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COMMONWEALTH
v.
Jorge DELGADO-RIVERA.

SJC-12919

Supreme Judicial Court of Massachusetts, Middlesex.

Argued November 2, 2020.
Decided June 1, 2021.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Barry A. Bachrach, Leicester, for the defendant.

David Rassoul Rangaviz, Committee for Public Counsel Services, Matthew R. Segal, Jessie J. Rossman, Jason D. Frank, & Michael A. Hacker, Boston, for American Civil Liberties Union of Massachusetts, Inc., & others, amici curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Lowy, Cypher, & Kafker, JJ.

GAZIANO, J.

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Jorge Delgado-Rivera and six codefendants were indicted on charges of trafficking in 200 grams or more of cocaine, G. L. c. 94C, § 32E (b) ; conspiracy to violate the drug laws, G. L. c. 94C, § 40 ; and conspiracy to commit money laundering, G. L. c. 267A, § 2. Delgado-Rivera's indictments stemmed from an investigation that originated, in part, from evidence acquired during a search of his codefendant's cellular telephone. Delgado-Rivera sought to join the owner of the telephone in a motion to suppress evidence obtained as a result of the search, which produced, inter alia, the contents of text messages sent by Delgado-Rivera; Delgado-Rivera argued that he had a privacy interest in the sent messages, while the Commonwealth argued that he had no standing to challenge the search. A Superior Court judge concluded that Delgado-Rivera had standing to challenge the motor vehicle stop of his codefendant, as well as the voluntariness of the search, and allowed him to join the motion to suppress.[1]

We conclude that, in the circumstances at issue here, the judge erred in deciding that Delgado-Rivera could join in the motion to suppress to challenge the stop and subsequent search. Delgado-Rivera should not have been allowed to join in the motion to suppress because he enjoyed no reasonable expectation of privacy, under either State or Federal law, in the text messages sent by him that were stored on a cellular telephone belonging to, and possessed by, another person.[2]

1. Factual background. Although the judge held an evidentiary hearing on the motion to suppress and, subsequent to that hearing, the Commonwealth requested that the judge "issue written findings of fact," ultimately her decision contained no explicit findings of fact. We recite the facts based upon the uncontroverted and undisputed evidence offered at the suppression

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hearing. See Commonwealth v. Alexis, 481 Mass. 91, 93, 112 N.E.3d 796 (2018).

On September 18, 2016, then Officer Jose Tamez of the Pharr police department in Texas stopped a vehicle in neighboring McAllen, Texas, after he observed a traffic violation. Tamez had

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been watching the vehicle because he had received information that Federal agents were conducting an investigation that indicated that the vehicle might contain narcotics. Leonel Garcia-Castaneda was the driver and sole occupant of the vehicle. The stop included a canine search of the vehicle and a search by

Tamez of the vehicle as well as of Garcia-Castaneda's cellular telephones. There is a factual dispute as to whether Garcia-Castaneda consented to these searches.[3]

While looking through one of Garcia-Castaneda's cellular telephones, Tamez observed text messages sent to and received from a Massachusetts area code. The messages appeared to discuss shipments of narcotics and payments to be made into certain bank accounts. The search, which evolved to include an X-ray of the vehicle at a nearby port of entry, did not yield contraband, and Castaneda thereafter was released with a warning. During the stop, Tamez was assisted by a second member of the Pharr police department, who also was a task force officer with the Department of Homeland Security.

Following the stop, Texas authorities relayed the information they had gleaned to law enforcement officers in the Commonwealth, who linked the Massachusetts telephone number to Delgado-Rivera. Police in Massachusetts thereafter conducted an investigation of Delgado-Rivera and other individuals suspected of engaging in a series of related drug trafficking and money laundering schemes. This investigation led to the indictments of Delgado-Rivera, along with Garcia-Castaneda, Jairo Salado-Ayala, Maritza Medina, Brandon Ortiz, Adika Manigo, and Mark Yarde as codefendants.

2. Procedural background. Garcia-Castaneda moved to suppress all evidence seized during the traffic stop; he argued that the search was without a warrant and without probable cause, in violation of the Fourth Amendment to the United States Constitution

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and art. 14 of the Massachusetts Declaration of Rights. Delgado-Rivera moved to join Garcia-Castaneda's motion; the Commonwealth opposed the motion on the ground that Delgado-Rivera lacked standing to challenge the search.

At the evidentiary hearing on the motion to suppress, a Superior Court judge orally ruled that Delgado-Rivera had standing and allowed him to join Garcia-Castaneda's motion. In response to the Commonwealth's request, the judge subsequently issued a written decision on the matter. The Commonwealth sought leave to pursue an interlocutory appeal in the county court pursuant to Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017), and the single justice allowed the appeal to proceed in the Appeals Court. We then transferred

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the matter to this court on our own motion.

3. Standard of review. In reviewing a judge's decision 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." Commonwealth v. Washington, 449 Mass. 476, 480, 869 N.E.2d 605 (2007), citing Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233 (2004). See Commonwealth v. Tremblay, 480 Mass. 645, 652, 107 N.E.3d 1121 (2018). "[O]ur duty is to make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." Scott, supra, quoting Commonwealth v. Mercado, 422 Mass. 367, 369, 663 N.E.2d 243 (1996).

4. Constitutional provisions. Article 14 and the Fourth Amendment protect individuals from unreasonable, governmental searches and seizures. The rights secured by these protections are specific to the individual. Under the Fourth Amendment, the right to be free from an unreasonable search and seizure is a "personal right." See Simmons v. United States, 390 U.S. 377, 389, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) ("rights assured by the Fourth Amendment are personal rights"). With respect to art. 14, "an individualized determination of reasonableness" similarly is required in light of the individualized rights protected. Commonwealth v. Feliz, 481 Mass. 689, 690-691, 119 N.E.3d 700 (2019), S.C., 486 Mass. 510, 159 N.E.3d 661 (2020). Thus, under both State and Federal law, "the question is whether the challenged search or seizure violated the ... rights of a criminal

defendant who seeks to exclude the evidence" obtained from the search, specifically those rights of privacy that these constitutional provisions were "designed to protect." Rakas v. Illinois, 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

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See generally Carpenter v. United States, ––– U.S. ––––, 138 S. Ct. 2206, 2213–2214, 201 L.Ed.2d 507 (2018) ; Commonwealth v. McCarthy, 484 Mass. 493, 498, 142 N.E.3d 1090 (2020). A defendant bears the burden of establishing such an infringement. See Rawlings v. Kentucky, 448 U.S. 98, 104–105, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) ; Commonwealth v. Miller, 475 Mass. 212, 219, 56 N.E.3d 168 (2016).

The substantive rights protected by these constitutional provisions, however, are not necessarily coterminous. Article 14 "does, or may, afford more substantive protection to individuals than that which prevails under the Constitution of the United States." Commonwealth v. Mora, 485 Mass. 360, 365, 150 N.E.3d 297 (2020), quoting Commonwealth v. Almonor, 482 Mass. 35, 42 n.9, 120 N.E.3d 1183 (2019). See, e.g., Commonwealth v. Stoute, 422 Mass. 782, 785-789, 665 N.E.2d 93 (1996) (art. 14 defines moment when individual's personal liberty has been restrained by police more broadly than does Fourth Amendment); Commonwealth v. Upton, 394 Mass. 363, 373, 476 N.E.2d 548 (1985) (concluding that probable cause to issue search warrants is more narrowly defined under art. 14 than under Fourth Amendment). The Fourth Amendment provides a floor below which the protection granted by art. 14 cannot fall. See Garcia v. Commonwealth, 486 Mass. 341, 350, 158 N.E.3d 452 (2020) ("Privacy rights under art. 14 are at least as extensive as those under the Fourth Amendment").

The tests that courts have adopted to determine whether defendants validly may invoke the protections of these constitutional provisions are related but distinct. Traditionally, under art. 14, "we

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determine initially whether the defendant has standing to contest the search and then whether she [or he] had an expectation of privacy in the area searched." Commonwealth v. Williams, 453 Mass. 203, 207-208, 900 N.E.2d 871 (2009). Although the "two concepts are interrelated, we consider them separately." Id. at 208, 900 N.E.2d 871. See Commonwealth v. Frazier, 410 Mass. 235, 244 n.3, 571 N.E.2d 1356 (1991) ("we think it is best to separate the issue of standing from the question whether there has been a search for constitutional purposes"). Only if the defendant proves both standing and a reasonable expectation of privacy do the protections of art. 14 apply. Almonor, 482 Mass. at 40-41, 120 N.E.3d 1183. See Commonwealth v. Tavares, 482 Mass. 694, 705, 126 N.E.3d 981 (2019) ; Commonwealth v. Lugo, 482 Mass. 94, 107-108, 120 N.E.3d 1212 (2019).

For purposes of art. 14, "[a] defendant has standing [to challenge a government search] either if [he or] she has a possessory interest in the place searched or in the property seized or if [he or]

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she was present when the search occurred."[4] Williams, 453 Mass. at 208, 900 N.E.2d 871. While this court has not established the precise contours of the possessory interest relevant to art. 14, we have held that it is congruent neither with legal title nor physical control. See, e.g., Commonwealth v. Morrison, 429 Mass. 511, 514, 710 N.E.2d 584 (1999). We have discerned such an interest where, for example, law enforcement seized the device subsequently searched from an individual who was not its owner, see Commonwealth v. Cruzado, 480 Mass. 275, 282, 103 N.E.3d 732 (2018), and evidence suggested that the individual asserting standing repeatedly had used, but did not own or possess, the item in question, see Commonwealth v. Fulgiam, 477 Mass. 20, 35-36, 73 N.E.3d 798, cert. denied, ––– U.S. ––––, 138 S. Ct. 330, 199 L.Ed.2d 221 (2017) ; Commonwealth v. Estabrook, 472 Mass. 852, 857 n.9, 38 N.E.3d 231 (2015).

By contrast, under Federal law, "the question whether the defendant has standing to challenge the constitutionality of a search or seizure is merged with the determination whether the defendant had a reasonable expectation of privacy in the place searched" (citation omitted). Commonwealth v. Mubdi, 456 Mass. 385, 391, 923 N.E.2d 1004 (2010). Compare Rawlings v. Kentucky, 448 U.S. 98, 105-106, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), with Tavares, 482 Mass. at 705, 126 N.E.3d 981. Thus, a defendant has standing under the Fourth Amendment only if the search violated his or her reasonable expectation of privacy. Rakas, 439 U.S. at 139, 99 S.Ct. 421. See Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). To establish a reasonable expectation of privacy, a defendant must prove both a subjective and an objective expectation of privacy. See, e.g., Commonwealth v. Montanez, 410 Mass. 290, 301, 571 N.E.2d 1372 (1991) ; United States v. Correa, 653 F.3d 187, 190 (3d Cir. 2011), cert. denied, 566 U.S. 924, 132 S.Ct. 1856, 182 L.Ed.2d 647 (2012). The defendant bears the burden of "demonstrat[ing] that he [or she] personally has an expectation of privacy in the place searched, and that [this] expectation is reasonable, i.e., one that has a source outside

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of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (quotation and citation omitted).

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Minnesota v. Carter, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998). See Commonwealth v. Johnson, 481 Mass. 710, 715, 119 N.E.3d 669, cert. denied, ––– U.S. ––––, 140 S. Ct. 247, 205 L.Ed.2d 138 (2019). See also Katz, 389 U.S. at 361, 88 S.Ct. 507 (Harlan, J., concurring).

While we have continued to recognize the conceptual differences between these State and Federal analyses, a number of our recent cases have implicitly eschewed the two-part inquiry set forth in Williams and instead, drawing heavily on recent Federal precedent, have focused on a defendant's reasonable expectation of privacy, without making a separate inquiry as to the question of standing. See, e.g., Commonwealth v. Figueroa, 468 Mass. 204, 216, 9 N.E.3d 812 (2014). See also Commonwealth v. Connolly, 454 Mass. 808, 833, 913 N.E.2d 356 (2009) (Gants, J., concurring) ("the appropriate constitutional concern is not the protection of property but rather the protection of the reasonable expectation of privacy"). Indeed, extending this focus even further, in Mubdi, 456 Mass. at 392-393, 923 N.E.2d 1004, we concluded that, for possessory offenses involving drugs or firearms, defendants did not need to establish either standing or a reasonable expectation of privacy so long as one of the individuals involved in the offense had a reasonable expectation of privacy. We explained that, "[i]n other words, the 'benefit' of automatic standing is that the defendant need not prove that he had a reasonable expectation of privacy in the home or automobile searched, where he is charged with possession of contraband found during that particular search." Id. at 392 n.7, 923 N.E.2d 1004.[5]

This trend toward a one-step inquiry focusing on a reasonable

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expectation of privacy has been pronounced in our case

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law assessing the constitutionality of digital searches, to which the traditional notions of physical possession underpinning an art. 14 possessory interest may be particularly ill suited. See Commonwealth v. Fredericq, 482 Mass. 70, 78-80, 121 N.E.3d 166 (2019) ; Commonwealth v. Rousseau, 465 Mass. 372, 382, 990 N.E.2d 543 (2013). See also Commonwealth v. Blood, 400 Mass. 61, 70 n.11, 507 N.E.2d 1029 (1987) ("[T]he premise that property interests control the right of the Government to search and seize has been discredited.... Today, the reach of [the

Fourth Amendment and, we add, art. 14] cannot turn upon the presence or absence of a physical intrusion into any given enclosure" [quotation and citations omitted]). This jurisprudence has given rise to well-founded skepticism regarding the continued utility and applicability of the discrete, preliminary standing analysis set forth in our earlier jurisprudence. See J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 3-4[a] (2019 ed.).

In most circumstances involving physical property, the two-part assessment to determine whether constitutional privacy rights are implicated under art. 14 likely would produce the same outcome as the one-part Federal inquiry, given the interrelated nature of the two analyses. See Williams, 453 Mass. at 207-208, 900 N.E.2d 871. It is possible, however, to imagine circumstances in which that would not be the case, particularly where digital searches are at issue.[6] As digital technologies continue to develop and digital searches play an increasingly important role in government investigations,

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our continued adherence to the standing analysis has become strained. Moreover, the application of the two-part inquiry under art. 14 might lead to the untenable result that the Massachusetts Declaration of Rights does not protect rights guaranteed by the Federal Constitution (i.e., where a defendant has no possessory interest in the area or item searched, but does have a reasonable expectation of privacy in it). Of course, if a defendant has a reasonable expectation of privacy, the defendant may challenge an illegal search under art. 14. We leave for another day whether this court should formally abandon the two-part analysis set forth in Williams in light of the concerns addressed here, as it neither was briefed by the parties nor is necessarily before us.

5. Application. To invoke the protections of either the Fourth Amendment or art. 14, Delgado-Rivera must prove that he had a reasonable expectation of privacy in the text messages that he sent to -- and that were received by -- Garcia-Castaneda. Without deciding whether Delgado-Rivera has standing under art. 14, we therefore turn to consider whether he enjoyed an expectation of privacy in the text messages he sent, an expectation that was violated when Tamez searched Garcia-Castaneda's cellular telephone. As the judge noted, the question whether an individual has a reasonable expectation of privacy in sent text messages acquired from another's cellular telephone is a matter of first impression in the Commonwealth, and the United States

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Supreme Court has provided no explicit guidance on the issue. See Ontario v. Quon, 560 U.S. 746, 759-760, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010) (assuming, arguendo, that expectation of privacy existed in text messages, specifically those sent on employer-provided device, but noting that "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior"). While the privacy rights protected under the Fourth Amendment and art. 14 are not coterminous, see, e.g., Blood, 400 Mass. at 68 n.9, 507 N.E.2d 1029, both the United States Supreme Court and this court "have been careful to guard against the ‘power of technology to shrink the realm of guaranteed privacy’ by emphasizing that privacy rights ‘cannot be left at the mercy of advancing technology but rather must be preserved and protected as new technologies are adopted and applied by law enforcement.’ " Almonor, 482 Mass. at 41, 120 N.E.3d 1183, quoting Johnson, 481 Mass. at 716, 119 N.E.3d 669. See United States v. Jones, 565 U.S. 400, 413-418, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring); Kyllo v. United States, 533 U.S. 27, 34-35, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

The central issue before us is the objective reasonableness of Delgado-Rivera's subjective expectation of privacy, set forth in

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his affidavit, in the text messages he sent to Garcia-Castaneda. "What is reasonable depends

upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." United States v. Montoya de Hernandez, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985). Relevant factors in this determination include, inter alia, the character of the item searched; the defendant's possessory interest, if any, in the item; and the defendant's precautions to protect his privacy. See Commonwealth v. Pina, 406 Mass. 540, 545, 549 N.E.2d 106, cert. denied, 498 U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 67 (1990).

In our view, the issue of control, or a lack of control, i.e., Delgado-Rivera's necessary relinquishment of control over what became of this type of sent text messages once they were delivered to Garcia-Castaneda's device, is determinative with respect to whether Delgado-Rivera had a reasonable expectation of privacy in the delivered text messages, as persuasively set forth by the Rhode Island Supreme Court in State v. Patino, 93 A.3d 40 (R.I. 2014), cert. denied, 574 U.S. 1081, 135 S.Ct. 947, 190 L.Ed.2d 842 (2015). In these circumstances, there was no reasonable expectation of privacy in the sent text messages because, as with some other forms of written communication, delivery created a memorialized record of the communication that was beyond the control of the sender. Federal courts have held uniformly that, "if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery" (citations omitted). United States v. Dunning, 312 F.3d 528, 531 (1st Cir. 2002). See, e.g., United States v. Gordon, 168 F.3d 1222, 1228 (10th Cir.), cert. denied, 527 U.S. 1030, 119 S.Ct. 2384, 144 L.Ed.2d 786 (1999) ; United States v. King, 55 F.3d 1193, 1196 (6th Cir. 1995) ; United States v. Knoll, 16 F.3d 1313, 1321 (2d Cir.), cert. denied, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 490 (1994) ; Ray v. United States Dep't of Justice, 658 F.2d 608, 611 (8th Cir. 1981). In reaching this conclusion, courts have reasoned that "when one party relinquishes control of a letter by sending it to a third party, the reasonableness of the privacy expectation is undermined." Knoll, supra.

More recently, courts have extended this logic to electronic communications, such as

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electronic mail messages, after concluding that these forms of communication similarly create a record beyond the control of the original sender and thus defeat any reasonable expectation of privacy. See, e.g., United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004) (declining to recognize reasonable expectation of privacy in electronic communication that had reached recipient); Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) (system operator's disclaimer stating that personal communications

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on computer bulletin board were not private defeated reasonable expectation of privacy). This reasoning is similarly applicable to the text messages at issue in this case, which created a record of the communications that was readily and lastingly available to, easily understood by, and almost instantaneously disbursable by the intended recipient, as well as unintended readers, all beyond the control of the sender.[7]

The record here, and the relinquishment of control it represents, is important because "the Fourth Amendment does not protect items that a defendant 'knowingly exposes to the public.' " Dunning, 312 F.3d at 531, citing United States v. Miller, 425 U.S. 435, 442, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). The judge sought to distinguish between communications that have been shared with a particular individual, such as the intended recipient, and communications that are released "more generally ... [in a way] in which [they] can be discovered by members of the public or police or anyone else." This distinction is not persuasive. "It is well settled that when an individual reveals private information to another, [the individual] assumes the risk that his [or her] confidant will reveal that information," frustrating the sender's original expectation of privacy and, in effect, making this once-private information subject to disclosure without a violation of the sender's constitutional rights. United States v. Jacobsen, 466 U.S. 109, 117, 104 S.Ct. 1652, 80 L.Ed.2d

85 (1984). In the circumstances here, Delgado-Rivera assumed the risk that the communications he shared with Garcia-Castaneda might be made accessible to others, including law enforcement, through Garcia-Castaneda and his devices.[8] See Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 784 (1st Cir. 1985), cert. denied,

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479 U.S. 816, 107 S.Ct. 72, 93 L.Ed.2d 29 (1986).

Any purported expectation of privacy in sent text messages of this type is significantly undermined by the ease with which these messages can be shared with others. In addition to simply displaying the message to another, as would be possible with nonelectronic, written forms of communication, a recipient also can forward

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the contents of the message to hundreds or thousands of people at once, or post a message on social media for anyone with an Internet connection to view. See, e.g., Patino, 93 A.3d at 56 n.21 ("We can think of no media more susceptible to sharing or dissemination than a digital message, such as a text message or email, which vests in the recipient a digital copy of the message that can be forwarded to or shared with others at the mere click of a button"). Thus, Delgado-Rivera had no reasonable expectation of privacy under the Fourth Amendment in the text messages at issue because, once they were delivered, Garcia-Castaneda, as the recipient, gained "full control of whether to share or disseminate the sender's message." Id. at 56. The technology used by Delgado-Rivera to communicate with Garcia-Castaneda effectively facilitated this transfer of control.[9]

The expectation of privacy we have recognized concerning certain oral conversations also is not applicable here. Delgado-Rivera -- and the amici -- contend that text messages are more similar to oral, rather than written, communication because they tend to be more informal and are exchanged more frequently, in a shorter format, than are other forms of written communication. This reasoning is unconvincing. The relative formality, frequency, or sensitivity of communication does not alone characterize the distinction between communications in which an individual has a reasonable expectation of privacy and those in which the individual does not, and we discern no reason to adopt such a standard here. While "the nature of the particular documents" is relevant to the expectation of privacy analysis, the content of the documents is considered in the context of the sharing of the

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information. See Carpenter, 138 S. Ct. at 2216-2217, and cases cited (while fact of sharing creates diminished expectations of privacy, fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely" [citation omitted]). The fact that individuals communicate personally revealing thoughts, feelings, and facts via text message rather than through another medium does not alter the analysis of whether they retained a reasonable expectation of privacy in those communications.

Moreover, we have recognized a reasonable expectation of privacy in oral conversations only in very limited circumstances, such as when the conversation occurred in person in a private home and neither party consented to a recording or transmission of the conversation. See Blood, 400 Mass. at 70, 74-75, 507 N.E.2d 1029. We have determined that there was no reasonable expectation of privacy where the conversation, akin to the text message exchanges at issue here, was overheard in some way by law enforcement, with the agreement of a third party, see Commonwealth v. Panetti, 406 Mass. 230, 230-233, 547 N.E.2d 46 (1989) (landlord agreed that officer could enter crawl space under floor where conversation was taking place), or where a participant in a telephone conversation (a confidential informant) had granted law enforcement permission to listen to it on

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an extension telephone, see Commonwealth v. Eason, 427 Mass. 595, 596, 598-601, 694 N.E.2d 1264 (1998).

In reaching the conclusion that Delgado-Rivera had a reasonable expectation of privacy in his sent text messages, the judge relied in large part upon the reasoning of the Washington State Supreme Court in State v. Hinton, 179 Wash. 2d 862, 319 P.3d 9 (2014). In Hinton, the court held that the defendant retained a reasonable expectation of privacy in sent text messages recovered from another individual's cellular telephone. Id. at 873, 319 P.3d 9. The analysis in Hinton, however, is not relevant here, in part because, unlike Delgado-Rivera, Hinton sought to assert privacy rights over text messages delivered to, but never received by, the intended recipient. See id.

Moreover, the relatively few State and Federal courts to have examined this issue have soundly rejected the logic relied upon in Hinton. These assessments uniformly have concluded that the Fourth Amendment does not protect similar text messages. See, e.g., United States v. Jones, 149 Fed. Appx. 954, 959 (11th Cir. 2005), cert. denied, 546 U.S. 1189, 126 S.Ct. 1373, 164 L.Ed.2d 80 (2006) (defendant did not have reasonable expectation of privacy in sent text messages saved on

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coconspirator's cellular telephone); United States v. Bereznak, U.S. Dist. Ct., No. 3:18-CR-39, 2018 WL 1993904 (M.D. Pa. Apr. 27, 2018) ("courts appear to be in general agreement that there is no reasonable expectation of privacy in electronic content ... once they are on a recipient's device"). See also Fetsch v. Roseburg, U.S. Dist. Ct., No. 6:11–CV–6343–TC, 2012 WL 6742665 (D. Or. Dec. 31, 2012) ; Hampton v. State, 295 Ga. 665, 669, 763 S.E.2d 467 (2014) ; State v. Boyd, 597 S.W.3d 263, 276 (Mo. Ct. App. 2019) ; State v. Carle, 266 Or. App. 102, 112-114, 337 P.3d 904 (2014) ; State v. Tentoni, 2015 WI App 77, ¶ 8, 365 Wis.2d 211, 871 N.W.2d 285.

In sum, Delgado-Rivera lacked a reasonable expectation of privacy in the sent text messages and therefore cannot challenge the search of Garcia-Castaneda's cellular telephone under either the Fourth Amendment or art. 14.

6. Conclusion. The decision allowing the motion to suppress is vacated and set aside. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

CYPHER, J. (concurring).

I agree with the reasoning and the outcome in the court's opinion. I write separately to examine the vexing relationship between standing and a reasonable expectation of privacy. See Commonwealth v. Williams, 453 Mass. 203, 207–208, 900 N.E.2d 871 (2009) (standing and expectation of privacy "interrelated" concepts but considered separately); Commonwealth v. Frazier, 410 Mass. 235, 244 n.3, 571 N.E.2d 1356 (1991) ("we think it is best to separate the issue of standing from the question whether there has been a search for constitutional purposes"). The court recognizes the trend in our case law toward a one-step reasonable expectation of privacy analysis and the concern that as digital searches become more common, the standing analysis, which encompasses the traditional notions of physical possession, may become strained. I agree that this is a topic for another day and write in an effort to clarify our case law and a difficulty I see in Commonwealth v. Mubdi, 456 Mass. 385, 393, 923 N.E.2d 1004 (2010).

A reasonable expectation of privacy alone is sufficient to establish that a defendant has standing under art. 14 of the Massachusetts Declaration of Rights. See

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Commonwealth v. King, 389 Mass. 233, 240, 449 N.E.2d 1217 (1983) (defendant has standing if he or she, as occupant of vehicle, had legitimate expectation of privacy). The defendant also may establish standing by showing a possessory

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interest or presence in the place searched. See Commonwealth v. Amendola, 406 Mass. 592, 601, 550 N.E.2d 121 (1990) ("When a defendant is charged with a crime in which possession of the seized evidence at the time of the contested search is an essential element of guilt, the defendant shall be deemed to have standing ..."). See also Commonwealth v. Franklin, 376 Mass. 885, 900, 385 N.E.2d 227 (1978) (defendant had standing where prosecution presented ample evidence at trial to prove defendant's presence and proprietary interest in apartment searched). Compare Commonwealth v. Mora, 402 Mass. 262, 267, 521 N.E.2d 745 (1988) (no basis for asserting automatic standing where defendant was not present in apartment at time of search). As such, I agree with the court that it is unnecessary to decide whether the defendant has standing where he did not enjoy a reasonable expectation of privacy in the text messages he sent. In a case where the defendant is charged with a possessory offense, and any claim of possessory interest in order to assert standing would result in the defendant's admission to the crime, standing is conferred upon the defendant to challenge the search and seizure. See Amendola, supra at 597, 550 N.E.2d 121.

The reverse, however, cannot be true: standing does not necessarily establish a reasonable expectation of privacy. See Commonwealth v. Montanez, 410 Mass. 290, 301, 571 N.E.2d 1372 (1991), citing Frazier, 410 Mass. at 244 n.3, 571 N.E.2d 1356 ("When a defendant has standing under our rule for State constitutional purposes, we then determine whether a search in the constitutional sense has taken place"). Thus, even if a defendant has established standing, he or she also must show an expectation of privacy in the place searched. See Commonwealth v. Lawson, 79 Mass. App. Ct. 322, 326, 945 N.E.2d 976 (2011), overruled on other grounds by Commonwealth v. Campbell, 475 Mass. 611, 59 N.E.3d 394 (2016) (defendant charged with possessory offenses has automatic standing but no reasonable expectation of privacy in place searched where he was in position of trespasser).

In other words, where standing is not automatic and is not based on a reasonable expectation of privacy, but rather on presence or a possessory interest, a defendant also must show that his or her own expectation of privacy was intruded upon. See Commonwealth v. Carter, 424 Mass. 409, 411 n.3, 676 N.E.2d 841 (1997) (defendant does not have right to "assert the constitutional rights of someone in no way involved with his allegedly criminal conduct").

Although the defendant may not assert another person's reasonable expectation of privacy, in Mubdi, 456 Mass. at 393, 923 N.E.2d 1004, the

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court stated: "The defendant, however, still must show that there was a search in the constitutional sense, that is, that someone had a reasonable expectation of privacy in the place searched, because only then would probable cause, reasonable suspicion, or consent be required to justify the search." This sentence has been interpreted to mean that a defendant did not need to show that he or she had a reasonable expectation of privacy in the place searched but only that someone had a reasonable expectation of privacy. See J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 3-4[a] (2019 ed.) (Grasso & McEvoy).

Such a construction would overrule Carter, 424 Mass. at 410, 676 N.E.2d 841, which specifically rejected this argument.

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Mubdi did not purport to overrule Carter, as one can fairly deduce from cases that followed Mubdi. See Commonwealth v. Martin, 467 Mass. 291, 303-304, 4 N.E.3d 1236 (2014) ; Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 303, 75 N.E.3d 51 (2017). See also Commonwealth v. Carnes, 81 Mass. App. Ct. 713, 718, 967 N.E.2d 148 (2012).

A reasonable expectation of privacy is personal

to a defendant. Were the court to have held otherwise, a person would have an expectation of privacy in any place in which another person had a reasonable expectation of privacy. Such a result would collapse the two-prong reasonable expectation of privacy analysis. Although a defendant may have automatic standing to challenge a possessory offense, we have not created an automatic expectation of privacy.[1] See, e.g., Commonwealth v. Arzola, 470 Mass. 809, 816-817, 26 N.E.3d 185 (2015), cert. denied, 577 U.S. 1061, 136 S.Ct. 792, 193 L.Ed.2d 709 (2016) (defendant does not have expectation of privacy that would prevent deoxyribonucleic acid analysis of lawfully seized evidence); Martin, 467 Mass. at 303-304, 4 N.E.3d 1236 (defendant had no expectation of privacy in abandoned telephone);

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Commonwealth v. Williams, 456 Mass. 857, 866, 926 N.E.2d 1162 (2010) (defendant does not have expectation of privacy in telephone call made after arrest).

It appears to me, as expressed in Grasso & McEvoy, supra at § 3-4[a], that

> " Mubdi confuses Carter's expressed rationale for excusing a co-defendant charged with a possessory offense from the need to show that he had a reasonable expectation of privacy in the area searched and instead declares an automatic expectation of privacy in the defendant whenever automatic standing exists and someone has an expectation of privacy."

Instead, the court in Carter, 424 Mass. at 410-411, 676 N.E.2d 841, observed: "[w]e have granted a defendant automatic standing to challenge the seizure of property in the possession of another at the time of the search, if the defendant has been charged with the constructive possession of that property at that time." In fact, Carter specifically stated that "[s]uch a defendant and his confederate are treated, in effect, as one for the purposes of deciding whether there was a reasonable expectation of privacy, otherwise the person who carried the contraband might go free (because of suppression of the evidence) and the defendant confederate would not." Id. at 411, 676 N.E.2d 841.

Notes:

[1] The judge concluded that a third defendant did not have standing to join the motion to suppress.

[2] We acknowledge the amicus brief submitted by the American Civil Liberties Union of Massachusetts, Inc.; the Committee for Public Counsel Services; and the Massachusetts Association of Criminal Defense Lawyers.

[3] At an evidentiary hearing on his motion to suppress, Leonel Garcia-Castaneda argued that Officer Jose Tamez's search of his cellular telephones was nonconsensual, at least in part because Garcia-Castaneda can speak and read only in Spanish, and the consent form he signed to authorize the searches was in English. The Commonwealth called Tamez to testify on this issue, but he invoked his right not to incriminate himself under the Fifth Amendment to the United States Constitution and therefore was not available to testify regarding the details of the stop and the subsequent searches. The Commonwealth presented no other evidence regarding the stop. The judge thus determined that the fruits of the search in Texas could not be used as evidence against Garcia-Castaneda.

[4] Under art. 14, a defendant who has been charged with a possessory offense has automatic standing to challenge a search that yielded evidence of that possession, and also need not show a reasonable expectation of privacy. See Commonwealth v. Mubdi, 456 Mass. 385, 392-394 & n.7, 923 N.E.2d 1004 (2010), and cases cited; Commonwealth v. Amendola, 406 Mass. 592, 596-601, 550 N.E.2d 121 (1990). Delgado-Rivera properly does not argue that the doctrine of automatic standing is relevant here.

[5] In her concurrence, Justice Cypher asserts that

a reasonable expectation of privacy is a personal right, and that this court has not held otherwise. She continues by suggesting that the court's holding in Mubdi has been "interpreted" to mean, but in fact did not say, that "a defendant did not need to show that he or she had a reasonable expectation of privacy in the place searched but only that someone had a reasonable expectation of privacy," and the court could not have intended to do so. Post at 566, 168 N.E.3d at 1098. The decision in Mubdi, however, clearly explained the rationale underlying its holding that, in possessory offenses committed by multiple individuals, defendants need show neither standing nor an expectation of privacy. Mubdi, 456 Mass. at 392 n.7, 923 N.E.2d 1004. Mubdi reiterated that this court had chosen to continue to rely upon automatic standing even though the United States Supreme Court had abandoned it "because we believed it unfair to place the defendant in the difficult position at the motion to suppress hearing of needing to explain his relationship to the place searched in order to establish his standing to challenge the constitutionality of the search, when that incriminating information may be used to impeach him if he were to testify at trial." Id.

Moreover, far from overlooking the holding in Commonwealth v. Carter, 424 Mass. 409, 676 N.E.2d 841 (1997), as Justice Cypher suggests that it did, see post at 566, 168 N.E.3d at 1098-99, the court in Mubdi, supra at 393 n.8, 923 N.E.2d 1004, explicitly declined to decide the issue raised in Carter, supra at 412, 676 N.E.2d 841, as to whether a defendant who was not lawfully in the location searched nonetheless could assert automatic standing. Carter did not reach the question of an automatic expectation of privacy, and given the absence of any briefing or record on this complex issue, attempting to do so here would risk creating innumerable unanticipated consequences. As Mubdi itself recognized, an automatic expectation of privacy could produce some anomalous results. See Mubdi, supra at 392 n.7, 923 N.E.2d 1004. These issues are best reserved for a case in which they occur.

[6] For example, a defendant could send a text message using an encrypted messaging service, where the message subsequently was acquired from the recipient device by law enforcement. Assuming that the defendant could establish a reasonable expectation of privacy based on the use of the encryption technology employed, the defendant would have standing under the Fourth Amendment to contest the search that yielded the text message. Using the two-part analysis under art. 14, however, the defendant likely would be unable to establish standing if he or she had no possessory interest in the recipient device and was not present during the search. This discrepancy cannot stand. See, e.g., Garcia v. Commonwealth, 486 Mass. 341, 350, 158 N.E.3d 452 (2020).

[7] The question whether an individual could use certain types of technologies, such as encryption or ephemeral messaging, to maintain control of sent electronic messages sufficiently to retain a reasonable expectation of privacy in those messages is not before us. Cf. WhatsApp Inc. v. NSO Group Techs. Ltd., 472 F. Supp. 3d 649, 659 (N.D. Cal. 2020) ; Nield, The best apps to send self-destructing messages, Popular Science (Nov. 15, 2020), https://www.popsci.com/send-self-destructing-messages.

[8] An individual's reasonable expectation of privacy in information held by third parties, such as telephone companies, is a separate and distinct question that is not at issue here. See, e.g., Commonwealth v. Fulgiam, 477 Mass. 20, 34, 73 N.E.3d 798, cert. denied, ––– U.S. ––––, 138 S. Ct. 330, 199 L.Ed.2d 221 (2017) (recognizing objectively reasonable expectation of privacy in content of defendant's text messages stored by cellular telephone service provider); Commonwealth v. Augustine, 467 Mass. 230, 241-255, 4 N.E.3d 846 (2014), S.C., 470 Mass. 837, 26 N.E.3d 709 and 472 Mass. 448, 35 N.E.3d 688 (2015) (recognizing objectively reasonable expectation of privacy in defendant's historical cell site location information records held by telephone service provider).

[9] The Commonwealth notes the absence of

evidence suggesting "that [Delgado-Rivera] took any steps to protect the contents of those messages [he sent to Garcia-Castaneda] by, for example, using encrypted messaging applications like Signal or Telegram, or an application that defaults to content deletion such as Snapchat." While the use of such applications, or similar efforts to enhance the privacy or security of the messages at issue, likely would be relevant to the extent that it reveals a defendant's efforts to protect his or her privacy, we leave for another day an issue that was not briefed by the parties and is not presently before us.

[1] Where the defendant has automatic standing, the defendant need not show that he or she has a reasonable expectation of privacy in the place searched. See Commonwealth v. Amendola, 406 Mass. 592, 601, 550 N.E.2d 121 (1990). A codefendant charged with constructive possession may be excused from establishing a reasonable expectation of privacy in the area searched, so long as the codefendant's confederate has done so. It is not, however, sufficient for the defendant to show that just "someone" has an expectation of privacy in the area searched. In Frazier, 410 Mass. at 244-245, 571 N.E.2d 1356, we held that a defendant charged with constructive possession had automatic standing to challenge the search of his confederate's handbag. There, the court concluded that the defendant's confederate had a reasonable expectation of privacy in the handbag and that the search was unlawful. Id. at 241, 571 N.E.2d 1356. Because the search was illegal as to his confederate, it was also illegal as to the defendant. Id. at 246, 571 N.E.2d 1356.
