

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	CIVIL ACTION
MICHAEL ELBERY)	NO. 97cv11743-MLW
Plaintiff)	
)	DEFENDANTS' MEMORANDUM
v.)	ON INSUFFICIENCY OF
)	FIREARM IDENTIFICATION
DANIEL SKLUT et al.)	CARD FOR PISTOL OUTSIDE
Defendant)	RESIDENCE OR PLACE OF
_____)	BUSINESS

On August 5, 1994, plaintiff Michael Elbery had a Beretta pistol and an Uzi pistol in his possession in his storage unit at EZ Mini Storage in Shrewsbury. Both pistols had barrels less than sixteen inches long. (The plaintiff admits that at least one "firearm," as defined by Mass. G.L. c. 140, §121, was in his storage locker on that date.)

At a May 10, 2002 conference with the District Court, the question arose on whether a "firearm identification card" was sufficient for legal possession of such firearms. The District Court requested the defendants to submit a memorandum on whether a "firearm identification card" allows possession of a pistol outside one's residence or place of business. In short, a Massachusetts resident without a license to carry firearms cannot possess a pistol outside his residence or place of business.

Massachusetts criminal law prohibits possession of a "firearm" without a "license to carry firearms," with limited exceptions.

Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty¹ without either:

- (1) being present in or on his residence or place of business; or
- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty;² or
- (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty;³ or
- (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty;⁴ or

¹G.L. c. 140, §121 defines "firearm" as "a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of barrel or barrels is less than 16 inches

²G.L. c. 140, §131 provides the ordinary procedure for the issuance of a "license to carry firearms."

³G.L. c. 140, §131F provides for temporary licenses to carry firearms for non-residents. The plaintiff lived in Worcester on August 5, 1994.

⁴G.L. c. 140, §129C requires a firearm identification card for any possession of firearms, rifles, shotguns and ammunition with, and provides twenty exemptions for residents and non-residents, none of which are applicable here. G.L. c. 140, §131G authorizes non-residents of the Commonwealth of Massachusetts to carry a pistol or revolver in or through Massachusetts to take part in competition, to attend meetings or exhibitions of a group of firearm collectors or to hunt. G.L. c. 140, §131G also requires

- (5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B;

...

shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction.

Mass. G.L. c. 269, §10(a).

As the District Court is aware, the plaintiff contends that G.L. c. 269, §10(a) requires a license to carry firearms only outside of "private" areas. The defendants disagree with this view, contending that the statute means what it says when it permits possession without a license to carry in a "residence or place of business." G.L. c. 269, §10(a)(1).

The plaintiff does not contend that on August 5, 1994, he had a license to carry firearms. His license to carry firearms was not only taken away; but the Worcester District Court had also denied the plaintiff's petition to reinstate that license. *Elbery v. Coakley*, Worcester District Court No. 9062 CV 2305 (Court's Memorandum of Decision and Rulings, January 24, 1991). The exception of G.L. c. 269, §10(a)(2) (allowing possession with a license to carry) does not apply.

The plaintiff was not a non-resident of the Commonwealth of Massachusetts and he is not contending that he had a temporary license to carry

that the non-resident be licensed to carry firearms in his own jurisdiction, under a licensing scheme that meets certain minimum requirements.

issued to non-residents under G.L. c. 140, §131F. The exception of G.L. c. 269, §10(a)(3) therefore does not apply.

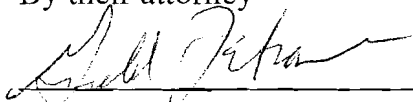
The exception in G.L. c. 269, §10(a)(4) requires compliance with a statute requiring a firearm identification card for any possession of firearms, rifles, shotguns and ammunition, G.L. c. 140, §129C, and compliance with the statute allowing certain non-residents to carry firearms in or through the Commonwealth, G.L. c. 140, §131G. Under the Massachusetts courts' construction of G.L. c. 140, §129C, a firearm identification card is not an authorization to possess a firearm outside one's residence or place of business. See *Commonwealth v. Dunphy*, 377 Mass. 453, 455 n.2, 386 N.E.2d 1036, 1038 n.2 (1979)(decided under previous version of G.L. c. 269, §10(a), when "carrying," and not mere possession, was an element of the crime). See also *Commonwealth v. Belding*, 42 Mass. App. Ct. 435, 436-437, 677 N.E.2d 707, 708 (1997)("[A] firearm may, under the statutory framework, be kept in a home or place of business for self-protection if the possessor has a firearm identification card, but the home or business exemption is inapplicable to common areas over which the possessor lacks exclusive control."). The plaintiff, a Worcester resident on August 5, 1994, does not qualify under any part of G.L. c. 140, §131G, which allows certain non-residents, acceptably licensed elsewhere, to carry firearms in or through Massachusetts for specific purposes. The exception of G.L. c. 269, §10(a)(4) does not apply.

The exception of G.L. c. 269, §10(a)(5) does not apply, because the weapons in the plaintiff's storage locker were not air rifles or BB guns.

In short, it is a crime under G.L. c. 260, §10(a) for a Massachusetts resident to possess a pistol outside his residence or place of business with only a firearms identification card, but not a license to carry firearms.

Defendants Daniel Sklut, James Carlin,
Stephen Faucher, Carl Hanson, Chester
Johnson, James Hurley, Wayne Sampson,
Robert McGinley and Town of Shrewsbury

By their attorney



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I hereby certify that I served a
true copy of the above document upon
each party appearing pro se by mail
on May 13, 2002.



Gerald Fabiano