

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

18-P-1548

COMMONWEALTH

vs.

DANIEL L. NASON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial, the defendant, Daniel L. Nason, was convicted of operating a motor vehicle while under the influence of alcohol, second offense; operating a motor vehicle with a suspended license, subsequent offense; and reckless operation of a motor vehicle.<sup>1</sup> On appeal, the defendant argues that the judge erred in denying his motion to dismiss based on the "no-fix" law, see G. L. c. 90C, § 2, and his motions for required findings of not guilty. We affirm.

1. No-fix law. a. Factual background. The judge could have found the following facts at the hearing on the motion to dismiss. See Commonwealth v. Provost, 12 Mass. App. Ct. 479, 480 (1981). On March 8, 2016, a Beverly police officer responded to a motor vehicle accident and found a vehicle

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<sup>1</sup> The second offense and subsequent offense findings were made at a subsequent jury-waived trial.

flipped on its side with two occupants inside. He saw the defendant "standing up on the driver's side window . . . trying to crawl out of the [passenger's side] window," and another man slumped over in the passenger's seat. The officer "had to calm [the defendant] down." The officer did not give the defendant a citation at the scene because "[h]e was uncooperative" and on-scene personnel "had to hold him down to get him to the stretcher to give him emergency care, medical care."

When the officer arrived at the hospital shortly thereafter, the defendant "appeared to be intoxicated" and was "uncooperative and incoherent." He had a "strong odor of alcohol" and a "head injury."<sup>2</sup> When the officer attempted to question the defendant, "he told [the officer] to leave." The officer determined that he was going to charge the defendant with the offenses listed supra, but decided to mail the citation because of the defendant's "head injury, [and] him being uncooperative and incoherent." The officer completed the citation that day; mailed the citation to the address listed for the defendant in records available through the Registry of Motor Vehicles (RMV); and filed it in District Court at 8:19 A.M. the following morning. The defendant, however, lived at a different

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<sup>2</sup> The defendant testified that he had suffered a broken neck in the accident.

address, and thus did not learn of the charges against him until three months later.

b. Discussion. Under the no-fix law, as relevant here, "[a] failure to give a copy of the citation to the violator at the time and place of the violation shall constitute a defense in any court proceeding for such violation, except where . . . the court finds that a circumstance, not inconsistent with the purpose of this section to create a uniform, simplified and non-criminal method for disposing of automobile law violations, justifies the failure." G. L. c. 90C, § 2. "We determine the applicability of [this] exception with reference to the dual purposes of § 2." Commonwealth v. O'Leary, 480 Mass. 67, 71 (2018). Those purposes are (1) "to prevent manipulation or misuse of the citation process because of any unnecessary or unreasonable delay" (citation omitted), and (2) "to afford prompt and definite notice of the nature of the alleged violation to the putative violator" (citation omitted). Id. "[T]he Commonwealth bears the burden to establish the applicability of [this] exception," Commonwealth v. Burnham, 90 Mass. App. Ct. 483, 485 (2016), but "there is no bright-line rule to ascertain whether a particular delay in issuing a citation is justified. Rather, '[e]ach case must be decided on its own peculiar facts'" (citation omitted). Id.

Here, the defendant claims that a dismissal is required because the Commonwealth failed to show any circumstance justifying the failure to give him the citation at the time and place of the violation "or as soon as possible thereafter," and that this failure frustrated both of the statute's purposes.<sup>3</sup> We are not persuaded. The judge correctly determined the officer did "what he need[ed] to do to satisfy the requirements of the statute."

First, the circumstances of the accident scene and concern for the defendant's injuries justified the failure to give him a citation at the time and place of the violation. See Commonwealth v. Russo, 30 Mass. App. Ct. 923, 924 (1991) ("the accident scene was sufficiently chaotic . . . and concern for the injuries of the accident victims sufficiently paramount that handing out citations was not, reasonably, a first order of business").

Second, to the extent there is a requirement to give or transmit the citation to the violator "as soon as possible" after leaving the place of the violation, that requirement was

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<sup>3</sup> Where the statute has been violated, a defendant is entitled to dismissal without any showing of prejudice. Commonwealth v. Ryan, 22 Mass. App. Ct. 970, 971 (1986). Here, defense counsel argued, albeit without evidence at the hearing, that had the defendant learned of the charges within thirty days, he could have obtained potentially exculpatory surveillance video footage, but that the footage had been recorded over by the time the defendant received notice of the charges.

met here.<sup>4</sup> Although the defendant suggests that the officer was required to give him the citation at the hospital, at that time the defendant was intoxicated, uncooperative, incoherent, had a head injury, and, upon being questioned, told the officer to leave. Cf. Commonwealth v. Dias, 358 Mass. 819, 820 (1971) (violator may, by his conduct, forfeit his right to receive citation at time and place of violation). The officer could reasonably determine that giving the defendant the citation in such circumstances would risk the citation's being misplaced or forgotten.

Nor was the officer required, as the defendant suggests, either (1) to leave the citation with a nurse to give to the defendant at the time of his discharge,<sup>5</sup> or (2) to "at least

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<sup>4</sup> When an exception to the no-fix law applies, the law requires that "the violation shall be recorded upon a citation as soon as possible after such violation and the citation shall be delivered to the violator or mailed to him" (emphasis added). G. L. c. 90C, § 2. The court appears to have read this language to require that, when an exception applies, police must "issue a citation and mail or deliver it to the defendant 'as soon as possible after such violation'" (citation omitted). Commonwealth v. Carapellucci, 429 Mass. 579, 581 (1999).

<sup>5</sup> Hospital personnel might or might not be willing and able to accept and carry out such a responsibility. Cf. Commonwealth v. Perry, 15 Mass. App. Ct. 281, 284 (1983) (delivery of citation to hospitalized defendant's father, who had requested that officer not visit defendant because she was in agitated condition, and who gave citation to counsel, consistent with statute; father and counsel were "reasonable surrogates or stand-ins for the offender").

attempt to tuck the citation in with the defendant's clothing."<sup>6</sup> An officer must be allowed reasonable latitude in making a judgment whether to attempt one of these alternative, ad hoc means of delivery at a hospital. "Each case must be decided on its own peculiar facts" (citation omitted). Burnham, 90 Mass. App. Ct. at 485.

The officer here can hardly be faulted for instead following the letter of the statute. He recorded the violation on a citation that same night after leaving the hospital.<sup>7</sup> He then mailed it "to the address appearing on [the defendant's] license or registration as appearing in [RMV] records," which

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<sup>6</sup> The defendant notes that such an approach was adopted in Russo, but there the officers also explained the charges to the violator, who nodded in response. 30 Mass. App. Ct. at 924. It was unclear whether the violator actually found the copy left in his clothing. *Id.* at 924-925 & n.2. Here, in contrast, the officer could reasonably determine, based on the defendant's condition and conduct when seen at the hospital, that attempting to explain the charges to the defendant would have been unproductive or counterproductive.

<sup>7</sup> This timing satisfied the requirement that "the violation shall be recorded upon a citation as soon as possible after such violation." G. L. c. 90C, § 2. See Perry, 15 Mass. App. Ct. at 284 (citation written day after violation, where police had already visited defendant in hospital on night of violation, considered "as soon as feasible"). See also Commonwealth v. Moulton, 56 Mass. App. Ct. 682, 684 (2002) (dismissal not required where officer spoke with defendant at scene, conducted further interview at hospital, returned to police station to write report, and "then promptly mailed the citation to the defendant at the address listed on her license and registration").

the statute expressly permits as an alternative to "deliver[ing]" the citation to the violator. G. L. c. 90C, § 2.

The officer's actions were consistent with the statute's dual purposes. First, nothing he did created any risk of "manipulation or misuse of the citation process because of any unnecessary or unreasonable delay" (citation omitted). O'Leary, 480 Mass. at 71. On the day of the violation, he recorded it on the citation, and he filed the completed citation in the District Court early the next morning.

Second, the officer's actions were consistent with the purpose of "afford[ing] prompt and definite notice of the nature of the alleged violation to the putative violator" (citation omitted). Id. As expressly permitted by the statute, he mailed the citation to the defendant at the address listed in records available through the RMV.<sup>8</sup> That the defendant himself had failed to inform the RMV of his current address, and thus did

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<sup>8</sup> We recognize that, in determining whether the "notice" purpose of the statute has been frustrated, "the cases have given weight to the following factors: whether the notice provisions of the statute have been met by other means, such as by an arrest; whether knowledge is an essential element of the motor vehicle crime charged and is required to be proved at trial; and whether the nature of the driving incident is so serious that the driver is deemed to be on notice" (footnotes omitted). Commonwealth v. Kenney, 55 Mass. App. Ct. 514, 519 (2002). Nothing in Kenney suggests that this list is exclusive, or that compliance with a statutorily-authorized method of giving notice is insufficient where the defendant's own actions caused notice not to be received.

not receive the notice, cannot render the officer's efforts insufficient. "General Laws c. 90, §§ 8 and 26A, required the defendant to provide the [RMV] with his address. These provisions would be meaningless if the [RMV] is not permitted to rely on the accuracy of the information provided thereunder. If the mailing address was incorrect, the defendant should have corrected it." Commonwealth v. Lora, 43 Mass. App. Ct. 136, 144 (1997). Similarly, evidence at the hearing that, unbeknownst to the officer, a more recent address for the defendant existed elsewhere in Beverly Police Department records does not mean that the officer could not rely, as the statute allows, on the address available through the RMV.

This is not a case where some "important feature of the statutory arrangements was . . . flouted through sloth or sheer inattention" (citation omitted). Russo, 30 Mass. App. Ct. at 925. The motion to dismiss the complaint was properly denied.

2. Motions for required findings of not guilty. The defendant asserts that his motions for required findings of not guilty were erroneously denied. He claims there was insufficient evidence that he, rather than the vehicle's other occupant, was the operator of the vehicle. We review to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). We see no error.

The Commonwealth may prove the element of operation using either direct or circumstantial evidence. See Commonwealth v. Woods, 414 Mass. 343, 354-355, cert. denied, 510 U.S. 815 (1993). Here, a Beverly resident heard a loud bang, looked out her window, and saw a vehicle flipped on its side on the street in front of her house. Within sixty seconds she had reached the vehicle and saw "an elderly gentleman," "pinned in the driver's side down." She noticed that the front windshield was cracked on the driver's side, "like a head hitting it," and the elderly man "was right in front of it" in the driver's seat. She saw a "younger" man "in the passenger side."

Upon arrival, the officer observed a "young" individual with his legs in the passenger seat and the middle of his body across the middle console. He observed an "[o]lder individual," who he identified as the defendant, on the driver's side. The defendant was upset and frantic and said to the younger man, "[T]ell them you were driving." The defendant had a bruise on his forehead and gave off an odor of an alcoholic beverage. After the defendant was removed from the vehicle, he admitted to the officer that "he was driving." At trial the defendant stipulated that he had been intoxicated.

Although an uncorroborated confession is insufficient to prove the element of operation, Commonwealth v. Leonard, 401 Mass. 470, 472-473 (1988), here the defendant's admission that he was driving was corroborated by the observations of the two witnesses. The defendant's own words, combined with his position in the vehicle, the bruise on his forehead, and the cracked windshield in front of the driver's seat, sufficed to prove that he was the driver. See Commonwealth v. Beltrandi, 89 Mass. App. Ct. 196, 201 (2016) (officer observed defendant in driver's seat). The motion for a required finding of not guilty at the close of the Commonwealth's case was correctly denied.

Lastly, the defendant claims that his own case caused the Commonwealth's case to deteriorate. "Deterioration occurs where 'evidence for the Commonwealth necessary to warrant submission of the case to the jury is later shown to be incredible or conclusively incorrect.'" Commonwealth v. Ross, 92 Mass. App. Ct. 377, 381 (2017), quoting Kater v. Commonwealth, 421 Mass. 17, 20 (1995). That did not happen here.

The defendant argues that his expert witness's testimony regarding seatbelt wear markings, together with the younger man's admission that he (rather than the defendant) was the driver, triggered the principle that "[w]hen the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by

legitimate proof." Commonwealth v. Fancy, 349 Mass. 196, 200 (1965). However, deterioration does not occur merely "because the defendant contradicted the Commonwealth's evidence." Kater, 421 Mass. at 20. "Because the credibility of the defendant's witnesses and the weight of their testimony are issues for the jury to decide, the Commonwealth's case could not have deteriorated where the defendant's evidence at trial turned solely on the credibility of his witnesses." Commonwealth v. Platt, 440 Mass. 396, 404 (2003). The defendant's renewed motion for required findings at the close of all the evidence was properly denied.

Judgments affirmed.

By the Court (Vuono, Rubin & Sacks, JJ.<sup>9</sup>),

Clerk

Entered: March 17, 2020.

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<sup>9</sup> The panelists are listed in order of seniority.