

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-51

COMMONWEALTH

vs.

EDGARDO PAGAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Edgardo Pagan, appeals from a conviction of trafficking in eighteen grams or more of cocaine after a jury trial in the Superior Court. We discern no error in the motion judge's denial of the defendant's motion to suppress items recovered during an impoundment inventory search of the defendant's motor vehicle. Further concluding that there was sufficient evidence that the defendant had constructive possession of the recovered cocaine, we affirm.

1. Motion to suppress. a. Standard of review. "In reviewing a ruling on a motion to suppress, we accept the judge's findings of fact absent clear error, but review independently the judge's ultimate findings and conclusions of law." Commonwealth v. Ehiabhi, 478 Mass. 154, 164 (2017). "[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." Commonwealth v. Clarke, 461 Mass. 336, 340 (2012), quoting Commonwealth v. Bostock, 450 Mass. 616, 619 (2008).

b. Impoundment and inventory search. "An inventory search is lawful under the United States Constitution and art. 14 of the Massachusetts Declaration of Rights only if (1) the impoundment of the vehicle was reasonable and (2) the search of the vehicle following impoundment was 'conducted in accord with standard police written procedures.'" Commonwealth v. Nicoleau, 90 Mass. App. Ct. 518, 520 (2016), quoting Commonwealth v. Oliveira, 474 Mass. 10, 13 (2016). "[I]mpoundment of a vehicle for noninvestigatory reasons is generally justified if supported by public safety concerns or by the danger of theft or vandalism to a vehicle left unattended." Commonwealth v. Ellerbe, 430 Mass. 769, 775 (2000), quoting Commonwealth v. Daley, 423 Mass. 747, 750 (1996). "[I]t would seem reasonably clear that the failure to give a person an opportunity to make reasonable alternative arrangements for the vehicle would not invalidate an inventory search under Fourth Amendment [to the United States Constitution] principles." Commonwealth v. Eddington, 459 Mass. 102, 109 n.12 (2011), quoting Commonwealth v. Caceres, 413 Mass. 749, 751 n.1 (1992).

Here, the motion judge found that impoundment "was justified by the need to remove Pagan's vehicle from a busy on ramp to an interstate highway," as the vehicle was obstructing traffic. See Commonwealth v. Davis, 481 Mass. 210, 218 (2019) ("the vehicle, which was stopped on the left hand side of a toll exit on the Massachusetts Turnpike, in the middle of the day, partially impeding exit from the toll booth and causing traffic delays, posed a public safety hazard"). At the time of arrest, the defendant was the only occupant in the vehicle. Police officers are not constitutionally obligated to make alternative arrangements with the owner of the vehicle. See Oliveira, 474 Mass. at 15 ("the police have no obligation to locate or telephone the registered owner to determine his or her wishes"); Ellerbe, 430 Mass. at 776 ("Reasonableness did not require police officers to guard the vehicle or to wait . . . until a licensed driver could be produced to take control of it"). Similarly, the police were not required to move the vehicle without conducting an inventory, much less to a grassy area not intended for parking. Cf. Commonwealth v. Brinson, 440 Mass. 609, 615 (2003) ("Car impoundments may be justified under the community caretaking function if the car is . . . illegally parked"). Based on the public safety concerns, the impoundment of the vehicle was reasonable.

The written police procedures here did not require that officers contact drivers who are not present in order to avoid towing the vehicle. Rather, the written policies allowed the vehicle to be "turned over to a licensed driver at the scene" and allowed the police to honor "[o]perators[]" requests for 'private tow clubs' . . . when response time is acceptable in the situation." As no licensed driver offered to take custody of the vehicle, and the defendant (the operator) made no request for a private tow, the policies provide no support for the defendant's position. See Ehiabhi, 478 Mass. at 164 ("an inventory search must hew closely to written police procedures"). The motion judge properly denied the motion to suppress.

2. Sufficiency of the evidence. a. Standard of review. In reviewing the sufficiency of the evidence, "we consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Faherty, 93 Mass. App. Ct. 129, 133 (2018), quoting Commonwealth v. Oberle, 476 Mass. 539, 547 (2017). "The inferences that support a conviction 'need only be reasonable and possible; [they] need not be necessary or inescapable.'" Commonwealth v. Waller, 90 Mass. App. Ct. 295,

303 (2016), quoting Commonwealth v. Woods, 466 Mass. 707, 713 (2014).

b. Constructive possession. Where constructive possession is at issue, the Commonwealth must show proof of "knowledge coupled with the ability and intention to exercise dominion and control" over the contraband. Commonwealth v. Romero, 464 Mass. 648, 653 (2013), quoting Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989). Although the presence of contraband in the same automobile as the defendant is insufficient by itself to prove possession, "[p]resence in the same vehicle supplemented by other incriminating evidence . . . may suffice to show knowledge or intent to control." Commonwealth v. Sinforoso, 434 Mass. 320, 327 (2001), quoting Commonwealth v. Garcia, 409 Mass. 675, 687 (1991).

Here, the defendant was the driver and sole occupant of the vehicle. The defendant's former girlfriend testified that she bought the vehicle with the defendant, although the vehicle was registered only in her name. She further testified that only she and the defendant had access to the vehicle, and she did not keep, or place, any narcotics in it. See Commonwealth v. Crapps, 84 Mass. App. Ct. 442, 444 (2013) ("Exclusive and continuous operation of the [vehicle] both supported the inference of the defendant's knowledge of its contents and reduced the number of possible alternate possessors").

Furthermore, officers observed the defendant engaging in suspicious behavior including parking for short periods of time with the brake lights flashing on and off, speeding, and fleeing the police at a high rate of speed until forced to stop by traffic in front of him. See Commonwealth v. Summers, 93 Mass. App. Ct. 260, 264 (2018) (flight contributes to finding of constructive possession).

During the inventory search, the police recovered 20.12 grams of cocaine from the rear of the vehicle in a storage area, numerous air fresheners throughout the vehicle, empty cut corners of sandwich bags containing a white substance in the center console, and three cell phones in the front of the vehicle.¹ See Commonwealth v. Woods, 94 Mass. App. Ct. 761, 766 & n.6 (2019) (expert testimony that cut-corner plastic bags, digital scale, and multiple cell phones were indicative of drug trade contributed to sufficiency). Cf. Commonwealth v. Wright, 85 Mass. App. Ct. 380, 384 (2014) (strong odor of air fresheners contributes to reasonable suspicion). "Where the contraband is narcotics, evidence of drug dealing may be sufficiently incriminating" to show constructive possession. Commonwealth v. Polanco, 92 Mass. App. Ct. 764, 772 (2018). Accordingly, there

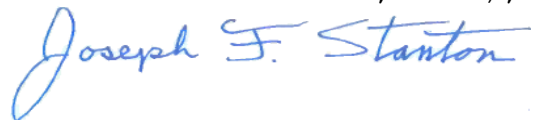
¹ An officer experienced in the methods of street level drug transactions testified that corner-cut sandwich bags are used to package narcotics for sale and that drug dealers often use air fresheners and multiple cell phones.

was sufficient evidence that the defendant constructively possessed the cocaine discovered in the motor vehicle he was

driving.

Judgment affirmed.

By the Court (Vuono,
Desmond & Ditzkoff, JJ.²),



Clerk

Entered: January 21, 2020.

² The panelists are listed in order of seniority.