

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-385

COMMONWEALTH

vs.

DENNIS DIPIETRO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from the order dismissing the indictments charging the defendant with (1) breaking and entering a building in the nighttime with intent to commit a felony, in violation of G. L. c. 266, § 16; (2) larceny from a building, in violation of G. L. c. 266, § 20; and (3) breaking into a depository, in violation of G. L. c. 266, § 16. For all the crimes, the grand jury also returned indictments charging the defendant with being a habitual offender, in violation of G. L. c. 279, § 25. The question before us is whether the Commonwealth presented the grand jury with sufficient evidence to establish the identity of the accused and probable cause that the defendant committed the charged crimes. We affirm.

Background. The grand jury heard the following evidence. On August 24, 2015, there was a break-in at Seabra's Supermarket

on South Main Street in Attleboro. A store alarm sounded at approximately 1 A.M.; an employee responded and "didn't discover anything" out of the ordinary. The morning staff later discovered misplaced items, damage to the money room and safes, and that nearly \$19,000 in cash and \$500 in postage stamps had been stolen.

The suspects had entered the store by cutting a hole in a refrigeration room wall. Responding officers found two sets of single-file footprints on the floor leading from the money room to the back of the store which they were able to preserve and recover. Police did not obtain any fingerprint or video surveillance from the store. Surveillance video from nearby businesses showed three individuals running into and away from the store multiple times during the early morning hours. They were seen carrying large items, which could have "possibly [been] tools inside bags."

Sergeant Kevin Fuoco of the Attleboro Police Department testified that a "similar" breaking and entering occurred about five weeks later in Avon. Officers had identified a suspect named Christopher Glover after running the license plate of a white Cadillac Escalade found near the locations of multiple break-ins in Norfolk County. As a result of surveillance, officers observed Glover and the defendant coming and going from a wooded area near the scene of an alleged break-in at a

Michael's store in Avon. Officers arrested Glover and the defendant and seized their footwear, including the defendant's size 8 Magnum "military style boots."

There were similarities between the break-in at the Michael's store and Seabra's, including entry by cutting a hole in the wall and single-file footprint patterns. An investigator matched Glover's shoes to the prints at Seabra's. Forensic analysis presented to the grand jury showed that the boot impressions from the Seabra's break-in were "consistent with" the design and size of the defendant's black Magnum boots. They shared "[t]he same size, the same design, same relative condition." The shoe prints "could have been made by those Magnum boots or any other boot of that same size and design."

Analysis of Glover's cell phone records showed that around the time of the Seabra break-in, Glover's phone left the area of his residence in Braintree, traveled to Malden (where the defendant lived), and then to Attleboro. After the break-in, the phone left the Attleboro area, returned to the Malden area, and then back to Braintree.

Discussion. "After the issuance of a [criminal] complaint, a motion to dismiss will lie for a failure to present sufficient evidence to the clerk-magistrate (or judge)." Commonwealth v. DiBennadetto, 436 Mass. 310, 313 (2002), citing Commonwealth v. McCarthy, 385 Mass. 160 (1982). The evidence must "provid[e]

reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense." Commonwealth v. Brennan, 481 Mass. 146, 149 (2018). "[A]t the very least the grand jury must hear sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him." McCarthy, supra at 163. Otherwise, it "justifies dismissal of the indictment." Id. "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013), quoting Brinegar v. United States, 338 U.S. 160, 175 (1949). We review these claims de novo. Humberto H., supra.

The evidence presented to the grand jury viewed in the light most favorable to the Commonwealth was not sufficient to warrant a prudent person in believing that the defendant had committed the offenses for which he was indicted. The evidence was consistent with the defendant being a culprit in the Seabra break-in, but it did not identify him. There were no footprints or video surveillance sufficient to identify him. The shoes he was wearing five weeks later were consistent with the shoe prints left at the scene of the break-in. However, those shoe prints "could have been made by those Magnum boots or any other

boot of that same size and design." There was no evidence of the defendant's cell phone on the night in question. Even considering the defendant's connection to Glover, whose shoes were a definitive match to the shoe prints found at the scene of the Seabra break-in and whose cell phone was in the area during the time of the break-in, the evidence did not establish probable cause that the defendant was one of those two other perpetrators.

Order allowing motion to
dismiss affirmed.

By the Court (Kinder, Henry &
Ditkoff, JJ.¹),



Clerk

Entered: February 10, 2020.

¹ The panelists are listed in order of seniority.