

373 Mass. 132, 135 (1977)* (firearm protruded from under defendant's seat); *Commonwealth v. Bailey*, 29 Mass. App. Ct. 1007, 1008 (1990) (same); *Commonwealth v. Diaz*, 15 Mass. App. Ct. 469, 471-472 (1983) (gun in borrowed car beneath defendant's feet); *Commonwealth v. Donovan*, 17 Mass. App. Ct. 83, 85-86 (1983) (gun under seat of borrowed car mixed in with defendant's belongings); *Commonwealth v. Kitchings*, 40 Mass. App. Ct. 591, 599-600 (1996) (defendant virtually lived in the van in which the guns were being transported). *See also Commonwealth v. Bean*, 15 Mass. App. Ct. 168, 170 (1983)* (defendant attempted to conceal ammunition handed to him by the driver); *Commonwealth v. Groves*, 25 Mass. App. Ct. 933, 937 (1987) (defendant's brother threw from the car a weapon that the two men had earlier used to carry out a robbery). *Cf. Commonwealth v. Perez*, 27 Mass. App. Ct. 550, 553 (1989) (drugs on front seat of defendant's car); *Alicea v. Commonwealth*, 410 Mass. 384, 387-388 (1991) (defendant became visibly agitated when a trooper searching his borrowed vehicle neared the spot where drugs were concealed). *Compare Commonwealth v. Almeida*, 381 Mass. 420, 422-423 (1980) (an inference of knowledge could not be drawn solely from the fact that defendant was driving a borrowed car with a gun hidden in the console); *Commonwealth v. Brown*, 401 Mass. 745, 748 (1988) (same, firearms hidden beneath passenger seat of stolen vehicle); *Commonwealth v. Bennefield*, 373 Mass. 452, 453-454 (1977)* (knowledge could not be imputed to a front seat passenger simply because a gun was found beneath the feet of a passenger in the rear seat); *Commonwealth v. Hill*, 15 Mass. App. Ct. 93, 94-97 (1983) (no evidence that defendant knew that a purse beneath his feet concealed a handgun).

While knowledge supports an inference of control, knowledge alone does not establish dominion and control. *Commonwealth v. Gray*, 5 Mass. App. Ct. 296, 299 (1977)*. Other evidence may, however, bridge the gap. A defendant, for example, may be shown to have exercised control over a firearm locked in a glove compartment or trunk. *Commonwealth v. Collins*, 11 Mass. App. Ct. 583, 586 (1981)* (defendant carried ammunition that fit guns concealed in the trunk); *Commonwealth v. Lucido*, 18 Mass. App. Ct. 941, 943 (1984) (knowledge and control inferred from defendant's possession of a

key to the glove compartment containing his personal letters and a gun); *Commonwealth v. Reilly*, 23 Mass. App. Ct. 53, 55 (1986) (same); *Commonwealth v. Montgomery*, 23 Mass. App. Ct. 909, 910 (1986) (defendant carried an ammunition clip fitting the handgun found on the floor of the car).

Possession (Carrying)

Note: As amended effective January 2, 1991, M.G.L. c. 269, § 10(a)*, no longer requires proof that a defendant "carried" an unlicensed firearm outside of his home or place of business. Simple possession of a firearm in a "public" place is sufficient.

While the statute provides an exception for the possession of a firearm within a person's residence or place of business (consistent with judicial interpretation of the pre-1991 statute), it forbids the unlicensed or unauthorized possession of a firearm in any public area, including the common areas of a private building. *See Commonwealth v. Seay*, 376 Mass. 735, 742-743 (1978)* (foyer of an apartment building); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910 (1980) (sidewalk). Whether a place is "public" depends upon the extent to which it is within a defendant's exclusive dominion and control, a concept distinct from mere ownership. *Commonwealth v. Belding*, 42 Mass. App. Ct. 435, 437 (1997) (defendant's ownership of a three family house did not give him "exclusive control" of its common hallways). *Compare Sanford v. Belemysesi*, 362 Mass. 123, 125 (1972) (tenant maintained exclusive control over a porch and flight of exterior stairs). "Exclusive control" is defined by common law concepts of property. Because the determination is fact-driven it presents an issue to be resolved by the jury. *See Commonwealth v. Statham*, 38 Mass. App. Ct. 582, 584-585 n.3 (1995) (refusing to construe a building's "curtilage" as within a defendant's "exclusive control" as a matter of law); *Commonwealth v. Dunphy*, 377 Mass. 453, 458-459 (1979) (same); *Commonwealth v. Belding, supra*, at 439 (same, whether defendant was "in or on" his residence when the shot was fired). If a defendant possesses a valid firearms identification card, the Commonwealth must prove beyond a reasonable doubt that the firearm was possessed in a public

place. *Commonwealth v. Morales*, 14 Mass. App. Ct. 1034, 1035 (1982). Cf. *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 990 (1984).

Note: The following two paragraphs relate to cases defining "carrying" in the pre-1991 statute. Carrying is an essential element of **section 10(a)*** offenses committed prior to January 2, 1991. For offenses committed on or after January 2, 1991, possession is the controlling concept. [Possession as a legal construct is also discussed in the chapter on Narcotics Offenses]. "Carrying" remains an operative concept for offenses falling under **sections 10(b)*** (carrying other dangerous weapons), **section 10(c)*** (carrying a sawed-off shotgun), and **10(j)*** (carrying firearms on school grounds).

2 Momentary possession is not enough. The idea of the [pre-1991] statute requires movement of the firearm on the person from one place to another. *Commonwealth v. Atencio*, 345 Mass. 627, 631 (1963)*. Momentary possession for the sole purpose of firing a gun is not "carrying." *Commonwealth v. Osborne*, 5 Mass. App. Ct. 657, 659 (1977)*. See *Commonwealth v. Ashley*, 16 Mass. App. Ct. 983, 984 (1983) ("The offense is not the handling or having a gun in hand, but carrying it on one's person").

"Carrying" may be shown circumstantially. See *Commonwealth v. Domingue*, 18 Mass. App. Ct. 987, 989-990 (1984) (where defendant's car was observed at the scene of the shooting, and some minutes later defendant was found in his place of business with a freshly fired gun of the same caliber, he could be inferred to have carried it from the scene of the crime). A person found standing or sitting alone outside his home with a weapon may be inferred to have carried it to the place where he is apprehended. *Commonwealth v. Ballou*, 350 Mass. 751, 756 (1966). See *Commonwealth v. Cullinan*, 9 Mass. App. Ct. 895 (1980) (defendant found firing a gun in public); *Commonwealth v. Samaras*, 10 Mass. App. Ct. 910 (1980) (defendant arrested in front of his home with a gun in his pocket); *Commonwealth v. Ashley*, 16 Mass. App. Ct. 983, 984 (1983) (defendant arrested in another's home with a revolver on his person).

Possession; City of Boston

A Home Rule Petition approved by the Legislature in 1993 (**St. 1993, c. 491**) bans the possession or carrying of a firearm in the City of Boston by any person under twenty-one years of age. A first offense may be punished by a fine of up to one thousand dollars; a second or subsequent offense by a sentence of up to two and one-half years on the House of Correction. Police are authorized to seize any firearm that may be evidence of a violation of the ordinance.

Mere Possession Not a Lesser Included Offense

M.G.L. c. 269, § 10(h)*, was amended effective January 2, 1991, to prohibit the practice of avoiding the mandatory sentencing provisions of **section 10(a)*** by permitting pleas to the discretionary penalties of **section 10(h)***. By legislative decree, unlicensed possession of a firearm outside of one's home or place of business may not be treated as a lesser included offense of **section 10(a)***, or prosecuted as a violation of **section 10(h)***. See *Commonwealth v. Cowan*, 40 Mass. App. Ct. 939, 940 (1996) ("We know of no sound reason for concluding that the Legislature may not constitutionally require a jury to render a straight up guilty or not guilty on an entire offense charged, precluding consideration of possible lesser included offenses"). See also *Commonwealth v. Alvarado*, 423 Mass. 266, 267 n.1 (1996) (improper finding of guilt where there "was no evidence that [a] motor vehicle was the defendant's 'residence or place of business'").

Section 10(h)* punishes the "non-public" possession of firearms, rifles, shotguns, or ammunition by persons who have not been issued a license to carry firearms under **M.G.L. c. 140, §§ 131 or 131F**, or who are not in compliance with the requirements relating to firearms identification cards. See **M.G.L. c. 140, §§ 129B & 129C**. As with a license to carry, the Commonwealth is not required to prove that a defendant *knew* that he was required to have a firearms identification card to possess a weapon legally. See *Commonwealth v. Sampson*, 383 Mass. 750, 762 (1981)*.