH

vs.

HARRY G. THOMPSON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from his conviction for carrying a firearm without a license, G. L. c. 269, § 10 (a). The firearm was discovered during a police search of the box truck that the defendant had been driving, and which he had crashed into a telephone pole. On appeal the defendant raises a host of arguments, including (1) that the judge erred by denying the defendant's motion to suppress the firearm, where the Commonwealth had tested the firearm in violation of a discovery order of the court; (2) that there was insufficient evidence that the defendant constructively possessed the firearm, (3) that the firearm should have been suppressed because the warrantless search of the defendant's vehicle was unlawful, and (4) that various of the judge's rulings during trial resulted in prejudicial error. For the reasons discussed below, we affirm.

Background.[1] At 2:30 A.M. on May 15, 2016, the Walpole police department (department) responded to a dispatch about a motor vehicle accident on North Street. When they arrived, they found that a box truck, similar to a U-Haul truck, had struck a telephone pole, breaking the pole in two places. The truck was blocking the road, there were live electrical wires hanging in the area, and the transformer on the telephone pole was leaking fluid. The defendant stated that he had been driving, and had crashed trying to avoid an animal in the road. The fire department was called, and the defendant was transported to the hospital because he was injured. A records search revealed that the defendant was not the owner of the truck.

The street remained closed for approximately two hours while the accident scene was being cleared. Because the truck was blocking the road, the officers decided that the vehicle had to be towed, and they conducted a search of the truck in advance of towing it. They did not attempt to contact the owner before doing so. When Walpole Police Officer Perciaccante opened the rear door of the truck, the nearest object was a black duffel bag containing several compartments. Officer Perciaccante

[1] The facts herein are drawn from the evidence presented during the relevant suppression hearings and at trial. We consider only the evidence presented at the suppression hearings to evaluate the suppression issues presented. Conversely, we consider only the evidence presented at trial to evaluate the sufficiency of the evidence arguments.

testified that he searched the bag for inventory purposes. He opened the bag and found a full beer can, still cold, together with two empty liquor bottles. With the alcohol, he also found several prescription bottles of medication with the defendant's name on them. In another compartment of the duffel bag, the officer found the black .22 caliber handgun that is the subject of this case, with a loaded magazine. A records check showed that the defendant was not licensed to carry a firearm. The defendant was later arrested and charged, in particular, with carrying a firearm without a license in violation of G. L. c. 269, § 10 (a).[2]

a. The testing of the firearm. Prior to trial, the defendant filed a "motion to preserve evidence," which asked a judge to order that a representative of the defendant be present at any test of the seized firearm, or alternatively, that the Commonwealth provide a complete video recording of the test. The judge allowed the motion. Defense counsel thereafter specifically brought the order to the attention of the relevant prosecutors. Nevertheless, an assistant district attorney (ADA) subsequently notified defense counsel that the firearm had been tested on September 27, 2016, by Officer John Wilmot, the

[2] The defendant was also charged with leaving the scene of property damage in violation of G. L. c. 90, § 24 (2) (a), but that charge was later dismissed by agreement.

armorer of the Walpole police, without notice to the defense. The ADA also provided Officer Wilmot's report, which described the tests and concluded that the gun was operable.

On August 10, 2017, defense counsel moved to exclude any evidence regarding the firearm. He argued that the Commonwealth had recklessly violated the prior order, and that in doing so it had engaged in "destructive testing" of what could well have been exculpatory evidence. The Commonwealth conceded that it had violated the order, but argued that Officer Wilmot's tests were done appropriately, that there was no showing that the gun had been altered before or as a result of the testing, and that the defense expert had later been given appropriate access to test fire the gun. The Commonwealth also argued that the defendant had not shown bad faith or recklessness.

A different motion judge held a lengthy nonevidentiary hearing on August 3, 2018, and thereafter denied the motion to exclude. He concluded that the defendant had not made "an evidence based showing of a reasonable possibility that the firearm in question was altered in some manner that destroyed exculpatory evidence." He also found that the Commonwealth had not "acted in bad faith or with recklessness." He did, however, order some relief: he stated that "the Court will allow the defendant to (1) cross examine Officer Wilmot on the steps he took during the first ballistics test and (2) to request a jury

instruction on the Commonwealth's failure to conduct the first ballistics test with the defense expert present."

b. The inventory search. Defense counsel also filed a pretrial motion to suppress the various items the police officers found in the box truck -- including the gun -- on the grounds that they were the fruits of an unlawful search. After an evidentiary hearing, another judge concluded that the officers had conducted a justified inventory search, insomuch as the driver had been taken to the hospital, and the truck was blocking the road and needed to be towed. The judge also concluded that the search had been initiated in accordance with the department's inventory policy. The judge did note that the police had not made a written inventory of all the significant items that were found, and that the recordkeeping "could have been better"; he concluded, however, that the recordkeeping failures did not require suppression.

c. Trial. After the defendant's efforts to exclude the firearm were unsuccessful the case proceeded to trial. The two responding officers testified about the crash scene, and the items found in the duffel bag. Officer Wilmot testified that he had tested the gun, and that it was operable. The defense contended that the Commonwealth had not proved constructive possession of the gun, emphasizing that the defendant did not own the truck, and that the Commonwealth's investigation and

evidence was inadequate (for example, that there were no photographs of the truck, its interior, or the duffel bag where the gun was found). The jury convicted the defendant of carrying a firearm without a license.

Discussion. 1. The discovery order violation. The defendant first argues that the judge erred by denying the defendant's motion to exclude the gun, where Officer Wilmot's tests had taken place in violation of the prior order. The defendant's position is not without force. The Commonwealth concedes that it violated the order, and that the order was specifically directed at preserving the defendant's right to view the firearm before it was, potentially, altered.

On the other hand, the defendant has not submitted evidence that supports a conclusion that the handgun was, in fact, materially altered by Officer Wilmot or anyone else. Officer Wilmot submitted a written report averring that he performed an inspection, and that he found the handgun "in working order." The defendant did not request an evidentiary hearing on this issue, and did not seek to examine Officer Wilmot during the hearing regarding the defendant's motion to exclude the gun. Indeed, during the nonevidentiary hearing, defense counsel did not challenge Officer Wilmot's representations as to what he did before testing the gun; defense counsel noted that the defense expert "believes him [Officer Wilmot]."

The defendant contends, nonetheless, that the gun should have been suppressed because the Commonwealth engaged in "destructive testing" the moment the gun was test fired, thereby destroying exculpatory evidence. Under the circumstances, we are not persuaded. The applicable law is set forth in Commonwealth v. Sanford, 460 Mass. 441, 445-451 (2011), a case nearly on all fours with this one, as it addressed the appropriate remedy where the Commonwealth had test fired a firearm in violation of a court order. There, the Supreme Judicial Court held that to succeed in excluding the gun, or the testing evidence, the defendant needed to show either (1) a reasonable possibility that the destroyed evidence was exculpatory, or (2) bad faith or reckless conduct by the Commonwealth. Id. at 447.

Here, as in Sanford, 468 Mass. at 449, the judge found that the defendant had failed to show a reasonable possibility that the test firing destroyed exculpatory evidence. We cannot say that conclusion was erroneous. The evidence before the judge included Officer Wilmot's report, which stated that he examined the gun and found it "in working order." The defendant's expert submission did not contest that fact, nor did the defendant seek to impeach Officer Wilmot by cross-examining him prior to trial.

On appeal, the defendant points to statements in Officer Wilmot's report which indicated that the gun was "dirty from

neglect," and missing a "follower, which is a part in the magazine that separates the ammunition from the magazine spring." The defendant fails to plausibly explain, however, how either of these facts materially undermines Officer Wilmot's statements that he found the handgun in working order or that he fired the handgun "without issue." There is no suggestion that the lack of a follower, which is part of the magazine rather than part of the gun, would render the gun inoperable. The defendant's arguments are mere speculation, divorced from actual evidence.

Nor did the judge commit error in finding that there was no bad faith or recklessness. The judge's statements in this regard were findings of fact, made after a hearing. The defendant seems to suggest that the finding of no recklessness was clear error, but we cannot agree. The defendant had the burden to show recklessness. See Sanford, 460 Mass. at 450. The violation of the court order alone demonstrates negligence, and perhaps gross negligence, given defense counsel's efforts to make sure that the prosecutors were aware of the order. See Commonwealth v. Woodward, 427 Mass. 659, 679 (1998). But to show recklessness, there needed to be evidence -- perhaps from Officer Wilmot, perhaps from the responsible ADA -- that went to the state of mind of the persons who made the decision to test the gun (for example, what those persons knew about the court

order, and what steps the prosecutors had taken to comply with the order). No such evidence was presented here. Moreover, the judge's specific finding of no recklessness distinguishes this case from Sanford, as in that case, the motion judge's "findings [were] unclear on the . . . level of the Commonwealth's culpability." Sanford, 460 Mass. at 450.

Under all the circumstances, the defendant has not met the showing required by the case law, and we do not find error in the judge's decision.[3]

2. Sufficiency of evidence as to constructive possession. The defendant also argues that there was insufficient evidence to demonstrate the defendant's constructive possession of the gun. We disagree.

When conducting a sufficiency review, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

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[3] The defendant's argument that the trial judge erred by allowing an armorer -- Officer Wilmot -- to testify as an expert is without merit. Officer Wilmot testified regarding his qualifications to offer opinions regarding firearms. The judge was well within his discretion in concluding that Officer Wilmot's experience and training, which included his twenty years as an armorer and multiple firearm manufacturer certifications, were sufficient to qualify him as an expert. Contrast Commonwealth v. Guinan, 86 Mass. App. Ct. 445, 450-451 (2014). Contrary to the defendant's suggestion, there is no statute establishing that only ballisticians can offer expert testimony regarding firearms. See G. L. c. 140, § 121A (ballistician certification constitutes prima facie evidence for firearm charges).

essential elements of the crime beyond a reasonable doubt" (quotation, emphasis, and citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). When the Commonwealth's theory as to a possession crime is not actual, but constructive possession, the Commonwealth must "show knowledge [of the contraband] coupled with the ability and intention to exercise dominion and control" (quotation and citation omitted). Commonwealth v. Romero, 464 Mass. 648, 653 (2013). Constructive possession cannot be proved by the defendant's mere proximity to the contraband; there must be an additional "plus factor" supporting the inference that the defendant had the requisite knowledge, dominion, and control as to the contraband. See Commonwealth v. Ortega, 441 Mass. 170, 174 (2004); Commonwealth v. Santana, 95 Mass. App. Ct. 265, 268 (2019).

Here, there were two plus factors that tended to show that the defendant had knowledge of the gun. First, the defendant's prescription medications were in the duffel bag in which Officer Perciaccante found the gun. Second, the police officers found a cold can of beer in the same bag. As indicated, the defendant was the only occupant of the truck and it was 2:30 in the morning, so the presence of a cold can of beer in the bag gave rise to the inference that the defendant had accessed the bag recently. And the presence of the defendant's medications in the bag further indicated that the defendant had dominion and

control over the bag, since he apparently had placed important personal items in there that he would need to retrieve. Since the gun was also in the bag, the jury could have inferred from these facts that the defendant "had both knowledge of the contraband and the ability and intention to exercise dominion and control over it." Ortega, 441 Mass. at 174.

3. Inventory search. The judge also did not err in denying the defendant's motion to suppress based on the warrantless search of the truck. On appeal, the defendant insists that the evidence shows that the investigating officers conducted an "investigatory search," rather than an inventory search, and that a pretextual investigatory search violates the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights. The judge found that the search was not pretextual, however, and that finding was not clearly erroneous here.

"Under both the Federal and Massachusetts Constitutions, analysis of the legitimacy of an inventory search of an impounded vehicle involves two related, but distinct, inquiries: (1) whether the impoundment of the vehicle leading to the search meets constitutional strictures, and (2) whether the conduct and scope of the search itself meet those strictures." Commonwealth v. Ellerbe, 430 Mass. 769, 772-773 (2000). As to the first inquiry, police officers may impound a vehicle if it would

present a safety hazard if not towed. See Commonwealth v. Davis, 481 Mass. 210, 218-219 (2019). Here, there is little question that the truck presented such a safety hazard; it was blocking the road, apparently inoperable, and its operator was on the way to the hospital. The officers were not obligated to attempt to track down the owner of a vehicle prior to impoundment, Commonwealth v. Oliveira, 474 Mass. 10, 15 (2016), and in any event it was 2:30 in the morning, and the road needed to be cleared expeditiously.

Inventory searches of impounded vehicles do not violate constitutional protections if the police act reasonably and pursuant to standard written policies. See South Dakota v. Opperman, 428 U.S. 364, 383-384 (1976) (Powell, J., concurring); Davis, 481 Mass. at 219. Under department policy, the truck needed to be inventoried if it was towed, and that policy was of course reasonable. In the course of that inventory, the officers encountered and searched the duffel bag, and this aspect of the search was also consistent with the department policy.

It is troubling that in conducting their inventory, the officers did not, in fact, maintain a written inventory of "valuable items" found in the truck. The "DJ equipment" that was present in the truck, for example, does not appear on any

list.[4] Such a written inventory was required by the policy, as part of its basic purpose. However, we agree with the judge that under the circumstances, the officers' failure to maintain a complete written inventory does not mandate suppression of the gun. See Commonwealth v. Torres, 85 Mass. App. Ct. 51, 53-54 (2014). This is because the inventory search was appropriate, and not a pretext, and the gun was the product of a properly conducted search. See id. at 55. There was thus no violation of art. 14 or the Fourth Amendment.

4. Trial issues. Finally, the defendant complains of various rulings and statements by the trial judge, which he argues improperly limited his cross-examination and his closing argument.

a. Cross-examination. As to cross-examination, the defendant first argues that the trial judge erred when he sustained an objection to defense counsel's question -- posed to one of the responding officers -- as to whether the defendant was initially charged with leaving the scene of property damage. See note 2, supra. "A trial judge has broad discretion to limit cross-examination of a witness." Commonwealth v. Mercado, 456 Mass. 198, 203 (2010). The judge's ruling was within his range of discretion. The purpose of the question was to impeach the

[4] The officers did list some seized material in their police reports; however, that is not a complete inventory.

charging officer by purportedly showing that the officer had issued a charge with no basis. But inasmuch as the leaving the scene charge had already been dismissed, the issue was decidedly collateral. The judge noted that the defendant's impeachment effort would require "a small hearing within a hearing."[5] It was within his discretion to decide that the probative value of the testimony would be outweighed by the risk of confusing the jury or wasting the jury's time. See Commonwealth v. Jones, 464 Mass. 16, 20 (2012).

Nor did the judge abuse his discretion when he prevented defense counsel from asking questions of Officer Wilmot, on recross-examination, regarding the violation of the court order as to the testing of the gun. Defense counsel did not pursue this line of questioning during his initial cross-examination, and there was no new information elicited during the redirect that would have justified the new line of questioning on recross-examination. See Commonwealth v. O'Brien, 419 Mass. 470, 475 (1995).

b. Interruptions and instructions during closing. The trial judge's two interruptions during defense counsel's closing present a more difficult question. Because defense counsel did

[5] The defendant's argument that he was prevented from cross-examining Officer Perciaccante regarding the lack of photographs of the contents of the truck is not supported by the record.

not object to either of the trial judge's interruptions at trial, we review for a substantial risk of a miscarriage of justice. See Commonwealth v. St. Louis, 473 Mass. 350, 359 (2015). We conclude that while the judge's charge during the second interruption was erroneous, it did not create a substantial risk of a miscarriage of justice.

The thrust of the defense closing was that the Commonwealth had failed to prove its constructive possession case beyond a reasonable doubt. Prior to the first interruption, defense counsel stated in his closing that the police officers "could have done a DNA test," or "a fingerprint analysis" on the gun, but failed to do so. The judge interrupted at that point and instructed the jury that "whether there's a DNA test, whether there was a fingerprint test, whether certain other tests were done or other people could have been or might have been called, it's completely irrelevant to your analysis and should not be given any weight at all during your deliberation." This first instruction by the trial judge was not erroneous, because there was no evidence regarding DNA tests or fingerprint analyses (or the lack thereof) during trial.

Defense counsel resumed his closing, however, noting that there were "[n]o photos of the bag. . . . No photos of the gun with the bag and the medication. . . . No photos of the rear of the truck. No documentation to show you what was in the back of

that truck." The trial judge then interrupted once again and said, among other things, that the jury's "deliberation and their judgment on what is part of the case, not guesses or speculation about whether there were or were not photos, whether they could have or could not have called other evidence or other witnesses. That's not part of your analysis."

This instruction was erroneous, because defense counsel had elicited testimony from Officer Perciaccante that he had not taken any photos of the bag or the truck. Since there was evidence that no photos had been taken -- and the lack of photos was relevant to whether the Commonwealth had proved its constructive possession case -- defense counsel should have been permitted an argument regarding "[t]he failure of the authorities to . . . produce certain evidence." Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980). The Supreme Judicial Court has indicated that instructions like the one at issue may risk improperly undercutting the defense's Bowden argument. See Commonwealth v. Alvarez, 480 Mass. 299, 318 (2018).

Here, however, the error does not rise to the level of a substantial risk of a miscarriage of justice. In making this evaluation, "[w]e consider the strength of the Commonwealth's case, the nature of the error, the significance of the error in the context of the trial, and the possibility that the absence of an objection was the result of a reasonable tactical

decision" (quotation and citation omitted). Commonwealth v. Bolling, 462 Mass. 440, 452 (2012). Although the judge erred, that error was perhaps understandable given that the judge had just had to correct defense counsel for arguing facts not in evidence. Further, defense counsel did not object to the judge's charge or request a curative instruction; indeed, the judge later appeared to offer a curative instruction, but defense counsel declined. Moreover, the Commonwealth's case was strong because the gun was found in a vehicle whose sole occupant was the defendant, in the same bag as a cold can of beer and the defendant's prescription medications. Under the circumstances, we are confident that the result of the trial would have been the same if the error had not been made. See Commonwealth v. Azar, 435 Mass. 675, 687 (2002).

Judgment affirmed.

By the Court (Rubin, Neyman & Englander, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: December 1, 2021.

[6] The panelists are listed in order of seniority.