

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

)	CIVIL ACTION
MICHAEL ELBERY)	NO. 97cv11743-MLW
Plaintiff)	
)	DEFENDANTS' OPPOSITION TO
v.)	PLAINTIFF'S MOTION TO
)	CORRECT COURT'S ERROR OF
DANIEL SKLUT et al.)	LAW ON SUMMARY JUDGMENT
Defendants)	DECISION OF 9-26-01
)	

The defendants oppose the plaintiff's motion to "correct court's error of law" in its denial of the plaintiff's motion for summary judgment. The defendants also oppose the plaintiff's request for certification of questions to the Massachusetts Supreme Judicial Court. The defendants also oppose a "finding" of "no probable cause" for the charge against the plaintiff under Mass. G.L. c. 269, §10(a).

I. AN UNLICENSED PERSON'S POSSESSION OF FIREARMS OUTSIDE HIS RESIDENCE OR PLACE OF BUSINESS, BUT ON PROPERTY WITHIN THAT PERSON'S EXCLUSIVE CONTROL, IS A CRIME IN MASSACHUSETTS.

The plaintiff asserts that this Court committed an error of law by deciding the defendants had probable cause to arrest him on August 5, 1994 for violation of the 1994 version of Mass. G.L. c. 269, §10(a) and §10(h). The Plaintiff contends that this Court misinterpreted Mass. G.L. c. 269, §10(a) by the Court's holding that a violation of this statute occurs when a person possesses a firearm outside of

that person's residence or business without a "license to carry," as the statute states. The Plaintiff argues that the proper interpretation of the 1994 version of Mass. G.L. c. 269, §10(a) requires a determination that because the E-Z Mini-storage where his firearms were located was property under his "exclusive control," he did not need a license to carry a firearm. Such an interpretation, the Plaintiff contends, requires this Court to decide that no probable cause to arrest him existed. Without probable cause, he argues, he should have received summary judgment in his favor.

In 1994, the year of the plaintiff's arrest, Mass. G.L. c. 269, §10(a), as amended by St. 1990, c. 511, §2, stated in relevant part, "Whoever ... knowingly has in his possession ... a firearm ... without ...: (1) being present in or on his residence ... shall be punished" Although this "residence" exemption was not present in the pre-1991¹ version of the statute, the Massachusetts Supreme Judicial Court had interpreted the pre-1991 statute as exempting the keeping of a firearm within a residence or place of business. *Commonwealth v. Seay*, 376 Mass. 735 (1978); *Commonwealth v. Statham*, 38 Mass. App. Ct. 582, 583 (1995). The Supreme Judicial Court judicially exempted residences and places of business from the pre-1991 version of the statute because Mass. G.L. c. 140, §123, Seventh, allowed a licensed gun dealer to carry a firearm to an unlicensed

¹St. 1990, c. 511, §2 became effective January 2, 1991.

purchaser at his "residence or place of business." *Commonwealth v. Seay*, 376 Mass. 735, 740–741 (1978).

Although the term "property" is used in some Massachusetts appellate decisions, the decisions on this subject, both before and after this exemption was incorporated into the statute itself in 1991, deal with whether a particular circumstance is within the exempt area of a residence. *Commonwealth v. Dunphy*, 377 Mass. 453 (1979)(whether possession in back yard of home was at defendant's residence depended on whether defendant had exclusive control of yard); *Commonwealth v. Seay*, 376 Mass. 735 (1978)(possession in foyer and stairs of his apartment building not within residence); *Commonwealth v. Brass*, 42 Mass. App. Ct. 88, 92 (1997)(hotel room after defendant's check-out time not defendant's residence); *Commonwealth v. Belding*, 42 Mass. App. Ct. 435 (1996)(possession on stairs of owner-occupied three-family was not possession in residence); *Commonwealth v. Statham*, 38 Mass. App. Ct. 582, 583 (1995)(whether possession in yard of defendant's home was possession within residence depended on whether defendant had exclusive control of yard, but possession on street or sidewalk sufficient for conviction).

In each case in which Massachusetts appellate courts considered the exemption for the place of possession, the issue was not just whether the criminal defendant had exclusive control of the *property* on which he had firearms. The

issue was whether the criminal defendant had exclusive control of the property as a contiguous extension of the criminal defendant's residence.

Massachusetts courts have not legalized unlicensed persons possessing firearms caches simply because the unlicensed person keeps exclusive control of the property where the weapons are stashed. No lack of clarity exists on this aspect of Massachusetts law.

II. A "NOT GUILTY" FINDING DOES NOT ESTABLISH LACK OF PROBABLE CAUSE TO ARREST.

The Plaintiff contends that because he was found “not guilty,” of the criminal charges against him, this Court should have determined that no probable cause to arrest the Plaintiff existed. Without probable cause to arrest, he argues, he should have received summary judgment in his favor.

The Court was not conducting a meaningless exercise in reviewing the facts presented on the plaintiff's motion for summary judgment and deciding that probable cause to arrest existed. A police officer has probable cause to arrest a suspect where the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the suspect had committed or was committing an offense. *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19 (1st Cir.1999).

Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. Rather, the court will evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action: In dealing with probable cause, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

Adams v. Williams, 407 U.S. 143, 149 (1972)(citations and internal quotations omitted).

Because more is required for conviction than to establish probable cause, acquittal of a criminal charge does not establish lack of probable cause.

CONCLUSION

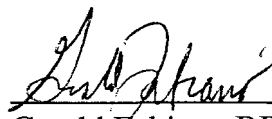
Without repeating the material filed with the defendants' opposition to the plaintiff's motion for summary judgment, and without repeating the Court's careful analysis of the parties' submissions, it is clear that viewing the material submitted in a light most favorable to the defendants and indulging all reasonable inferences in the defendants' favor, see *e.g.*, *Sheehy v. Town of Plymouth*, 191 F.3d 15, 19–20 (1st Cir.1999)(standard for summary judgment), probable cause to arrest the plaintiff existed.

The Court should deny the plaintiff's motion. In particular,

- the Court should not change its decision that the plaintiff did not make the necessary showing for allowance of his motion for summary judgment
- the Court should not certify a question to the Massachusetts Supreme Judicial Court
- the Court should not make a determination that no probable cause to arrest the plaintiff existed.

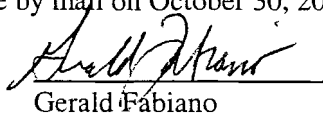
The defendants

By their attorneys



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I hereby certify that a true
copy of the above document was
served upon each party appearing
pro se by mail on October 30, 2001.



Gerald Fabiano