No. _____

In the

Supreme Court of the United States

NATNAEL ZEMENE,
Petitioner

vs.

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

For Natnael Zemene

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June 3, 2025

QUESTIONS PRESENTED

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court held that the Second Amendment presumptively protects an individual's right to carry a firearm in public for self-defense. *Id. at 10, 33.* Over 1½ months after this decision issued, the Petitioner was convicted in state court of carrying a firearm in public without a license. His conviction was vacated after he argued that the prosecution had failed to introduce evidence to rebut the presumption that he was engaged in constitutionally protected conduct. His motion to prevent retrial on double jeopardy grounds was denied and the Massachusetts Supreme Judicial Court (hereinafter, "SJC") held that a retrial was not barred by double jeopardy principles.

The questions presented to this Court are:

1. Whether the Fifth Amendment's double jeopardy clause as interpreted by *Burks v. United States*, 437 U.S. 1, 18 (1978) protects an individual from a subsequent prosecution where the prosecutor produced insufficient evidence at trial to support a conviction by failing to rebut the presumption already established by *Bruen* at the time of trial of a right to carry a firearm outside the home in self-defense;
2. Whether a state court must immediately implement this Court's interpretation of the Second Amendment and not delay its full application until such time as it has had the opportunity to rule on

how that holding impacts state evidentiary law pursuant to U.S. Const. Art. VI; and

3. Whether an evidentiary statute that places the burden on a defendant to produce evidence that he is engaged in constitutionally protected conduct offends notions of Due Process and cannot justify the prosecution's failure to prove an element of a criminal offense in accordance with *In re Winship*, 397 U.S. 358 (1970).

LIST OF PARTIES

The Petitioner is Natnael Zemene, a citizen of the United States. The Respondent is the Commonwealth of Massachusetts.

DIRECTLY RELATED PROCEEDINGS

Zemene v. Commonwealth, SJC-13592, 495 Mass. 573 (2025).[1] Judgment entered March 25, 2025.

Commonwealth v. Zemene, SJ-2024-0108. Single Justice Session, Supreme Judicial Court of Massachusetts. Judgment entered April 16, 2024.

Commonwealth v. Zemene, 2023-P-0088. Massachusetts Appeals Court. Appeal dismissed without prejudice January 18, 2024.

Commonwealth v. Zemene, 2023-J-0008. Massachusetts Appeals Court. Order denying stay of sentence issued January 24, 2023.

Commonwealth v. Zemene, 2152CR000735. Cambridge District Court. Judgment entered August 12, 2022 and was vacated on November 27, 2023.

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[1] The Petitioner's case was argued before the Supreme Judicial Court of Massachusetts with *Commonwealth v. Crowder*, 495 Mass. 552 (2025) which raised many of the same issues as the ones presented in this petition. It is anticipated that the defendant in *Crowder* will also seek certiorari review in this Court, presenting issues closely related, if not identical, to the issues presented in this Petition. This Court may wish to consider both petitions at the same time. If this Court ultimately grants certiorari in either case, the petitioner urges the Court to grant review in the other as well and consolidate the cases for decision.

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The Petitioner respectfully prays that a writ of certiorari issue to reverse and remand the judgment below and order that a second trial be barred on the grounds of double jeopardy.

OPINIONS BELOW

The decision of the Massachusetts Supreme Judicial Court (SJC) affirming the single justice's denial of the petitioner's Emergency Petition under G.L. c. 211, §3 for relief from the denial of his motion to dismiss is reported as *Zemene v. Commonwealth*, 495 Mass. 573 (2025) and is reprinted in the Appendix, pp. 32-36.

The SJC single justice's decision denying extraordinary relief from the March 8, 2024 trial court order denying the Petitioner's motion to dismiss based on a double jeopardy claim is reprinted in the Appendix, p. 37.

The Petitioner's Motion to Dismiss on Double Jeopardy Grounds and supporting affidavit are reprinted in the Appendix, pp. 38-40.

The decision of the SJC in *Commonwealth v. Crowder*, 495 Mass. 55 (2025), a case involving a related legal issue that was argued with the petitioner's case before the SJC, is reprinted in the Appendix, pp. 41-55.

JURISDICTION

The SJC decided the case on March 25, 2025. This petition is filed within 90 days of that decision. The SJC is the highest state court in

Massachusetts and jurisdiction of this Court is invoked under 28 U.S.C. §1257(a). *See Abney v. United States*, 431 U.S. 651 (1977).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article Six of the Constitution provides in relevant part, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. Art. VI.

The Second Amendment to the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II.

The Double Jeopardy Clause of the Fifth Amendment provides in relevant part, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part, "No State shall … deprive any person of life, liberty, or property, without due process of law…." U.S. Const. Amend. XIV.

28 U.S.C. §1257(a) provides in relevant part, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where … where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the

United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

G.L. c. 211, § 3 provides in relevant part, "The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided…."

G.L. c. 269, §10 (a) provides in relevant part, "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 … without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms …

…

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 18 months nor more than two and one half years in a jail or house of correction."

G. L. c. 278, §7 provides in relevant part, "A defendant in a criminal prosecution, relying for his justification upon a license … shall prove the same; and, until so proved, the presumption shall be that he is not so authorized."

STATEMENT OF THE CASE

On June 22, 2021, the Petitioner was stopped for a civil traffic infraction after the officer claimed that he was unable to read his license plate at night. The Petitioner and the occupants of his vehicle were ordered out of the car and repeatedly searched without finding anything on them. A gun was allegedly found on the ground under the Petitioner's foot after the third search. *Zemene*, 495 Mass. at 574-575.

The following day, the Petitioner was arraigned in the Cambridge District Court (Docket No. 2152CR000735) and charged with possession of ammunition without a license (G.L. c. 269, §10(h)), carrying a firearm without a license (G.L. c. 269, §10(a)), carrying a loaded firearm without a license (G.L. c. 269, §10(n)), unlicensed operation of a motor vehicle (G.L. c. 90, §10), and two civil motor vehicle infractions. He pled not guilty/not responsible to all charges and was released on personal recognizance. *Zemene*, 495 Mass. at 575.

Jury trial commenced on August 11, 2022.[2] No evidence was produced to rebut the presumption of a right to carry a firearm that was announced in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), which had been decided more than 1½ months earlier on June 23, 2022. *Zemene*, 495 Mass. at 574-576.

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[2] The prosecutor informed the court that she would not be going forward with the motor vehicle charges. *Zemene,* 495 Mass. at 575 n.4.

On August 12, 2022, the Petitioner was found guilty of carrying a firearm without a license and not guilty/not responsible for the remaining charges and infractions. Having no prior record, he received the mandatory minimum sentence of 18 months to serve. *Zemene*, 495 Mass. at 575-576.

While his case was pending on appeal (2023-P-0088), the SJC decided *Commonwealth v. Guardado* (*Guardado I*), 491 Mass. 666 (2023), S.C. (*Guardado II*), 493 Mass. 1 (2023), cert. denied, ___U.S. ___, 144 S. Ct. 2683 (2024). *Guardado I* acknowledged that as a result of *Bruen*'s holding that the Second Amendment to the United States Constitution presumptively protects an individual's right to carry a firearm in public, evidence of licensure was no longer an affirmative defense that had to be raised by a defendant. Instead, lack of licensure was an element of the offense that the prosecution was required to prove. *Guardado I*, 491 Mass. at 690-692.

In April, 2023, the Appeals Court stayed the appeal of the Petitioner's case and allowed him to file a motion for post-conviction relief. The Petitioner's sentence was stayed by the trial court on April 26, 2023 and he was released upon personal recognizance. *Zemene*, 495 Mass. at 576.

On November 6, 2023, after the decision in *Guardado II* had issued, appellate counsel filed an amended motion to vacate his conviction and enter a required finding of not guilty. On November 27, 2023, the trial

judge denied the Petitioner's motion, but granted him a new trial. *Zemene*, 495 Mass. at 576. The appeal of the Petitioner's now-vacated conviction (2023-P-0088) was subsequently dismissed without prejudice. *Zemene*, 495 Mass. at 576. n.5.

In January of 2024, the Petitioner filed a motion in the Cambridge District Court to dismiss the case on the grounds of double jeopardy. This motion was denied after a hearing. *Id.* at 576; App. 38.

The Petitioner filed an Emergency Petition under G.L. c. 211, §3 for relief from the denial of his motion to dismiss to the single justice of the SJC (SJ-2024-0108). App. 38. His petition for relief was denied in April of 2024. *Id.*; App. 37.

The SJC allowed the Petitioner's appeal from the single justice's order to proceed with full briefing in the ordinary course (SJC-13592). Relief was denied on March 25. 2025 and a retrial was authorized. *Id. at 576-577.*

The Petitioner now seeks leave to file a petition for writ of certiorari with this Court.

REASONS FOR GRANTING THE PETITION

I. Introduction

For many years, the SJC took the position that the provisions of the Second Amendment did not encompass carrying a firearm outside the home and that licensure was an affirmative defense to be raised by a defendant, rather than an element of the crime. *Commonwealth v. Gouse*, 461 Mass. 787, 799-803 (2012). G. L. c. 278, § 7 was consistent with that interpretation. It provided, "A defendant in a criminal prosecution, relying for his justification upon a license … shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." *Id.*

That interpretation was rocked to its core when this Court released its decision in *Bruen*. *Bruen* held that "The Second Amendment conferred an individual right to keep and bear arms." *Bruen* went on to state that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17, 20, 24. Eliminating any doubts about the scope of the Second Amendment's coverage, *Bruen* held that "the plain text of the Second Amendment protects … carrying handguns publicly for self-defense." *Id.* at 32.

The *Bruen* decision shifted the burden to the government to justify whether any infringement on the right to bear arms in public was constitutional. The *Bruen* holding should have been sufficient to put the prosecution on notice that there now existed a constitutional presumption

that an individual had a right to carry a firearm in public and that the old Massachusetts practice of requiring an accused to demonstrate that he had the right to bear arms offended the Constitution. Where carrying a firearm was now presumptively protected conduct, proving the absence of licensure or the right to carry could no longer be treated as an affirmative defense to the crime of carrying a firearm in public without a license and instead, had to be treated as an essential element of the crime. This conclusion was confirmed by the SJC the first time the matter came before it – over a year after the Petitioner's trial while the Petitioner's case was pending on appeal – in *Guardado I*, 491 Mass. at 668 ("Because possession of a firearm in public is constitutionally protected conduct, in order to convict a defendant of unlawful possession of a firearm, due process requires the Commonwealth prove beyond a reasonable doubt that a defendant did not have a valid firearms license.").

Unlike the defendant in *Guardado I* whose trial occurred before *Bruen* was decided, the Petitioner's trial occurred after the *Bruen* decision issued, but prior to the decision in *Guardado I*. Therefore, *Bruen's* interpretation of the Second Amendment which effectively annulled Massachusetts' presumption that a person in possession of a firearm was engaged in wrongful conduct unless proven otherwise was applicable to the Petitioner's case. As of the time of the Petitioner's trial, the burden had shifted to the prosecution to show that the accused was not engaged in constitutionally protected conduct.

The prosecution failed to introduce evidence at trial to overcome the presumption established in *Bruen* that the Petitioner was engaged in constitutionally protected conduct. The Petitioner's conviction was vacated, but despite the holding in *Burks* protecting an individual from double jeopardy, the SJC allowed the prosecution to retry him. This Court in *Burks* established a clear rule; specifically, that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Burks*, 437 U.S. at 18. The SJC treated the failure to present sufficient evidence as simple trial error because at the time of the Petitioner's trial, it had not had the opportunity to directly rule on the impact of *Bruen* on state evidentiary law. *Zemene*, 495 Mass. at 577. Such a holding ignored the immediate impact of *Bruen* and was in direct conflict with *Burks* by giving the prosecution a second bite at the apple to try to produce evidence that it failed to present in the first trial.

This Court should grant certiorari to review the important double jeopardy question raised by the SJC's decision permitting a retrial in the absence of sufficient evidence presented at the first trial. This Court should grant certiorari to assure that the Supremacy Clause requires a state court to fully accept this Court's interpretation of the constitution as of the time the interpretation was made, not at a later date after the state court has had the opportunity to rule on the issue. Finally, this Court should hold that G. L. c. 278, § 7 is unconstitutional as applied post-*Bruen*

to the extent that it requires an individual to produce evidence that the individual is engaged in constitutionally protected conduct.

II. Massachusetts' Decision to Permit Retrial of the Petitioner After His Conviction Was Reversed for Insufficient Evidence Violates the Double Jeopardy Clause of the Fifth Amendment As Interpreted By This Court in *Burks v. United States*, 437 U.S. 1 (1978)

A. As of the Time of the Petitioner's Trial, an Individual Was Presumed to Have the Right to Carry a Firearm for Self-Defense In Public Under the Second Amendment

Prior to *Bruen*, Massachusetts law did not treat carrying a firearm in public as falling under the protections of the Second Amendment and Massachusetts placed the burden on the defendant to produce evidence of licensure so as to overcome a presumption of unauthorized possession of a firearm and avoid conviction under G. L. c. 269, §10(a). *Gouse*, 461 Mass. at 802-804; G.L. c. 278, §7. *Bruen* effected a significant change in Second Amendment law by negating that presumption. In *Bruen*, this Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17.

Under Massachusetts law pre-*Bruen*, licensure was an affirmative defense. *Gouse*, *supra.* However, once *Bruen* held that "the plain text of the Second Amendment protects … carrying handguns publicly for self-defense," *Id.* at 32, a presumption arose that an individual did have the right to carry a firearm outside the home for self-defense and the burden necessarily shifted to the prosecution to rebut it. Since an individual was

presumed to have the right to carry a firearm outside the home, lack of licensure became an element of the crime to be proven by the prosecution and could no longer be treated as an affirmative defense.

The SJC adopted this interpretation at the first opportunity it had to consider it.

> In the wake of *Bruen*, this court's reasoning in *Gouse*, 461 Mass. at 802, is no longer valid. It is now incontrovertible that a general prohibition against carrying a firearm outside the home is unconstitutional. See *Bruen*, 142 S.Ct. at 2134. Because possession of a firearm outside the home is constitutionally protected conduct, it cannot, absent some extenuating factor, such as failure to comply with licensing requirements, be punished by the Commonwealth. *See id.* at 2122-2123. Accordingly, the absence of a license is necessary to render a defendant's possession of a firearm "punishable." *See Smith*, 568 U.S. at 110, quoting *Dixon*, 548 U.S. at 6 (affirmative defense does not negate element of crime where it "excuse[s] conduct that would otherwise be punishable"). It follows, then, that failure to obtain a license is a "fact necessary to constitute" the crime of unlawful possession of a firearm. See *Smith, supra*, quoting *In re Winship*, 397 U.S. at 364.

Guardado I, 491 Mass. 690 (2023)

In *Guardado I*, the SJC acknowledged Bruen's holding as eliminating the burden on the defense to produce evidence of licensure and shifting the burden onto the prosecution to prove a lack of a right to carry; thus, making proof of the lack of a right to carry/absence of licensure a necessary element of the charge. *Guardado I*, 491 Mass. at 668 ("Because possession of a firearm in public is constitutionally protected conduct, in order to convict a defendant of unlawful possession of a firearm, due process requires the prosecution prove beyond a

reasonable doubt that a defendant did not have a valid firearms license."). By virtue of lack of licensure being an element that the prosecution had to prove in order to secure a conviction, a defendant no longer had an affirmative burden to demonstrate that he had a right to carry. *See In re Winship,* 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Mullaney v. Wilbur*, 421 U.S. 684, 699-704 (1975) (due process violation to require a defendant to disprove an element of the offense).

The inclusion of Second Amendment protection for carrying a firearm outside the home was the result of the *Bruen* decision, not an independent and otherwise isolated interpretation of Massachusetts state law. *Bruen's* holding was controlling on Massachusetts prosecutions as of the date of its issuance – over 1½ months prior to the Petitioner's trial.

B. The Prosecution Failed to Produce Evidence at Trial to Rebut the Presumption that the Petitioner Had a Right to Carry a Firearm in Public for Self Defense and Thus, Failed to Prove an Element of the Crime

Although the Commonwealth had been placed on notice by Bruen that there was now a presumptive right to carry a firearm, it failed to introduce evidence rebutting that presumption at the Petitioner's trial. *Zemene*, 495 Mass. at 574-575. It should be noted that Massachusetts law did not preclude a prosecutor from introducing evidence of lack of

licensure if it existed.[3] Indeed, the Petitioner is aware of a number of cases in which the prosecution chose to introduce evidence of lack of licensure in similar prosecutions involving G. L. c. 269, §10. *See e.g.*, *Commonwealth v. Gelin*, 494 Mass. 777, 782, 788 (2024), and Docket, *Commonwealth v. Gelin*, no. 2179PT00014 (Hampden Cty. Super. Ct.); *Commonwealth v. McFarlane*, 493 Mass. 385, 386, 389 n.7 (2024); *Commonwealth v. Bookman*, 492 Mass. at 400-401; *Commonwealth v. Francis*, 104 Mass. App. Ct. 593, 604 (2024), and *Commonwealth v. Francis*, no. 1584CR10224 (Suffolk Ct. Super. Ct.). The Commonwealth was on notice after the *Bruen* decision that the burden of proof had shifted and that there was a constitutional presumption that an individual had the right to carry. Because no evidence was introduced that the Petitioner lacked the right to carry a firearm in public, the evidence presented at his trial was insufficient for a rational trier of fact to find him guilty beyond a reasonable doubt of violating of G. L. c. 269, §10. His conviction had to be, and was in fact, reversed. Notwithstanding its failure to produce sufficient evidence to support a conviction at the Petitioner's trial, the prosecution now seeks a second opportunity to attempt to convict him on the same charge.

[3] In his concurring opinion in *Guardado I*, Justice Lowy noted several ways that the prosecution could prove lack of licensure. *Guardado I*, 491 Mass. at 694-698.

C. **The Failure to Produce Sufficient Evidence to Prove an Element of the Crime Was Not a Simple, Minor Trial Error and the Fifth Amendment Protects the Petitioner From Being Subjected to a Second Prosecution**

The Fifth Amendment proclaims that "No person shall . . . be twice put in jeopardy" for the same offense. U.S. Const. Amend. V. The Commonwealth's failure to present evidence to overcome the presumption that the Petitioner had a right to carry a firearm in public should have resulted in an order for a not-guilty verdict to enter in favor of the Petitioner that would have barred retrial under double jeopardy principles.

The prosecution was not free to ignore the Supreme Court's interpretation of federal constitutional law merely because of a lack of a confirmatory ruling on the issue by the state courts. Effective as of the date of Bruen, i.e., prior to the Petitioner's trial, the Commonwealth was put on notice that the Second Amendment created the presumption that an individual had the right to bear arms, and thus, it was required to present evidence to rebut that presumption in order to secure a conviction. *See United States v. Gaskin*, No. 3:22-cr-00098, 2023 U.S. Dist. LEXIS 103160 *16 (D. Conn. June 14, 2023) (After *Bruen*, "an individual cannot be presumed to be carrying a firearm unlawfully simply because of their possession of a firearm."); *United States v. Homer*, No. 23-CR-86 (NGG), 2024 U.S. Dist. LEXIS 64739 *8, 11 (E.D.N.Y. Apr. 8, 2024) (Claim that government could not have foreseen the change mandated by *Bruen* was without merit. When the government continued to treat licensure as an

affirmative defense post-*Bruen*, "it did so at its own risk."). The prosecution could not rely upon state precedent when doing so caused it to run afoul of Federal constitutional interpretations.

This Court has previously acknowledged that certain new constitutional doctrines are so important to justice that they must be applied retroactively.

> "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances."

Hankerson v. North Carolina, 432 U.S. 233, 241 (1977), citing *Williams v. United States*, 401 U.S. 646, 653 (1971). Although unlike the present case, *Hankerson* involved a constitutional interpretation that occurred after the defendant's trial, the reasoning in *Hankerson* regarding reliance on prior law or accepted practice being an insufficient justification for ignoring this Court's constitutional proclamations strongly suggests that the prosecution's failure to present evidence to rebut the presumption of a right to carry cannot be justified.

The prosecution's failure to address the impact of *Bruen* does not create an exception to the protections afforded by the Second, Fifth and Fourteenth Amendments. The prosecution "bears the risk of its own errors or mistakes at trial insofar as double jeopardy considerations are

impacted." *Mars v. Mounts,* 895 F.2d 1348, 1359 (11th Cir. 1990) citing *Addington v. Texas,* 441 U.S. 418, 423-24 (1979).

> One of the central objectives of the double jeopardy prohibition against successive trials is to prevent the state, with its unlimited resources, from using the first trial in the appellate process to pinpoint the inadequacies of its case. The double jeopardy clause forbids a second trial for the purpose of affording the prosecution "another opportunity to supply evidence that it failed to muster in the first trial." *Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 2146, 57 L. Ed. 2d 1 (1978). This aspect of double jeopardy protection "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218, 72 L. Ed. 2d 652 (1982)

Mars, 895 F.2d at 1359.

Where the prosecution had a full and fair opportunity to present its case and failed to present evidence to overcome the presumption that an individual had a right to carry, a retrial must be prohibited on double jeopardy grounds. The prosecution is not entitled to a second bite of the apple based upon its unreasonable reliance on state law in conflict with this Court's decision. *See Tibbs v. Florida*, 457 U.S. at 41. *See also Burks*, 437 U.S. at 18 ("Since … the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal"). Prohibitions against double jeopardy exist to protect the defendant, not to benefit the prosecution, and they cannot be swept away

merely because the state's appellate courts did not yet have the opportunity to address the issue post-*Bruen*.

The prosecution's inability to satisfy its burden as to an essential element of the charge by failing to produce evidence that the Petitioner lacked a license to carry should have had the effect of an acquittal once the trial judge reversed the Petitioner's conviction. The fact that the trial judge did not enter a finding of not guilty and merely granted a new trial is not dispositive of the outcome. *McElrath v. Georgia*, 601 U.S. 87, 96 (2024), quoting *Evans v. Michigan*, 568 U.S. 313, 325 (2013) ("it is not dispositive whether a factfinder 'incanted the word 'acquit"; instead, an acquittal has occurred if the factfinder 'acted on its view that the prosecution had failed to prove its case.'").

> [T]he ultimate question is whether the Double Jeopardy Clause recognizes an event as an acquittal. In making that determination, we ask whether—given the operation of state law—there has been "any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense."

McElrath, 601 U.S. at 96, quoting *Evans*, 568 U.S. at 318. The trial judge's action of reversing the conviction in the Petitioner's case where no evidence was introduced to prove absence of licensure acted as an acquittal for purposes of the Double Jeopardy Clause. The prosecution did not appeal from the trial judge's reversal of the conviction so it became final. *See Commonwealth v. Brangan*, 475 Mass. 143, 146 (2016) (Prosecution has the right to appeal a post-verdict motion for new trial or motion for a required finding). Where there was insufficient evidence of lack of

licensure to support the conviction and the trial occurred post-*Bruen*, double jeopardy considerations mandate that a retrial is foreclosed by the Fifth Amendment. *See Burks,* 437 U.S. at 16.

The SJC erred in treating the failure to follow the dictates of this Court as simple trial error and claiming that the impact of *Bruen* was essentially inapplicable to state prosecutions until such time as the SJC had the opportunity to determine its impact. *Zemene*, 495 Mass. at 577. The existence of evidentiary insufficiency based upon a failure to follow a ruling of this Court took this case out of the realm of simple trial error.

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e. g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks v. United States, 437 U.S. at 15. Here, the judicial process was not defective; rather the prosecution introduced no evidence to overcome the presumption that the Petitioner was engaged in constitutionally protected conduct. There is no exception for the prosecution's failure to be aware of Supreme Court holdings and there was no prohibition to prevent the prosecution from introducing the necessary evidence at trial if it existed. Reversal based upon a failure to produce sufficient evidence is such a

significant error that it merits the protection of the Fifth Amendment even when the basis for the acquittal was not legally sound.

> Retrial following a court-decreed acquittal is barred, even if the acquittal is "based upon an egregiously erroneous foundation," *Fong Foo v. United States*, 369 U. S. 141, 143, 82 S. Ct. 671, 7 L. Ed. 2d 629, such as an erroneous decision to exclude evidence, *Sanabria v. United States*, 437 U. S. 54, 68-69, 98 S. Ct. 2170, 57 L. Ed. 2d 43; a mistaken understanding of what evidence would suffice to sustain a conviction, *Smith v. Massachusetts*, 543 U. S. 462, 473, 125 S. Ct. 1129, 160 L. Ed. 2d 914; or a "misconstruction of the statute" defining the requirements to convict, *Arizona v. Rumsey*, 467 U. S. 203, 211, 104 S. Ct. 2305, 81 L. Ed. 2d 164. Most relevant here, an acquittal encompasses any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense.

Evans, 568 U.S. at 313.

The present case did not pose a situation where the lack of evidence was due to a merely procedural error and unrelated to the factual guilt or innocence of the defendant. Because the error was due to a failure of the prosecution to produce sufficient evidence, the prosecution is not entitled to a second opportunity to try to convict the Petitioner. The Double Jeopardy Clause is intended to protect individuals from prosecutors' repeat attempts to convict them for the same offense and granting the prosecution an opportunity for another attempt to convict the Petitioner would not be in accordance with those principles.

III. A State Court May Not Rely On State Evidentiary Law that Conflicts With a Pronouncement of this Court to Justify a Delay in Following the Edict of this Court Until Such Time As It Has Had the Opportunity to Rule on the Matter

Despite acknowledging the significant change in the law resulting from the *Bruen* decision, the SJC adopted the reasoning expressed in *Crowder* that *Bruen* had no impact on the elements of the crime of carrying a firearm in public until the SJC decided *Guardado I*. *Zemene*, 495 Mass. at 577. In *Guardado I,* the SJC acknowledged that "in the wake of *Bruen*, [its] reasoning in *Gouse*, 461 Mass. at 802, is no longer valid." *Guardado I*, 491 Mass. at 690. It further determined that the "treatment of firearms licensure as an affirmative defense was no longer tenable", that G.L. c. 278, §7 was "'no longer applicable'" to such prosecutions, and that the Commonwealth must fully bear the burden of proving that "the defendant in fact failed to comply with the licensure requirements for possessing a firearm." *Crowder*, 495 Mass. at 558, citing *Guardado I*, 491 Mass. at 690.

The SJC initially held that the proper remedy for a failure to produce evidence of a license to carry at trial was the entry of a finding of not guilty. *Guardado I*, 491 Mass. at 694. The SJC subsequently reconsidered *Guardado I* and held that Mr. Guardado, whose case was tried prior to the *Bruen* decision, could be retried after his conviction was vacated. *Guardado II*, 493 Mass. at 7. The basis for that determination was:

> Because the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial, the Commonwealth has not been given a fair opportunity to offer whatever proof it could assemble at

> trial. Further, because absence of licensure was not recognized as an essential element at the time of trial, the resulting verdict did not resolve this element of the offenses charged. …
>
> Here, *because the Commonwealth reasonably could not have known we would reverse our holdings in [Gouse and similar cases]*, a judgment of acquittal is not required by principles of double jeopardy. Without the ability to gaze into the future of this court's and the Supreme Court's rulings, and without any notice from the defendant of an intent to raise the issue of licensure, the Commonwealth simply had no reason to believe that any evidence concerning licensure would be necessary." (Quotation, citations, and alteration omitted.)

*Crowde*r, 495 Mass. at 558-559, (emphasis added) quoting *Guardado II*, 493 Mass. at 7.

The rationale used by the SJC in *Guardado II* to permit retrial is inapplicable to the Petitioner's case because for him, *Bruen* was not "a legal development that occurred after trial." *Guardado II*, 493 Mass. at 7. *Bruen* clearly overruled prior state precedent which held that the Second Amendment afforded no protection and treated the right to carry a firearm in public as an affirmative defense, rather than constitutionally protected conduct. *Gouse*, 461 Mass. at 799-803. After the *Bruen* decision was released, the prosecution reasonably should have known that (1) *Gouse* was no longer good law because it relied entirely upon the SJC's no longer tenable interpretation that the Second Amendment was not applicable to carrying a firearm outside the home; (2) the SJC was bound to follow this Court's interpretation of constitutional law under U.S. Const. Art. VI; and (3) that no presumption existed post-*Bruen* that would justify placing the

burden of production of evidence of a right to carry a firearm on the accused.

The SJC's failure to acknowledge that this Court's decision in *Bruen* announcing a presumption of a right to carry a firearm in public for self-defense took precedence over state evidentiary law and had to be followed immediately, not merely when the SJC got around to opining on the matter, was not simple trial error. Forcing the accused to prove that they had a right to carry a firearm notwithstanding the existence of a constitutional presumption that they had such a right directly impacted the presumption of innocence.

Although various jurisdictions have held that it is mere trial error when there has been a change of law that occurred after trial while the case was on appeal, [4] the Petitioner has not been able to locate any cases to support the proposition that failing to follow a federal constitution interpretation in effect at the time of trial was simple trial error; possibly because it is obvious that the state courts are bound to follow federal

[4] In *United States v. Weems,* 49 F.3d 528, 531 (9th Cir. 1995)), the change in the law resulting from this Court's decision took place after the trial and prior to the finalization of the case on appeal. Similarly, in *United States v. Harrington*, 997 F.3d 812, 817 (8th Cir. 2021), the change in the law was the result of this Court's decision that occurred 6 years after the trial. *See also United States v. Nasir*, 982 F.3d 144, 176 (3d Cir. 2020), vac'd on other grounds, 142 S.Ct. 56 (2021) (This Court's decision changed the law two years after the trial); *United States v. Robison*, 505 F.3d 1208, 1225 (11th Cir. 2007) (This Court's decision changed the law a year after the trial); *United States v. Reynoso*, 38 F.4th 1083, 1091 (D.C. Cir. 2022) (Comm. Opp. 10) (Change in the law occurred after guilty verdict had been rendered).

constitution interpretations as they exist at the time of trial. Because the change in the law in the Petitioner's case occurred prior to trial, there exists no justification to ignore it. It was simply unreasonable for the SJC and the prosecution to continue to treat the right to carry a firearm for self-defense as non-constitutionally protected conduct after *Bruen*.

The SJC now attempts to justify its position that *Bruen* had not shifted the burden of production to the prosecution in cases tried post-*Bruen* but pre-*Guardado I* by claiming "the Supreme Court had not addressed or decided how the Second Amendment applies to the particular aspects of State law at issue" and that "*Bruen* did not define the elements of criminal violations of firearms licensing schemes or who bears the burden of production on such elements." *Crowder*, 495 Mass. at 562-563. The fact that *Bruen* addressed a New York licensing law issue is not dispositive of whether the broad pronouncement on the reach of the Second Amendment was applicable to Massachusetts. In the past, the SJC has ordered the entry of a verdict in favor of the defendant when it applied an interpretation involving a different statute to the statute under review. *See e.g., Commonwealth v. Brown*, 479 Mass. 600, 605-608 (2018), (verdict of not guilty based upon insufficient evidence was appropriate where there was judicial interpretation from other cases available even absent "explicit language" involving the particular statute). There should certainly be a legitimate expectation that the SJC would follow an interpretation of federal constitutional law by this Court.

By eliminating the presumption that an individual lacked the right to carry a firearm outside the home, *Bruen* eliminated the justification for placing the burden of production of a license on a defendant – a fact which the prosecution reasonably should have noted and which the SJC addressed as soon as it was presented with the issue post-*Bruen* in *Guardado I*. *Bruen* completely undermined the rationale behind the *Gouse* decision which held that licensure was an affirmative defense and that the Second Amendment did not extend to carrying a firearm outside the home. Thus, it was *Bruen*, not *Guardado I,* that should have put the prosecution on notice that it could not, consistent with due process, require the defendant to rebut an element of the crime.

If the SJC's decision is allowed to stand, it will permit a state court to delay the full application of a Supreme Court decision regarding constitutional law merely because it was inconsistent with state law until such time as the state court has the opportunity to reconsider the matter. The implementation of a Supreme Court interpretation of a constitutional provision cannot turn on when a state court gets around to confirming the issue. Although the SJC acknowledged that defendants whose cases were pending post-*Bruen* were entitled to the presumption that carrying a firearm in public was constitutionally protected conduct, by granting the prosecution a "pass" from following the principles of *Bruen* at the trial of the Petitioner's case until such time as the matter had been addressed by

the SJC, it circumvented an individual's right to be protected from double jeopardy. *Zemene, 495 Mass. at 597.*

Continuing to place the burden on the accused to produce evidence that he was engaged in what was now constitutionally protected conduct could no longer be justified once this Court decided in *Bruen* that the Second Amendment presumptively protected an individual's right to carry a firearm in public,. The decision in *Guardado* was clearly foreseeable, even mandated by *Bruen*, and the prosecution's failure to heed *Bruen's* holding cannot justify depriving the Petitioner of the protections against double jeopardy afforded by the Fifth Amendment. It is not unreasonable that the prosecution should be made to bear the burden of anticipating a potential change in state law based on the holdings of this Court, even if it was addressed to a different statute so long as the constitutional pronouncement was applicable to the statute and case law at issue. The failure to produce evidence under these circumstances was not simple trial error but one of evidentiary insufficiency controlled by *Burks*. The SJC's decision to permit a retrial merely because it had not yet ruled on this Court's decision in *Bruen* ignored the immediate implications of the *Bruen* decision on Massachusetts law in violation of the Supremacy Clause and gutted the protections afforded by the Fifth Amendment. Its decision should not be allowed to stand.

IV. A State Evidentiary Rule that Placed the Burden on a Defendant to Come Forward With Evidence that He Is Engaged in Constitutionally Protected Conduct Offends the Constitution

G. L. c. 278, §7 provided, "A defendant in a criminal prosecution, relying for his justification upon a license … or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." Prior to the Bruen holding, the application of that statute to charges involving carrying a firearm was consistent with the existing presumption under Massachusetts caselaw that an individual did not possess a right to carry a firearm outside the home. *Gouse*, 461 Mass. at 802. Subsequent to the *Bruen* holding, that presumption was no longer tenable because it was inconsistent with an individual's presumptive right under the Second Amendment to carry a firearm outside the home for self-defense. *Bruen*, 597 U.S. at 10,17. *See Tot v. United States*. 319 U.S. 463, 467-469 (1943) (Due process requires the existence of a "rational connection between the facts proved and the fact presumed" in a statute); *Turner v. United States*, 396 U.S. 398, 421 (1970) (Statutory inference could not be sustained absent a basis to support it). *County Court of Ulster County v. Allen,* 442 U.S. 140, 166-167 (1979) (Inference must be warranted beyond a reasonable doubt if a statutory permissive inference is the sole basis for finding an essential element of the crime).

With regard to an element of the crime, Massachusetts places both the burden of production and the burden of persuasion on the prosecution. *Commonwealth v. Burke*, 390 Mass. 480, 483 (1983). *See*

also Smith v. United States, 568 U.S. 106, 110 (2013) (It is well established that no state may shift the burden of proof to the defendant to raise an affirmative defense that negates an element of the crime). If an accused is forced to persuade the jury that an element of the crime is not present, it essentially requires them to prove their innocence, rather than requiring the state to prove their guilt. This totally upends the constitutional order and in general, would place a nearly impossible burden on the accused, who typically lacks the resources and investigative power of the state. It would transform the presumption of innocence into a presumption of guilt that the accused must overcome and would permit a conviction should the accused fail to present evidence that he was engaged in constitutionally protected conduct.

In the present case, there was a complete disconnect between the Massachusetts statutory inference that was the basis of G. L. c. 278, §7; namely, that an individual lacked the right to carry a firearm in public for self-defense, and the presumption established in *Bruen* that the Second Amendment presumptively protected such conduct. There simply was "no rational way the trier could make the connection permitted by the inference," that carrying a firearm in public implied that such action was illegal. *See County Court of Ulster County*, 442 U.S. at157. The use of the presumption set forth in the statute would risk causing "the presumptively rational factfinder to make an erroneous factual determination" in violation of due process. *Id.* Placing the burden on the accused to produce

a license to carry under G. L. c. 278, §7 cannot coexist with due process because proof of noncompliance is an element of the crime post-*Bruen*. *Crowder*, 495 Mass. at 558, citing *Guardado I* at 690. ("[B]ecause possession of a firearm outside of the home is constitutionally protected conduct post-*Bruen*, 'the absence of a license is an essential element of the offense of unlawful possession of a firearm pursuant to G. L. c. 269, § 10 (a).'"). Thus, because the logical conclusion from *Bruen* decision was that proof of lack of licensure/right to carry outside the home was now an element of the crime, *see Guardado I*, 491 Mass. at 690-692, the prosecution had both the burden of persuasion and the burden of proof on that element. It would not comport with due process to place the burden on the defense to prove or even produce evidence of what he presumptively had a right to do, i.e., carry a firearm.

The SJC was correct in holding that holding that G.L. c. 278, § 7 was inapplicable to cases pending at the time of the *Bruen* decision[5] but it erred by not holding that G.L. c. 278, § 7 was *foreseeably* inapplicable to untried cases involving carrying a firearm outside the home effective as of the date of the *Bruen* decision. The SJC's holding that "G. L. c. 278, § 7, was still the governing law until this court ruled to the contrary," *Crowder,*

[5] This was not the first time that the SJC had held that the statute was inapplicable to a situation involving a firearm. The SJC had previously acknowledged that the statute was inapplicable in situations where licensure should not be treated as an affirmative defense. *See Commonwealth v. Humphries*, 465 Mass. 762, 770 (2013) (defendant charged as joint venturer and co-defendant had the firearm).

495 Mass. at 563, failed to take into account that consistent with *Bruen*, G. L. c. 278, § 7 could no longer be applicable to prosecutions under G.L. c. 269, §10(a) because the evidentiary presumption that an individual was not authorized to carry a firearm without a license was no longer valid and it conflicted with this Court's interpretation of the Second Amendment.

The net impact of the *Zemene* and *Crowder* holdings is the creation of the proposition that only the SJC could determine at what time a state law violated the constitution, regardless of the actions of this Court. *Cooper v. Aaron*, 358 U.S. 1, 16-20 (1958) made it quite clear that state courts lack the authority to ignore or delay the implementation of federal constitutional interpretations. As of the date of the *Bruen* decision, the presumption that an individual had no right to carry a firearm in public for self-defense was no longer consistent with the Second Amendment. By continuing to place the burden of production on the defense during that time, a defendant who was engaged in constitutionally protected conduct could be convicted merely for failing to produce evidence of innocence – a concept inconsistent with due process. *See e.g., Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949). This Court should determine that effective the date of *Bruen*, rather than at a later date after the state court had the opportunity to consider the issue, the application of G.L. c. 278, § 7 to the Massachusetts firearm statue involved in this case violated the constitution and that unnecessary reliance upon a blatantly

unconstitutional-as-applied statute cannot justify depriving an individual of the protections from double jeopardy enshrined in the Constitution.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

For Natnael Zemene,

June 3, 2025
Date

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APPENDIX

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495 Mass. 573
Supreme Judicial Court of Massachusetts,
Suffolk.

Natnael ZEMENE
v.
COMMONWEALTH.

SJC-13592
|
Argued January 6, 2025.
|
Decided March 25, 2025.

Synopsis

Background: Defendant was convicted of carrying a firearm without a license. Defendant appealed. Appeals Court stayed appellate proceedings and granted leave to file motion for postconviction relief in trial court. Defendant filed amended motion to vacate conviction and enter required finding of not guilty in light of changes in decisional law. Trial court denied motion but ordered new trial. Defendant appealed. Defendant moved in trial court to dismiss on double jeopardy grounds. The District Court Department, Cambridge Division, denied motion. Defendant filed notice of appeal and emergency petition for relief to a single justice. A single justice of the Supreme Judicial Court, Suffolk County, Georges, J., denied petition, and defendant appealed.

The Supreme Judicial Court, Kafker, J., held that Double Jeopardy Clause did not preclude retrial following change in decisional law adding element to offense.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

****1204** Firearms. Constitutional Law, Right to bear arms, Double jeopardy. Practice, Criminal, Double jeopardy. License.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on March 29, 2024.

The case was heard by Georges, J.

Attorneys and Law Firms

Esther J. Horwich for the petitioner.

Jamie Michael Charles, Assistant District Attorney (Timothy Ferriter, Assistant District Attorney, also present) for the Commonwealth.
Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Dewar, & Wolohojian, JJ.

Opinion

KAFKER, J.

***573** This case is before us on appeal from the decision of a single justice of the county court. It concerns the same remedy question we address in Commonwealth v. Crowder, 495 Mass. 552, 253 N.E.3d 1207 (2025), also decided today: whether a new trial or entry of a required finding of not guilty is the appropriate remedy for defendants who were convicted under G. L. c. 269, § 10 (a), in the interim between the United States Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022) (Bruen), and this court's decision in Commonwealth v. Guardado (Guardado I), 491 Mass. 666, 206 N.E.3d 512 (2023), S.C., 493 Mass. 1, 220 N.E.3d 102 (2023) (Guardado II), cert. denied, —— U.S. ——, 144 S. Ct. 2683, 219 L.Ed.2d 1299 (2024). As in Crowder, we hold that a new trial is the appropriate remedy here and affirm the single justice's denial of the defendant's emergency petition for relief under G. L. c. 211, § 3.[1]

***574** 1. Background. a. Facts. We recite the facts of this case as the jury could have found them. Commonwealth v. Corey, 493 Mass. 674, 675, 228 N.E.3d 1183 (2024).

At around 9 p.m. on June 22, 2021, an on-duty Cambridge police officer, Donald Conrad, observed a black Mazda sedan traveling on Alewife Brook Parkway. From roughly fifteen feet behind the Mazda, Conrad noticed that the sedan's rear license plate was not illuminated and not visible to him. He then decided to effect a motor vehicle stop.

As Conrad approached the pulled-over sedan, he observed three people inside: the defendant, who was the driver; a male in the front passenger seat; and a female in the right rear passenger seat. After determining that the sedan needed to be towed due to an expired registration, the officer removed the three occupants from the vehicle in order to conduct an inventory search in accordance with Cambridge police department policy. Two additional officers arrived on scene to assist, and Conrad began to search the sedan as the three occupants stood on a nearby sidewalk.

During the inventory search, Conrad found a bottle of tequila in the area of the front passenger seat and a box of ammunition ****1205** in the back pocket of the front passenger seat. The box contained twenty-eight "hollow point style" nine millimeter rounds. Conrad alerted the two other officers to the presence of the ammunition, and the three of them handcuffed the three vehicle occupants. Conrad then pat frisked the defendant and, after finding nothing of note, continued to inventory the sedan.[2]

At around 9:15 p.m., after the ammunition was discovered in the sedan, Officers Miltiades Antonopoulos and Marcus Collins responded to a radio call requesting additional backup at the motor vehicle stop. Shortly after arriving on scene, Antonopoulos, citing safety concerns, moved the three vehicle occupants, who remained handcuffed, from the sidewalk to a grassy area next to the roadway. He then asked Collins to pat frisk the defendant again, directed another officer to pat frisk the male passenger, and called for a female officer to arrive and pat frisk the female passenger.[3]

As Collins pat frisked the defendant, the defendant "was doing a lot of movements with his legs. His left leg specifically was ... ***575** going back and forth about a foot, repeatedly." Collins did not find any contraband on the defendant but, after completing the patfrisk, observed that the defendant's "stance" was "abnormal." While looking down at the defendant's left

foot, which "was planted at an angle with his toes pointed away from his body," Collins noticed that the defendant was stepping on an object resembling the magazine of a firearm.

Collins pulled the defendant to the side and realized the defendant had a "complete firearm" underfoot, rather than only a magazine. He handed the firearm, a Ruger LC9s semiautomatic handgun with an extended magazine and a laser aiming device, to Antonopoulos. After Antonopoulos showed Conrad the firearm discovered by Collins, Conrad read the defendant the Miranda warnings, which the defendant verbally confirmed he understood.

When asked by Conrad to whom the gun belonged, the defendant told him to "let them go," in reference to the man and woman traveling with him in the sedan. Conrad informed the defendant he could not let anybody go until he knew who owned the gun. In response, the defendant stated, "It's mine." Conrad then arrested the defendant.

b. Procedural history. On June 23, 2021, a criminal complaint issued from the Cambridge Division of the District Court Department charging the defendant with one count of possession of ammunition without a license, in violation of G. L. c. 269, § 10 (h); one count of carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a); and one count of carrying a loaded firearm without a license, in violation of G. L. c. 269, § 10 (n). The defendant was also charged with one misdemeanor count of unlicensed operation of a motor vehicle, in violation of G. L. c. 90, § 10, and cited for two civil motor vehicle infractions pursuant to G. L. c. 90, §§ 6 and 9. He was arraigned that day and pleaded not guilty to all charges and not responsible for the civil infractions.

The defendant filed a motion to suppress, which was subject to a hearing on July 8, 2022, and was denied on August 3. ****1206** A jury trial commenced on August 11. At trial, the Commonwealth elected to go forward only with the three felony counts.[4]

On August 12, the jury found the defendant guilty of carrying a firearm without a license but returned verdicts of not guilty on ***576** the other two charges. After denying the defendant's renewed motion for a required finding of not guilty, the trial judge imposed the statutory minimum sentence of eighteen months of incarceration in a house of correction. Immediately after sentencing, the defendant filed a notice of appeal and moved for, but was denied, a stay of his sentence.

Following his sentencing, the defendant filed, and appealed from the rulings on, numerous posttrial motions between November 2022 and April 2024. Relevant to this appeal, six days after this court issued its decision in Guardado I in April 2023, the Appeals Court stayed the defendant's pending appellate proceedings[5] and granted him leave to file a motion for postconviction relief in the trial court pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). The trial court stayed the defendant's sentence on April 26 and released him on personal recognizance.

In light of our October 2023 decision in Guardado II, 493 Mass. at 2, 220 N.E.3d 102, the defendant filed an amended motion to vacate his conviction and enter a required finding of not guilty pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), and Mass. R. Crim. P. 30 on November 6. After a hearing, the trial judge denied the defendant's amended motion on November 27 and ordered a new trial. The defendant filed a timely notice of appeal.

In January 2024, the defendant filed a motion in the trial court to dismiss the case on double jeopardy grounds. The trial judge denied the defendant's motion to dismiss after a hearing. The defendant then filed a notice of appeal and an emergency petition for relief under G. L. c. 211, § 3, to the single justice of this court, which the Commonwealth opposed. In April 2024, the single justice denied the defendant's petition for relief, and the defendant appealed. Pursuant to S.J.C. Rule 2:21, as

amended, 434 Mass. 1301 (2001), the defendant filed a memorandum in this court, arguing that review of the trial judge's denial of his motion on double jeopardy grounds could not adequately be obtained on appeal from any final adverse judgment in a further trial or by other available means. We agreed and ordered that the appeal from the single justice proceed to full briefing in the ordinary course. That appeal is now before us.

***577** 2. Discussion. "We review a single justice's denial of a petition under G. L. c. 211, § 3, for clear error of law or abuse of discretion." Campbell v. Commonwealth, 494 Mass. 750, 752, 242 N.E.3d 580 (2024). On issues of law, "we review the single justice's decision de novo." Garcia v. Commonwealth, 487 Mass. 97, 101, 164 N.E.3d 862 (2021). See TJR Servs. LLC v. Hutchinson, 495 Mass. 142, 144, 247 N.E.3d 853 (2024).

Like the defendant in Crowder, 495 Mass. at ——, 253 N.E.3d 1207, this defendant was tried and convicted after the Supreme Court issued Bruen in June 2022 ****1207** but before this court issued Guardado I in April 2023. Although situated in a different procedural posture, the defendant's double jeopardy argument is virtually identical to that raised in Crowder and commands the same result.

For all the reasons set forth in Crowder, we conclude that our decision in Guardado I, rather than the Supreme Court's decision in Bruen, effected the relevant legal change in the elements of the defendant's charge under G. L. c. 269, § 10 (a). Under our prevailing jurisprudence at the time of the defendant's trial, the burden of production as to whether the defendant possessed a license to carry had not yet shifted to the Commonwealth. The double jeopardy clause of the Fifth Amendment to the United States Constitution therefore does not bar retrial of the defendant. Accordingly, the single justice's denial of the defendant's petition was not a clear error of law.

3. Conclusion. Retrial of the defendant on the charge of carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a), does not violate the double jeopardy clause. The single justice did not abuse his discretion or commit a clear error of law in denying the defendant's petition for relief under G. L. c. 211, § 3, on this basis.

Judgment affirmed.

All Citations

495 Mass. 573, 253 N.E.3d 1203

Footnotes

[1] Although Natnael Zemene commenced this action by filing a petition in the county court, for convenience, we refer to him as the defendant.

[2] At trial, Conrad testified that, after handcuffing the defendant, he "demanded to see [the defendant's] license to carry." He did not, however, testify as to the defendant's response to this demand.

[3] It is not clear from the record whether Antonopoulos or Collins was aware that, prior to their arrival on the scene, Conrad had already pat frisked the defendant.

[4] The Commonwealth moved to dismiss the misdemeanor charge for unlicensed operation of a motor vehicle, and the defendant was found not responsible for the two civil motor vehicle infractions.

[5] The Appeals Court ultimately dismissed the defendant's pending appeal without prejudice. See Commonwealth vs. Zemene, Appeals Ct., No. 2023-P-88 (Jan. 18, 2024).

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2024-0108

Cambridge District Court
No. 2152CR000735

COMMONWEALTH

v.

NATNAEL ZEMENE

JUDGMENT

This matter came before the Court, Georges, J., on the defendant's petition pursuant to G.L. c. 211, § 3, seeking extraordinary relief from the March 8, 2024 trial court order denying the defendant's motion to dismiss based on a double jeopardy claim. The Commonwealth filed an opposition, to which the defendant motioned to file a reply.

Upon consideration thereof, it is ORDERED that the defendant's motion to file a reply is DENIED. It is FURTHER ORDERED that the defendant's petition be, and the same hereby is, DENIED without hearing. See Commonwealth v. Guardado, 493 Mass. 1 (2023) (Guardado II).

By the Court, (Georges, J.)

Maura S. Doyle, Clerk

Entered: April 16, 2024

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

CAMBRIDGE DISTRICT COURT
NO. 2152 CR 000735

COMMONWEALTH

v.

NATNAEL ZEMENE

Denied
3-8-24

MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS

Now comes the defendant and moves that this case be dismissed. As grounds therefor, he states that in his original trial in August of 2022, the Commonwealth failed to introduce sufficient evidence to overcome the presumption of a right to bear arms – specifically, that he lacked a license to carry a firearm. A second prosecution on these charges would run afoul of the 5th Amendment's protections against double jeopardy where insufficient evidence was introduced in the first trial to support a conviction.

Respectfully submitted,

January 16, 2024
Date

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

CAMBRIDGE DISTRICT COURT
NO. 2152 CR 000735

COMMONWEALTH

v.

NATNAEL ZEMENE

AFFIDAVIT OF PATRICK M. WINN, ESQ. IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS

I, Patrick M. Winn, do swear and depose that:

1. I have been appointed to represent Mr. Zemene in the above-entitled matter.

2. I have reviewed the transcripts from Mr. Zemene's first trial which occurred on August 11-12, 2022.

3. In that trial, the Commonwealth failed to introduce evidence that Mr. Zemene lacked a license to carry sufficient to overcome the presumption of a right to bear arms that was established in the Supreme Court decision, New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 142 S.Ct. 2111 (2022).

4. On November 6, 2023, appellate counsel Esther J. Horwich filed an amended motion pursuant to Mass.R.Crim.P. Rule 25(b)(2) and Rule 30 to set aside the verdict in the interest of justice and enter a required finding of not guilty. This motion relied upon the holdings of Bruen, Commonwealth v. Guardado, 491 Mass. 666, 667 (2023) and Commonwealth v. Guardado, 220 N.E.3d 102, 103 (2023).

5. On November 24, 2024, Judge Frank denied Mr. Zemene's request for a required finding of not guilty but granted him a new trial.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 16th DAY OF JANUARY, 2024.

Patrick M. Winn

495 Mass. 552
Supreme Judicial Court of Massachusetts,
Middlesex.

COMMONWEALTH
v.
Dasahn CROWDER.

SJC-13616
|
Argued January 6, 2025.
|
Decided March 25, 2025.

Synopsis
Background: After his motion to suppress evidence obtained at scene of traffic stop was denied by the District Court Department, Malden Division, Emily A. Karstetter, J., defendant was convicted in the District Court Department, David E. Frank, J., of carrying a firearm without a license. Defendant filed posttrial motion for a required finding of not guilty, which was denied. Defendant appealed.

Holdings: The Supreme Judicial Court, Kafker, J., held that:

retrial would not violate double jeopardy;

officer had reasonable suspicion that defendant was carrying a firearm in his jacket, which justified patfrisk during traffic stop;

officer had reason to conclude that defendant was armed and dangerous, and therefore could seize firearm he found during lawful patfrisk; and

Court would not address defendant's claims relating to purported errors at trial in light of grant of new trial.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Post-Trial Hearing Motion.

****1209** Firearms. Constitutional Law, Right to bear arms, Double jeopardy. Practice, Criminal, Double jeopardy, Motion for a required finding, Motion to suppress, New trial. License. Search and Seizure, Reasonable suspicion, Probable cause, Protective frisk. Probable Cause.

Complaint received and sworn to in the Malden Division of the District Court Department on January 7, 2021.

A pretrial motion to suppress evidence was heard by Emily A. Karstetter, J.; the case was tried before David E. Frank, J., and a motion for postconviction relief was heard by him.

The Supreme Judicial Court granted an application for direct appellate review.

Attorneys and Law Firms

Hannah Taylor for the defendant.

Jamie Michael Charles, Assistant District Attorney (Timothy Ferriter, Assistant District Attorney, also present) for the Commonwealth.

Christopher DeMayo, for Lorenzo Jones, amicus curiae, submitted a brief.
Present: Budd, C.J., Gaziano, Kafker, Wendlandt, Dewar, & Wolohojian, JJ.

Opinion

KAFKER, J.

***553 **1210** A jury found the defendant, Dasahn Crowder, guilty of one count of carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a). The defendant was sentenced to an eighteen-month term of incarceration in a house of correction, the minimum term required by statute.

The defendant's trial occurred in the interim between two cases involving firearms regulation: the United States Supreme Court's decision in New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022) (Bruen), and this court's decision in Commonwealth v. Guardado, 491 Mass. 666, 206 N.E.3d 512 (Guardado I), S.C., 493 Mass. 1, 220 N.E.3d 102 (2023) (Guardado II), cert. denied, —— U.S. ——, 144 S. Ct. 2683, 219 L.Ed.2d 1299 (2024). In light of these decisions, the defendant appeals from the denial of his posttrial motion for entry of a finding of not guilty. Alternatively, if subject to a new trial, the defendant requests that this court reverse the denial of his motion to suppress evidence and statements obtained at the scene of the traffic stop precipitating the defendant's arrest. He also asks this court to address various issues that may recur at a new trial.

For the reasons discussed infra, we affirm the denial of the defendant's posttrial motion for a required finding of not guilty and order a new trial on the charge of carrying a firearm without a license. We also affirm the denial of the defendant's pretrial motion to suppress the firearm seized during the traffic stop[1] and leave to the new trial judge's discretion the remaining errors raised by the defendant should they arise again.[2]

1. Background. a. Facts. We recite the facts as the jury could have found them, reserving certain details for our discussion of the issues. Commonwealth v. Corey, 493 Mass. 674, 675, 228 N.E.3d 1183 (2024).

At around 10:30 p.m. on January 6, 2021, State police Trooper ***554** Alexander Vath observed a vehicle with Maine registration ****1211** plates traveling at a high rate of speed on Interstate Highway 95 in the Wakefield area. Using "lidar,"[3] Vath confirmed that the vehicle was traveling ninety-nine miles per hour in a zone with a speed limit of fifty-five miles per hour. He then proceeded to initiate a motor vehicle stop.

Once the vehicle came to a stop, Vath observed four individuals inside. From the passenger's side window, he requested the driver's license and the vehicle's registration. The driver was unable to provide valid documentation, and Vath determined both that the vehicle was unregistered and that no licensed driver was present in the vehicle.[4] In accordance with State police policy, Vath initiated an inventory search of the vehicle before it was towed.

While still the only officer on scene, Vath started to remove the four vehicle occupants one by one to effect the inventory search and tow. He began with the occupant in the front passenger seat, later identified as the defendant. As the defendant got out of the vehicle, he "bladed" his stance, such that he "turned his body away from [Vath] slightly with one side of his body pointing generally in [Vath's] direction and the other part pointing away." Vath then observed the defendant press on his jacket pocket with his left hand.

Based on his training and experience, Vath believed that the defendant's behavior indicated he was concealing a weapon. Vath performed a patfrisk of the defendant's jacket pocket and, upon feeling a heavy object inside, reached in and retrieved a Smith & Wesson Shield firearm. Vath then took the defendant into custody, placed him in the backseat of his cruiser, and called for backup.

b. Procedural history. On January 7, 2021, a complaint issued from the Malden Division of the District Court charging the ***555** defendant with receiving a firearm with a defaced serial number, in violation of G. L. c. 269, § 11C (count 1); and commission of a firearm violation with one prior violent or drug crime, in violation of G. L. c. 269, § 10G (a) (count 2). At his arraignment that day, the defendant pleaded not guilty to both charges. Count 2 was later amended to the charge of carrying a firearm without a license, in violation of G. L. c. 269, § 10 (a).

On October 7, 2021, the defendant filed a motion to suppress the firearm seized from him during the motor vehicle stop and a statement he made during the stop indicating he did not have a license to carry a firearm, discussed infra. After an evidentiary hearing on September 14, 2022, the motion judge denied the motion via margin endorsement on September 21.

A two-day jury trial commenced on February 14, 2023, before a different judge, at which Vath was the sole witness. At the close of the Commonwealth's case, the defendant moved for a required finding of not guilty. The trial judge granted the motion as to count 1 but denied it as to ****1212** count 2. On February 15, the jury returned a guilty verdict on count 2, and the trial judge sentenced the defendant to the statutory minimum term of eighteen months in a house of correction. The defendant filed a timely notice of appeal.

After this court's decision in Guardado I, the defendant filed a posttrial motion for entry of a finding of not guilty or, in the alternative, for a new trial, on June 30, 2023, pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995). On July 12, after this court granted in part the Commonwealth's motion to reconsider Guardado I, the defendant filed an amended motion seeking only entry of a finding of not guilty. The trial judge heard argument on the amended motion on July 13 and subsequently denied the motion without prejudice. The defendant's motion to stay his sentence pending appeal was granted. We allowed the defendant's application for direct appellate review in June 2024.

2. Discussion. a. Proper remedy. The defendant first contends that it was error for the trial judge to deny his posttrial motion for entry of a finding of not guilty as to the charge of carrying a firearm without a license. He argues that to retry him on this charge, when his trial occurred after the Supreme Court's decision in Bruen, which declared New York's "may issue" gun licensing scheme unconstitutional, would violate principles of double jeopardy. He makes this argument even though his trial

***556** took place before our decision in Guardado I, which first addressed and resolved the burden of proof issues that are central to his double jeopardy claim in the instant case. "We review determinations regarding double jeopardy de novo." Commonwealth v. Edwards, 491 Mass. 1, 13, 198 N.E.3d 740 (2022), quoting Commonwealth v. Taylor, 486 Mass. 469, 477, 159 N.E.3d 143 (2020). See Commonwealth v. Arias, 488 Mass. 1004, 1006, 173 N.E.3d 752 (2021) (questions of law reviewed de novo); Commonwealth v. Aldana, 477 Mass. 790, 801, 81 N.E.3d 763 (2017) (same).

i. Legal background. It is necessary to frame our discussion with a brief overview of recent developments in jurisprudence concerning the Second Amendment to the United States Constitution that inform the defendant's invocation of double jeopardy principles.

In its June 2022 decision in Bruen, 597 U.S. at 8-10, 142 S.Ct. 2111, the United States Supreme Court established an individual's constitutional right under the Second and Fourteenth Amendments to the United States Constitution to carry a firearm for self-defense outside of the home. Bruen addressed New York's firearms licensing scheme, which required individuals to apply for and obtain an "unrestricted license to 'have and carry' a concealed 'pistol or revolver' " if they sought to carry firearms for self-defense beyond their home or place of business. Id. at 12, 142 S.Ct. 2111, quoting N.Y. Penal Law § 400.00(2)(f). Applicants could obtain such licenses only if they proved "proper cause" and were otherwise limited to purpose-restricted public carry licenses.[5] Bruen, supra, quoting N.Y. Penal Law § 400.00(2)(f). New York's statutory scheme did not define ****1213** "proper cause," but courts generally understood the term to require an applicant to "demonstrate a special need for self-protection distinguishable from that of the general community." Bruen, supra, quoting Matter of Klenosky, 75 A.D.2d 793, 793, 428 N.Y.S.2d 256 (N.Y. 1980).

After instituting a new framework for assessing the constitutionality of firearms restrictions that requires the State to show that a restriction "is consistent with the Nation's historical tradition of firearm regulation," the Court struck down New York's ***557** statutory scheme as an unconstitutional "may issue" licensing regime. Bruen, 597 U.S. at 11, 19, 24, 142 S.Ct. 2111. Unlike "shall issue" licensing regimes, in which "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements" and lack discretion to deny licenses "based on a perceived lack of need or suitability," New York's "may issue" regime impermissibly granted authorities "discretion to deny concealed-carry licenses even when the applicant satisfie[d] the statutory criteria." Id. at 13-14, 142 S.Ct. 2111. See Commonwealth v. Marquis, 495 Mass. 434, 447 (2025) (explaining distinction between "may issue" and "shall issue" regimes).

Prior to Bruen, our precedent treated firearms licensure as an affirmative defense to the crime of unlawful possession of a firearm under G. L. c. 269, § 10 (a), rather than as an element of the crime for which the Commonwealth bore the burdens of production and of persuasion. See Commonwealth v. Gouse, 461 Mass. 787, 801-802, 965 N.E.2d 774 (2012); Commonwealth v. Powell, 459 Mass. 572, 582, 946 N.E.2d 114 (2011), cert. denied, 565 U.S. 1262, 132 S.Ct. 1739, 182 L.Ed.2d 534 (2012); Commonwealth v. Tuitt, 393 Mass. 801, 810, 473 N.E.2d 1103 (1985); Commonwealth v. Jones, 372 Mass. 403, 406, 361 N.E.2d 1308 (1977). We did so under the ambit of G. L. c. 278, § 7, which provides: "A defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized."

In first applying § 7 to prosecutions under G. L. c. 269, § 10 (a), in 1977, we bifurcated the burdens of production and of persuasion, with the former allocated to the defendant and the latter allocated to the Commonwealth:

> "The holding of a valid license brings the defendant within an exception to the general prohibition against carrying a firearm, and is an affirmative defense.... Absence of a license is not 'an element of the crime,' as that phrase is commonly

> used. In the absence of evidence with respect to a license, no issue is presented with respect to licensing. In other words, the burden is on the defendant to come forward with evidence of the defense. If such evidence is presented, however, the burden is on the prosecution to persuade the trier of facts beyond a reasonable doubt that the defense does not exist."

Jones, 372 Mass. at 406, 361 N.E.2d 1308. See Gouse, 461 Mass. at 802-803, 965 N.E.2d 774 (reiterating this allocation and collecting cases doing same).

***558** After the Supreme Court redefined the scope of the Second Amendment in District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and McDonald v. Chicago, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), we reaffirmed the relationship between G. L. c. 278, § 7, and G. L. c. 269, § 10 (a), in Gouse. Gouse, 461 Mass. at 801, 965 N.E.2d 774 ("Nothing in the McDonald and Heller decisions has altered or abrogated ****1214** our jurisprudence regarding the elements of the crime of unlawful possession of a firearm or the allocation of the burdens of production and proof with respect to the affirmative defense of licensure"). Accord Commonwealth v. Loadholt, 460 Mass. 723, 727, 954 N.E.2d 1128 (2011).

One year after Bruen issued, we determined in Guardado I that Gouse's treatment of firearms licensure as an affirmative defense was no longer tenable. Guardado I, 491 Mass. at 690, 206 N.E.3d 512. Instead, because possession of a firearm outside of the home is constitutionally protected conduct post-Bruen, "the absence of a license is an essential element of the offense of unlawful possession of a firearm pursuant to G. L. c. 269, § 10 (a)." Id. General Laws c. 278, § 7, is thus "no longer applicable" to such prosecutions, and the Commonwealth now fully bears the burdens of production and proof to demonstrate "the defendant in fact failed to comply with the licensure requirements for possessing a firearm." Id.

Concomitant with this holding, we vacated the Guardado I defendant's convictions of unlawfully carrying a firearm, unlawfully carrying a loaded firearm, and unlawfully carrying ammunition. Id. at 694, 206 N.E.3d 512. We also remanded the case "to the Superior Court for entry of judgments of not guilty on those indictments." Id. Several months later, however, we granted the Commonwealth's motion to reconsider Guardado I's holding insofar as it required entry of a judgment of not guilty for the defendant, rather than a retrial. See Guardado II, 493 Mass. at 2, 220 N.E.3d 102.

Upon reconsideration of Guardado I, we concluded that the appropriate remedy was, in fact, a retrial of the defendant, rather than vacatur:

> "Because the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial, the Commonwealth has not been given a fair opportunity to offer whatever proof it could assemble at trial. Further, because absence of licensure was not recognized as an essential element at the time of trial, the ***559** resulting verdict did not resolve this element of the offenses charged....
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> "Here, because the Commonwealth reasonably could not have known we would reverse our holdings in [Gouse and similar cases], a judgment of acquittal is not required by principles of double jeopardy. Without the ability to gaze into the future of this court's and the Supreme Court's rulings, and without any notice from the defendant of an intent to raise the issue of licensure, the Commonwealth simply had no reason to believe that any evidence concerning licensure would be necessary." (Quotation, citations, and alteration omitted.)

Guardado II, 493 Mass. at 7, 220 N.E.3d 102. To preclude retrial in these circumstances would have thereby "den[ied] the Commonwealth a 'first opportunity to prove what it did not need to prove before but needs to prove now.' " Id. at 8, 220 N.E.3d 102, quoting United States v. Harrington, 997 F.3d 812, 818 (8th Cir. 2021).

ii. Double jeopardy. That the Commonwealth must now prove that a defendant does not possess a valid firearms license when prosecuting a defendant for a violation of G. L. c. 269, § 10 (a), is not in dispute, nor is the fact that this particular defendant's existing conviction for violating the statute cannot stand where the Commonwealth did not prove this element at trial. Rather, we are asked to determine whether the defendant is entitled to a new trial or to a required finding of not guilty. In Guardado I, unlike in this case, the ****1215** defendant was tried before Bruen issued. In the instant case, the defendant was tried after Bruen was issued but before Guardado I.

We hold today that a new trial is the proper remedy for defendants who were convicted under G. L. c. 269, § 10 (a), after the Supreme Court decided Bruen but before this court decided Guardado I. We therefore affirm the denial of the defendant's motion for a required finding of not guilty and remand.

Pursuant to the Fifth Amendment to the United States Constitution, no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." See Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (applying Fifth Amendment to States through Fourteenth Amendment). However, "[i]t has long been settled ... that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government ***560** from retrying a defendant who succeeds in getting his first conviction set aside ... because of some error in the proceedings leading to conviction." Lockhart v. Nelson, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), citing United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964), and Ball v. United States, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896). See Commonwealth v. DiBenedetto, 414 Mass. 37, 45, 605 N.E.2d 811 (1992), S.C., 427 Mass. 414, 693 N.E.2d 1007 (1998) (retrial not prohibited by double jeopardy where conviction vacated due to erroneous admission of testimony). This "well-established part of our constitutional jurisprudence" goes to the core of striking an appropriate balance between a defendant's right to a fair trial and society's interest in punishing criminal offenses. Lockhart, supra, quoting Tateo, supra at 465, 84 S.Ct. 1587.

This tenet is not without exception, including, as relevant here, in situations governed by Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In Burks, the Supreme Court held that, when an appellate court reverses a defendant's conviction on the ground of insufficient evidence, the double jeopardy clause prohibits retrial on the same charge. Id. See Lockhart, 488 U.S. at 39, 109 S.Ct. 285 (reiterating this holding from Burks). See also Hudson v. Louisiana, 450 U.S. 40, 44-45, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981) (where facts of case indistinguishable from Burks, "the Double Jeopardy Clause barred the State from prosecuting petitioner a second time"). The way in which the Court distinguished the appropriate remedy for reversals due to trial error and reversals due to insufficient evidence is particularly informative:

> "[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of a defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect .... When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished....
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> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not ***561** have even been submitted to the ****1216** jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying

> a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (Footnote omitted.)

Burks, supra at 15-16, 98 S.Ct. 2141.

Our task is therefore to determine whether the Commonwealth's failure to offer proof of the defendant's lack of a firearms license at trial is better characterized as a trial error or evidence insufficiency. To do so, we must first answer an antecedent question: when did the relevant change in law bearing on the elements of a crime under G. L. c. 269, § 10 (a), occur? In other words, at what point should the Commonwealth have known that the absence of a firearms license was not an affirmative defense to be raised by a defendant, but an element for which the Commonwealth bears the burden of production and proof?

The defendant contends, inter alia, that Bruen, rather than our decision in Guardado I, is the correct demarcation. Therefore, he argues, because his trial occurred between Bruen and Guardado I, the Commonwealth was sufficiently on notice that it was required to prove the defendant did not possess a firearms license or firearm identification (FID) card at the time of his trial. This failure to marshal evidence that the Commonwealth knew or should have known to be essential to a conviction would thus place the case within the ambit of Burks, and retrial of the defendant would be barred as a matter of double jeopardy. We are not convinced.

As discussed supra, Bruen constitutionally enshrined "an individual's right to carry a handgun for self-defense outside the home" and held that, for the government to impose a regulation on that individual right, it "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." Bruen, 597 U.S. at 10, 17, 142 S.Ct. 2111. In so doing, Bruen decided that New York's discretionary "may issue" firearms licensing scheme was unconstitutional under the Second Amendment. Id. at 11, 70, 142 S.Ct. 2111. It did not address the allocation of the burden of production with respect to criminal violations of a valid firearms licensing scheme, nor did it speak on the requisite elements of such crimes. See, e.g., id. at 71-72, 142 S.Ct. 2111 (Alito, J., concurring) ***562** ("[T]oday's decision therefore holds that a State may not enforce a law, like New York's Sullivan Law, that effectively prevents its law-abiding residents from carrying a gun for this purpose. That is all we decide" [emphasis added]).

Bruen's holding therefore did not address the relationship between the Commonwealth's licensing scheme and G. L. c. 278, § 7, which, again, provides: "A defendant in a criminal prosecution, relying for his justification upon a license, appointment, admission to practice as an attorney at law, or authority, shall prove the same; and, until so proved, the presumption shall be that he is not so authorized." Accordingly, it was Guardado I, not Bruen, that addressed and resolved the legality of such a presumption post-Bruen.

Until this court decided Guardado I in April 2023, possession of a firearms license remained an affirmative defense for which the defendant bore the burden of production, as it had been for the preceding forty-six years. See, e.g., Commonwealth v. Harris, 481 Mass. 767, 772, 119 N.E.3d 1158 (2019) (characterizing licensure as affirmative defense); Commonwealth v. Allen, 474 Mass. 162, 174, 48 N.E.3d 427 (2016) (same); Gouse, 461 Mass. at 803-805, 965 N.E.2d 774 (same); ****1217** Loadholt, 460 Mass. at 727, 954 N.E.2d 1128 (same); Powell, 459 Mass. at 582, 946 N.E.2d 114 (same); Commonwealth v. Colon, 449 Mass. 207, 226, 866 N.E.2d 412, cert. denied, 552 U.S. 1079, 128 S.Ct. 810, 169 L.Ed.2d 611 (2007) (same); Commonwealth v. Anderson, 445 Mass. 195, 213-214, 834 N.E.2d 1159 (2005) (same); Commonwealth v. Couture, 407 Mass. 178, 181-183, 552 N.E.2d 538, cert. denied, 498 U.S. 951, 111 S.Ct. 372, 112 L.Ed.2d 334 (1990) (same); Tuitt, 393 Mass. at 810, 473 N.E.2d 1103 (same); Jones, 372 Mass. at 406, 361 N.E.2d 1308 (same). In Guardado II, we recognized that Bruen gave rise to, but did not itself effect, this change in the law: "It only was after the defendant's trial that the Supreme

Court issued its decision in Bruen, which in turn led this court to overturn its previous holdings and rule that absence of licensure is an essential element ..." (emphasis added). Guardado II, 493 Mass. at 7, 220 N.E.3d 102.

In concluding that the date of our decision in Guardado I, rather than the date of the decision in Bruen, is determinative here, we are not in any way suggesting that it is our decision-making, and not the Supreme Court's, that is controlling on the requirements of the Second Amendment. We are unquestionably bound by decisions of the Supreme Court on questions of Federal constitutional law. Commonwealth v. Vasquez, 456 Mass. 350, 356, 923 N.E.2d 524 (2010). Commonwealth v. Masskow, 362 Mass. 662, 667, 290 N.E.2d 154 (1972). Here, however, the Supreme Court had not addressed or decided how the Second Amendment applies to the particular aspects of State law at issue.

***563** In arguing that Bruen itself, and not Guardado I, shifted the burden of production and changed the elements of a criminal violation of the Massachusetts firearms licensing requirements, the defendant focuses on the statement in Guardado I, 491 Mass. at 694, 206 N.E.3d 512, that the "rule we announce today is dictated by the Court's decision in Bruen." This reading, however, is divorced from context.

Our statement that Bruen "dictated" the result in Guardado I was made specifically with respect to our holding that Guardado I only "applie[d] prospectively and to those cases that were active or pending on direct review as of the date of the issuance" of Bruen. Guardado I, 491 Mass. at 693-694, 206 N.E.3d 512. Stated differently, Bruen "dictated" the result in Guardado I insofar as necessary to determine Guardado I's retroactivity under Federal constitutional principles. See id. at 693, 206 N.E.3d 512, quoting Commonwealth v. Perry, 489 Mass. 436, 463, 184 N.E.3d 745 (2022) ("The retroactivity of a constitutional rule of criminal procedure turns on whether the rule is new or old" [quotations omitted]); Commonwealth v. Bray, 407 Mass. 296, 301, 553 N.E.2d 538 (1990), quoting Teague v. Lane, 489 U.S. 288, 301, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (case "announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final"). It did not "dictate" the result in Guardado I in the sense the defendant proposes.

As explained above, Bruen, by its own terms, could not have "dictated" the result in Guardado I in the manner argued by the defendant. Bruen did not define the elements of criminal violations of firearms licensing schemes or who bears the burden of production on such elements. See Bruen, 597 U.S. at 71-72, 142 S.Ct. 2111 (Alito, J., concurring). In the absence of any such guidance from the Supreme Court, G. L. c. 278, § 7, was still the governing law until this court ruled to the contrary, and neither the trial court nor the Commonwealth was sufficiently on notice as to the effect of Bruen on our existing characterization of licensure as an affirmative ****1218** defense. See Guardado II, 493 Mass. at 7, 220 N.E.3d 102 ("Without the ability to gaze into the future of this court's and the Supreme Court's rulings ... the Commonwealth simply had no reason to believe that any evidence concerning licensure would be necessary").

The antecedent question thus resolved, we return to the central question on appeal: is the appropriate remedy for the defendant a new trial or a required finding of not guilty? Having determined that Guardado I marked the relevant legal change, our holding ***564** and rationale in Guardado II as to the proper remedy applies with equal force to the defendant's case. The defendant is therefore entitled only to a new trial.

We concluded in Guardado II, 493 Mass. at 6, 220 N.E.3d 102, that double jeopardy protection did not bar a retrial of the defendant because, "[a]t the time of the defendant's trial, this court's precedent clearly had established that absence of licensure was not an essential element of any of the crimes with which the defendant was charged." Given the state of the law at the time of trial, "the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial"—our decision in Guardado I. Id. at 7, 220 N.E.3d 102. Rather than impermissibly

afford the Commonwealth a second opportunity to marshal evidence it should have already presented, a new trial was "warranted so that the Commonwealth may have 'one complete opportunity to convict' the defendant under the new law." Id., quoting Commonwealth v. Hebb, 477 Mass. 409, 413, 77 N.E.3d 308 (2017). See Guardado II, supra, quoting United States v. Houston, 792 F.3d 663, 670 (6th Cir. 2015) ("the government would not be seeking a second bite at the apple but a first bite under the right legal test").

So, too, in this case. Where Gouse remained the controlling law at the time of trial, the Commonwealth could not have known that it was required to prove the defendant did not possess a valid firearms license. See Guardado II, 493 Mass. at 6-7, 220 N.E.3d 102. The invalidity of the defendant's conviction stems not from the Commonwealth's failure to produce sufficient evidence at the defendant's trial, but from a posttrial change in the Commonwealth's burden of production. Id. See, e.g., United States v. Reynoso, 38 F.4th 1083, 1091 (D.C. Cir. 2022) (defendant "cannot make out a sufficiency challenge as to offense elements that the government had no requirement to prove at trial under then-prevailing law"); United States v. Kim, 65 F.3d 123, 126-127 (9th Cir. 1995) (where prosecution "had no reason to introduce ... evidence" of element under circuit law at time of trial, sufficiency of evidence as to that element not examined). Double jeopardy is therefore not a bar to retrial of the defendant, as "[p]ermitting retrial in this instance is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed." Lockhart, 488 U.S. at 42, 109 S.Ct. 285. See United States v. Aiello, 118 F.4th 291, 300-301 (2d Cir. 2024), petition for cert. filed, U.S. Supreme Ct., No. 24-958 (Mar. 4, 2025) (change in governing law after trial is "type of trial error" distinct ***565** from failure to produce sufficient evidence, and retrial is therefore not prohibited by Burks); Harrington, 997 F.3d at 818 (rationale of Burks "not implicated" where government "is being given a first opportunity to prove what it did not need to prove before but needs to prove now"); United States v. Weems, 49 F.3d 528, 531 (9th Cir. 1995) (retrial does not violate double jeopardy when it "merely permits the government to prove its case in accordance with the recent change in law").

****1219** Finally, the defendant briefly argues that Guardado II was wrongly decided. Aside from repeating his assertion that "the substantive holding in Guardado I was mandated by the Supreme Court's decision in Bruen," addressed supra, the defendant incorporates by reference arguments raised in Guardado's unsuccessful petition for certiorari to the Supreme Court. As the preceding discussion demonstrates, our decision in Guardado II—itself the product of careful reconsideration of part of our holding in Guardado I—is supported by thorough analysis and a significant body of appellate authority from other jurisdictions. We therefore decline the defendant's invitation to revisit Guardado II here.

b. Denial of defendant's motion to suppress the firearm. In the alternative, the defendant contends that the motion judge erred in denying his motion to suppress the firearm discovered on his person in two respects: (1) Vath lacked reasonable suspicion to conduct a patfrisk; and (2) upon identifying the firearm in the defendant's pocket, Vath lacked probable cause to seize it because he did not know whether the defendant was licensed.

"In reviewing a ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of [the judge's] ultimate findings and conclusions of law" (quotation omitted). Commonwealth v. Medina, 485 Mass. 296, 299-300, 149 N.E.3d 747 (2020), quoting Commonwealth v. Cawthron, 479 Mass. 612, 616, 97 N.E.3d 671 (2018). For the reasons stated infra, we affirm the denial of the defendant's motion to suppress as to the firearm.

i. The patfrisk. The defendant does not challenge the motor vehicle stop or exit order that ultimately led to the patfrisk of his left jacket pocket. He instead argues that neither his movements while getting out of the vehicle -- namely, in the words of the

motion judge, "blading" his body and touching his jacket pocket -- nor any general safety concerns on the part of Vath were sufficient to justify the patfrisk.

***566** In the context of a lawful motor vehicle stop, "[a] patfrisk is permissible only where an officer has reasonable suspicion that the stopped individual may be armed and dangerous." Commonwealth v. Sweeting-Bailey, 488 Mass. 741, 744, 178 N.E.3d 356 (2021), cert. denied, —— U.S. ——, 143 S. Ct. 135, 214 L.Ed.2d 40 (2022), citing Commonwealth v. Torres-Pagan, 484 Mass. 34, 36-37, 138 N.E.3d 1012 (2020). See Commonwealth v. Ng, 420 Mass. 236, 237, 649 N.E.2d 157 (1995) (reasonable suspicion for patfrisk must exist as to "particular individual"). To determine whether an officer indeed had the requisite reasonable suspicion to engage in a patfrisk, "we ask whether a reasonably prudent [person] in the [officer's] position would be warranted in the belief that the safety of the police or that of other persons was in danger" (quotations and citation omitted). Sweeting-Bailey, supra. The officer's reasonable suspicion must be based on specific, articulable facts and inferences reasonably drawn therefrom. See id. at 746, 178 N.E.3d 356; Torres-Pagan, supra at 38-39, 138 N.E.3d 1012; Commonwealth v. Almeida, 373 Mass. 266, 271, 366 N.E.2d 756 (1977), S.C., 381 Mass. 420, 409 N.E.2d 776 (1980). See also Commonwealth v. Silva, 366 Mass. 402, 406, 318 N.E.2d 895 (1974), citing Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (neither "[a] mere 'hunch' " nor "[s]imple good faith" on officer's part is enough to satisfy reasonable suspicion).

Our inquiry is an objective one in which we consider the totality of the circumstances surrounding the patfrisk, including ****1220** an officer's training and experience. See Sweeting-Bailey, 488 Mass. at 745, 748, 178 N.E.3d 356; Commonwealth v. Fraser, 410 Mass. 541, 545, 573 N.E.2d 979 (1991); Almeida, 373 Mass. at 271-272, 366 N.E.2d 756. See also Terry, 392 U.S. at 21, 88 S.Ct. 1868 ("it is imperative that the facts [of a search or seizure] be judged against an objective standard"). Thus, the inquiry is also highly fact-specific, as our existing case law demonstrates. See, e.g., Commonwealth v. Karen K., 491 Mass. 165, 176-179, 199 N.E.3d 860 (2023), and cases cited.

Relevant to this aspect of the defendant's appeal, the motion judge made the following findings of fact on the record:

> "[W]hen the defendant was ordered to get out of the passenger side of the vehicle, he turned that part of his body that had the firearm in a pocket away from the Trooper and put his hand on the pocket where it was located and pressed the pocket up to his body, which the Trooper has been trained to understand to be something called blading, and intending, therefore, to conceal either contraband or a weapon. And so he did a very limited pat of that pocket, found a firearm with ***567** which he is exceptionally familiar, was able to recognize it simply by the feel from the outside, and then he ... asked or told the defendant to put his hands on his head, removed the firearm from the defendant's pocket, and placed him in handcuffs."

As at the trial, Vath was the only witness at the pretrial motion hearing. The motion judge credited "all" of his testimony. Although we "leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing ..., we review independently the motion judge's application of constitutional principles to the facts found" (quotation and citation omitted). Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 306, 930 N.E.2d 91 (2010).

We begin with Vath's observations of the defendant after ordering him out of the vehicle. The defendant complied with the order but, as he got out, "blad[ed]" part of his body and "press[ed] the [left jacket] pocket towards his own person—towards his body."

"Blading" is a term lacking an exact or consistent definition. See Karen K., 491 Mass. at 173, 199 N.E.3d 860 (term has "become both unwieldy, lacking precision or a single definition, and tinged with loaded connotations"). That said, we have

previously described such conduct as "the action of creating a thin profile of oneself with respect to another viewpoint, effectively hiding one side of the body from the other person's view." Id. at 172, 199 N.E.3d 860, quoting Commonwealth v. Resende, 474 Mass. 455, 459 n.8, 52 N.E.3d 1016 (2016). Vath's characterization of the defendant's movements roughly aligns with this definition:

> "[The defendant made s]ort of a half step—a rotational step, if you will. I wouldn't say neither towards nor away. As he exited the door, he sort of [sic] a crescent move. I'm not sure how to best define that but turning his body without actually moving his body away from me."

Both on direct and cross-examination, Vath also explained that he received training at the State police academy on "how body postures are manipulated" when a person is concealing a weapon and that he was "specifically trained on [blading] as a stance of potential aggression." Where, as here, there is a specific, supported finding of "blading," this movement can contribute to the reasonable suspicion calculus. See ***568 **1221** Karen K., supra at 174-176, 199 N.E.3d 860; Sweeting-Bailey, 488 Mass. at 746-748, 178 N.E.3d 356; Resende, 474 Mass. at 461, 52 N.E.3d 1016; Commonwealth v. DePeiza, 449 Mass. 367, 372, 868 N.E.2d 90 (2007). See also Commonwealth v. Watson, 430 Mass. 725, 729, 723 N.E.2d 501 (2000) (inferences supporting reasonable suspicion "can follow in light of the officer's experience").

Particularly when the observed "blading" is considered in tandem with other details of the interaction between the defendant and Vath, we discern no error in the motion judge's finding of reasonable suspicion to justify a patfrisk. See Karen K., 491 Mass. at 175, 199 N.E.3d 860; DePeiza, 449 Mass. at 372, 868 N.E.2d 90 ("Although nervous or furtive movements do not supply reasonable suspicion when considered in isolation, they are properly considered together with other details to find reasonable suspicion"). See also J.A. Grasso, Jr., Suppression Matters Under Massachusetts Law § 5-3[c][3] (2024 ed.) (furtive gestures by subject of stop "clearly ha[ve] bearing on the question whether there exists a reasonable apprehension of danger to the police ... that justifies a frisk").

As Vath watched the defendant "blade" his stance, he also observed the defendant "depress[ ] [his left] jacket [pocket] against his body" near his belt line, in a manner consistent with the trooper's training in identifying individuals who may be concealing firearms. Like his observation of "blading," Vath could rightfully consider the defendant's manipulation of his jacket pocket in his determination of reasonable suspicion. See Karen K., 491 Mass. at 174-176, 199 N.E.3d 860; Sweeting-Bailey, 488 Mass. at 746-748, 178 N.E.3d 356; Resende, 474 Mass. at 461, 52 N.E.3d 1016; DePeiza, 449 Mass. at 372, 868 N.E.2d 90. Cf. Commonwealth v. Stampley, 437 Mass. 323, 327, 771 N.E.2d 784 (2002) (vehicle occupant "retrieving or concealing an object[ ] raise[s] legitimate safety concerns to an officer conducting a traffic stop"). That Vath was outnumbered four to one while on the side of the highway at around 10:30 p.m. when he observed the defendant's particular movements at close range is yet another factor supporting a finding of reasonable suspicion for a patfrisk. See Silva, 366 Mass. at 407, 318 N.E.2d 895 (reasonable suspicion analysis of patfrisk took into account that encounter took place in isolated area at night). Compare, e.g., Commonwealth v. Robinson, 83 Mass. App. Ct. 419, 428-429, 984 N.E.2d 872 (2013) (occupants of minivan outnumbered troopers on scene, contributing to justification for exit order and patfrisk), with Commonwealth v. Darosa, 94 Mass. App. Ct. 635, 648-649, 118 N.E.3d 131 (2019) (officers outnumbering defendant three to one during stop contributed to determination of no reasonable suspicion).

***569** Taken together, then, the "blading" of the defendant's stance, the way in which the defendant pressed against his pocket, and Vath's inherent safety concern in being outnumbered while effecting this nighttime motor vehicle stop gave rise to reasonable suspicion that the defendant was armed and dangerous. The patfrisk of the defendant's left jacket pocket was thus

permissible, and the motion judge did not err in denying the defendant's motion to suppress the discovered firearm on this basis.

ii. Seizure of the firearm. The defendant also briefly argues that, upon executing the patfrisk, Vath lacked probable cause to seize the firearm found in the defendant's pocket. More specifically, as the carrying of a firearm outside of one's home for self-defense is now constitutionally protected conduct under Bruen, the defendant argues that it is unconstitutional to presume an individual's possession of a firearm is ****1222** unlawful, and Vath therefore could not have seized the firearm without first investigating whether the defendant had a license to carry or FID card. We disagree.

The defendant again reads into Bruen that which it does not say. Under Bruen, as discussed supra, ordinary, law-abiding citizens have a constitutional right to carry a firearm outside of the home for self-defense. See Bruen, 597 U.S. at 8-10, 142 S.Ct. 2111. Bruen did not, however, address Terry-type stops or the constitutionality of an officer's presumptions upon discovering a firearm during a lawful patfrisk. We thus analyze the seizure of the defendant's firearm under the familiar contours of Terry and its progeny.

As we have previously explained, "[t]he purpose behind the protective measures allowed by Terry is to enable an officer to confirm or dispel reasonable suspicions that the stopped suspect may be armed with a weapon, thus allowing the officer 'to pursue his investigation without fear of violence.' " Commonwealth v. Pagan, 440 Mass. 62, 68-69, 793 N.E.2d 1236 (2003), quoting Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). Such measures are permissible when "confined to what is minimally necessary to learn whether the suspect is armed and to disarm him should weapons be discovered" (emphasis added). Commonwealth v. Wilson, 441 Mass. 390, 396, 805 N.E.2d 968 (2004), citing Terry, 392 U.S. at 29-30, 88 S.Ct. 1868. For the reasons discussed above, the defendant's movements and pressing of his pocket provided reasonable suspicion that the defendant was armed and dangerous. An officer outnumbered four to one, conducting a nighttime traffic stop, when confronted with behavior such as the defendant's, has reason to conclude that a person is armed and dangerous and can therefore seize the weapon, as the ***570** trooper did in this case.[6] See Karen K., 491 Mass. at 176, 199 N.E.3d 860; Resende, 474 Mass. at 461, 52 N.E.3d 1016; DePeiza, 449 Mass. at 371-372, 868 N.E.2d 90. See also Adams, 407 U.S. at 146, 92 S.Ct. 1921 (given safety purpose of limited search permitted by Terry, "frisk for weapons might be equally necessary and reasonable, whether or not carrying a concealed weapon violated any applicable state law"); United States v. Isham, 501 F.2d 989, 991 (6th Cir. 1974) (officers permitted under Terry to seize weapon not obviously contraband from backseat of car to protect officers' safety); People v. Williams, 111 A.D.3d 448, 448, 974 N.Y.S.2d 415 (N.Y. 2013) ("reasonable" for officer to immediately seize pistol "as a safety measure" after lawful stop and frisk). Cf. Schubert v. Springfield, 589 F.3d 496, 503 (1st Cir. 2009) (seizure of firearm permissible for time necessary to determine whether person was legally permitted to carry firearm after officer observed him walking near court house with handgun partially concealed under his suit jacket).

To deny a law enforcement officer properly engaged in a Terry-type stop the ability to seize a firearm from a person who is reasonably suspected of being armed and dangerous unless and until the officer can confirm licensure status would unnecessarily place officers in danger as they perform their public safety responsibilities. See ****1223** Terry, 392 U.S. at 34, 88 S.Ct. 1868 (Harlan, J., concurring) (once officer is justified in engaging in Terry-type stop to prevent or investigate crime, "the officer's right to take suitable measures for his own safety follow[s] automatically"). Accordingly, Vath, who had properly stopped the vehicle for speeding and reasonably believed the defendant to be armed and dangerous, was entitled to protect himself by seizing the defendant's firearm. See id. at 30-31, 88 S.Ct. 1868 (when firearm is discovered during lawful stop and frisk, frisk "is a reasonable search under the Fourth Amendment [to the United States Constitution], and any weapons seized may properly be introduced in evidence against the person from whom they were taken"). See also Adams,

407 U.S. at 148, 92 S.Ct. 1921 (loaded gun seized as result of officer's "limited intrusion [of reaching into the defendant's car where firearm was thought to be hidden] designed to insure his safety" admissible at trial). The motion judge did not err in denying the motion to suppress the firearm based on the ***571** circumstances of its seizure.

c. Miranda warnings and unpreserved errors. Finally, the defendant asks us to review four discrete errors that he claims arose at either his pretrial motion hearing or at trial.

First, the defendant asserts that his statement to Vath acknowledging he did not have a license to carry was the product of a custodial interrogation, for which the defendant did not receive the requisite Miranda warnings.[7] He therefore argues that the motion judge erred in denying his pretrial motion to suppress this statement. The defendant did not fully brief this issue in his pretrial motion to suppress, but he did raise it orally at the pretrial hearing. Notably, the Commonwealth did not seek to admit the statement at trial.

Second, the defendant raises three unpreserved trial errors: (1) the admission in evidence of a spent cartridge and projectile that were not clearly connected to the firearm at issue in the case; (2) statements made during the Commonwealth's closing argument that were purportedly unsupported by the evidence admitted at trial; and (3) the trial judge's jury instructions on the element of possession, in which the judge twice instructed that one possesses whatever is in one's pocket.[8]

Given that the defendant is entitled to a new trial, it would be ***572** ****1224** premature for us to decide these issues. Cf. Commonwealth v. Graziano, 371 Mass. 596, 599-600, 358 N.E.2d 776 (1976) (premature to decide four questions involving polygraph testing where "on remand the trial judge may decline to permit the polygraph test or, if such a test is given, may subsequently exclude its results from use at the trial"). Indeed, it may be completely unnecessary to decide such questions, as we do not know if or how they may present themselves at a new trial. Nevertheless, the defendant asks us to exercise our discretion to address these averred errors because they may recur at retrial. See Commonwealth v. Cyr, 425 Mass. 89, 95-98, 679 N.E.2d 550 (1997), S.C., 433 Mass. 617, 744 N.E.2d 1082 (2001).

We decline to do so.[9] See Commonwealth v. Keizer, 377 Mass. 264, 271, 385 N.E.2d 1001 (1979); Commonwealth v. Crayton, 93 Mass. App. Ct. 251, 259, 102 N.E.3d 1001 (2018). See also Commonwealth v. Anestal, 463 Mass. 655, 673-674, 978 N.E.2d 37 (2012); Commonwealth v. A.B., 72 Mass. App. Ct. 10, 14 n.6, 887 N.E.2d 1107 (2008). The defendant is, of course, free to raise these issues should they arise at any subsequent retrial.

3. Conclusion. We discern no error in the denial of the defendant's motion for a required finding of not guilty as to the charge of carrying a firearm without a license, G. L. c. 269, § 10 (a), or in the denial of the defendant's pretrial motion to suppress the firearm seized from him during the lawful traffic stop. In light of our holding in Guardado II, we vacate the conviction and remand the case to the Superior Court for a new trial.

So ordered.

All Citations

495 Mass. 552, 253 N.E.3d 1207

Footnotes

[1] As explained in greater detail infra, we do not address the denial of the defendant's pretrial motion to suppress insofar as it concerned the defendant's statement, which was not used as evidence at trial, that he was unlicensed.

[2] We acknowledge the amicus brief in support of the defendant submitted by Lorenzo Jones.

[3] "Lidar," a portmanteau of "light" and "radar," refers to "[a]n optical sensing technology used to determine the position, velocity, or other characteristics of distant objects by analysis of pulsed laser light reflected from their surfaces." American Heritage Dictionary of the English Language 1013 (5th ed. 2016).

[4] As to the driver's license, at a pretrial motion hearing in September 2022, Vath testified that the driver provided a New Jersey identification card but no driver's license. Vath queried a computer database and determined the driver did not possess a license in New Jersey or any State in New England. The driver also did not provide the vehicle registration and instead produced a "purchase and sales agreement [for the vehicle] that was handwritten on a piece of notebook paper." The Commonwealth did not, however, elicit this testimony or submit evidence to this effect at trial.

[5] Although not explicitly laid out in the statutory provisions, New York courts had permitted licensing officials to restrict licensees' public carry to activities including hunting, target shooting, and traveling to and from a place of employment where being armed was a job requirement. See Bruen, 597 U.S. at 12, 142 S.Ct. 2111, citing Matter of O'Brien, 87 N.Y.2d 436, 438-439, 639 N.Y.S.2d 1004, 663 N.E.2d 316 (1996), Babernitz v. Police Dep't of New York, 65 A.D.2d 320, 324, 411 N.Y.S.2d 309 (N.Y. 1978), and Matter of O'Connor, 154 Misc. 2d 694, 696-698, 585 N.Y.S.2d 1000 (N.Y. County Ct. 1992).

[6] As noted supra, at the hearing on the defendant's motion to suppress, Vath testified that the defendant verbally confirmed he did not have a license to carry after his firearm was discovered. Because we need not address the defendant's Miranda argument to resolve this appeal for the reasons discussed infra, we do not consider the statement in our analysis of the defendant's assertion of illegitimacy regarding the seizure.

[7] Although the defendant's pretrial motion to suppress was ultimately denied, the motion judge made the following relevant finding of fact:

> "[I]t was after [removing the firearm from the defendant's pocket and placing him in handcuffs] that the Trooper asked the defendant whether he had a license to carry or a firearms identification card and the answer was no. And that question occurred without any evidence of the defendant having been given his Miranda rights" (emphasis added).

At trial, however, the Commonwealth did not elicit any testimony or offer any evidence regarding the defendant's response to Vath's question about licensure, and the jury was therefore unaware of it.

[8] More specifically, in his initial charge to the jury, the trial judge instructed, in part: "A person, obviously, possesses something if that person has direct physical control or custody of it at a given time. In that sense, you possess whatever you have in your pocket or in your bag right now." After the jury sent a note asking to be reinstructed on "the definition of possession and knowing possession," the trial judge again used this example: "And as I said earlier and I say, again, now, in that sense, you possess something that you have in your pocket." Because the firearm at issue in this case was found in the defendant's jacket pocket, and Vath testified to this effect at trial, the defendant

argues that these jury instructions impermissibly "created a mandatory presumption that the element of possession is met where the facts show that an item is recovered from a person's pocket."

[9] We note, too, that, at oral argument before this court, the Commonwealth conceded it would not seek to admit the defendant's admission that he did not possess a license to carry or FID card at retrial and that the jury instruction regarding possession would best be illustrated by a different example.