

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-616

COMMONWEALTH

vs.

PAUL MIRANDA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Paul Miranda, appeals from a Superior Court judge's order denying his motion for new trial. On appeal, he maintains that the judge abused her discretion because his trial counsel was ineffective and because his convictions of possession of a firearm without a license, pursuant to G. L. c. 269, § 10 (a), and possession of a loaded firearm without a license, pursuant to G. L. c. 269, § 10 (n), violated double jeopardy. We affirm.

Discussion. We review the judge's denial of the motion for an abuse of discretion. See Commonwealth v. Spray, 467 Mass. 456, 472 (2014).

1. Ineffective assistance of counsel. We apply the familiar two-part Saferian test to the claim of ineffective assistance of counsel: (1) whether the defendant has

demonstrated "serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," and (2) whether counsel's poor performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

a. Motion to suppress. The defendant contends that trial counsel was ineffective in failing to bring a motion to suppress the firearms seized from the defendant's stepfather's apartment. We are hampered in our analysis of the defendant's claim because he has not provided an affidavit of trial counsel. Thus, we are unable intelligently to measure counsel's performance to determine whether the decision not to bring the motion was a tactical or strategic decision that was "manifestly unreasonable." Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 107-108 (1999).

In addition, the defendant has not demonstrated that the motion to suppress would have been successful. See Commonwealth v. Comita, 441 Mass. 86, 91 (2004). Assuming arguendo that the defendant correctly posits that exigent circumstances no longer existed when the police officers entered the defendant's stepfather's apartment, the defendant has not shown that the doctrine of inevitable discovery would not apply, thereby defeating any motion to suppress. See Commonwealth v. Avellar,

70 Mass. App. Ct. 608, 614 (2007). To the contrary, the officer's affidavit in support of the application for a search warrant, independent of the observations from the allegedly illegal initial search, established probable cause to search the defendant's apartment. The affidavit indicated (1) witness testimony (including that of the victim) that an individual in a red hooded sweatshirt and black pants began shooting at the victim outside of a court house in Dorchester; (2) officers who arrived at the scene located six nine millimeter Luger casings; (3) the victim's car had ballistic damage; (4) the witness to the incident described (a) the gunman as wearing a red hoodie and black pants and (b) the gunman's vehicle as a "dark black sedan"; (5) the witness also provided the license plate number; (6) officers linked the license plate number to its registered owner and address, where a black Mercedes was found parked but unoccupied; and (7) a second witness, at the address, told the officers that he observed a man, matching the description of the gunman, pull up in the vehicle minutes before the officers arrived and further saw the man enter the registered address.¹

¹ The affidavit further indicated that while one team of officers was at the vehicle's registered address, officers at the special investigations unit received information from an informant that the suspect entered his residence to discard the firearm and clothing, and walked towards the "Four Corners" area after exiting the residence to wait for a ride from someone in a Honda Accord. The informant was unidentified; nonetheless, the rest of the police investigation, as indicated supra, independently

Together, this information established probable cause to believe that the firearm and the suspect's clothing would be found in the apartment. See Commonwealth v. DeJesus, 439 Mass. 616, 627 (2003).

b. Plea offer. The defendant also argues that his counsel was ineffective because counsel failed to provide the defendant with discovery sufficient to apprise the defendant of the Commonwealth's case; according to the defendant, this failure prevented him from rationally considering the Commonwealth's plea offer. Because we have no affidavit from trial counsel, we are hampered in our analysis. See Commonwealth v. Velez, 479 Mass. 506, 513-514 (2018) (cannot be certain about defense counsel's strategic choice without affidavits).

Based on the limited information provided to us, the defendant was offered a plea of five years in State prison. At the time, he possessed the police reports, the search warrant, and the grand jury minutes. When the defendant asserted that he had only received the grand jury minutes two days prior to the plea offer, the Commonwealth kept the offer open until the next court date, which was four days later (giving the defendant a total of six days to review the grand jury minutes). On this

corroborated the information. Furthermore, the special investigations officers in the Four Corners area spotted the Honda Accord.

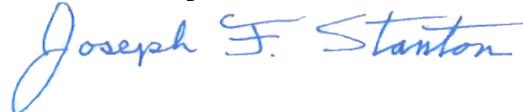
record, the defendant has not shown a "reasonable probability that but for counsel's unprofessional errors," he would have taken the plea (quotations and citation omitted). Commonwealth v. St. George, 89 Mass. App. Ct. 764, 770 (2016). The judge did not abuse her discretion in rejecting the defendant's self-serving affidavit to the contrary. See Commonwealth v. Robello, 450 Mass. 118, 130 (2007).

2. Double jeopardy. The defendant next contends that his convictions of possession of a firearm without a license, pursuant to G. L. c. 269, § 10 (a), and possession of a loaded firearm without a license, pursuant to G. L. c. 269, § 10 (n), violated double jeopardy. However, where (as here) "the Legislature has specifically authorized cumulative punishment under two statutes, even if the two statutes proscribe the same conduct . . . the intent of the Legislature is to be enforced." Commonwealth v. Alvarez, 413 Mass. 224, 232 (1992). General Laws c. 269, § 10 (n), clearly states that one who violates G. L. c. 269, § 10 (a), by means of a loaded firearm, "shall be further punished . . ., which sentence shall begin from and after the expiration of the sentence for the violation of

paragraph (a)" (emphasis added). There was no double jeopardy violation.²

Order denying motion for new trial affirmed.

By the Court (Desmond,
Wendlandt &
McDonough, JJ.³),



Clerk

Entered: March 16, 2020.

² To the extent that any arguments are not expressly addressed, "they 'have not been overlooked. We find nothing in them that requires discussion.'" Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

³ The panelists are listed in order of seniority.