

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-1533

COMMONWEALTH

vs.

WILSON PAULA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from an order allowing the defendant's motion to suppress based on the unexcused failure of its only witness, a State Police trooper, to appear for two scheduled evidentiary hearings.<sup>1</sup> We affirm.

Background. On May 29, 2018, the defendant, Wilson Paula, was arraigned in the Boston Municipal Court on a criminal complaint charging him with speeding, negligent operation of a motor vehicle, operating under the influence, failing to stop for a police officer, improper storage of a large capacity firearm, and carrying a loaded firearm, while being licensed to do so, under the influence.

On October 30, 2018, the defendant filed a motion to suppress statements, observations, and items seized as the

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<sup>1</sup> The Commonwealth also appeals from a related order denying its motion for a continuance.

result of the trooper's stop of the defendant's car. The motion was supported by the affidavit of the defendant.

At a status hearing held on November 5, 2018, the parties agreed to continue the case until November 16, 2018, for a hearing on the motion to suppress. On the agreed-upon date, the defendant appeared ready to proceed, but the Commonwealth's only witness, the trooper, was not present. The motion hearing was continued, over the defendant's objection, until December 20, 2018.

On December 20, 2018, the defendant requested a continuance because his "key witness, the front seat passenger," was unable to attend because her baby was sick and in the hospital. The defendant requested a hearing date of January 18, 2019. Before agreeing to the date, the prosecutor said, "[W]e're just checking with the troopers sitting right outside to make sure that's a good day for him." After a pause the prosecutor reported, "That works."

As scheduled, the case was called for a hearing on the motion to suppress on the morning of January 18, 2019. The trooper, who had been summonsed to appear, was not present and had not contacted the prosecutor. The judge put the case on for a second call. When the case was called again, approximately two hours later, the trooper was still absent and the prosecutor reported, "We quite frankly aren't having any luck getting in

contact with him." The only information available about the trooper's whereabouts was "that this particular trooper is not working today." The defendant asked the judge to allow the motion to suppress based on the facts that (1) the trooper had twice failed to appear, the second time after having been present in court and agreeing to the date when the hearing was scheduled; (2) the defendant was present with his two civilian witnesses; and (3) the defendant had been present for each prior hearing date, missing work to attend. Because there had been "two motion dates where the trooper has not been present," and "[h]e knew of today's date" and has "not made himself available," the judge allowed the motion to suppress.

A single justice of the Supreme Judicial Court granted the Commonwealth's application for leave to appeal from the suppression order. See Mass. R. Crim. P. 15 (a) (2), as amended, 476 Mass. 1501 (2017).

Discussion. "Generally, '[t]he decision whether to grant a motion to continue lies within the sound discretion of the . . . judge . . . [and a] denial of a continuance will not constitute error absent an abuse of that discretion.'" Commonwealth v. Clegg, 61 Mass. App. Ct. 197, 200 (2004), quoting Commonwealth v. Super, 431 Mass. 492, 496 (2000). "The judge's discretion is not unfettered, however, but bounded by important considerations." Clegg, supra. In considering a request for a

continuance, the judge "should balance the movant's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party if the motion is granted." Super, supra at 496-497. The judge may also consider whether the party seeking the continuance exercised due diligence to obtain available witnesses. See Commonwealth v. Burston, 77 Mass. App. Ct. 411, 416-417 (2010), citing Mass. R. Crim. P. 10 (a) (2) (C), 378 Mass. 861 (1979).

We have found trial judges to have abused their discretion by dismissing cases or allowing motions to suppress where the Commonwealth was unprepared for a single event. In Clegg, 61 Mass. App. Ct. at 199, the Commonwealth's key witness, a police officer, was present for the first scheduled hearing on the defendant's motion to suppress, which was continued because of the defendant's absence.<sup>2</sup> At the next scheduled hearing date, because the officer was out of State for "personal reasons" and unavailable to the Commonwealth, the judge allowed the motion to suppress. Id. We held this to be an abuse of discretion for two reasons. First, because the judge made no inquiry into the witness's reasons for being absent, the judge had no basis to conclude that the absence was not based on good cause. Id. at 201. Second, the defendant did not file a supporting affidavit

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<sup>2</sup> A default warrant against the defendant was issued and removed the same day. Id.

as required by the rules of criminal procedure. Id. at 203-204, citing Mass. R. Crim. P. 13 (a) (2), as appearing in 442 Mass. 1516 (2004).

In Commonwealth v. Borders, 73 Mass. App. Ct. 911, 911 (2009), on the first scheduled trial date, the Commonwealth requested a continuance because two of its necessary witnesses were unavailable. Noting that the case was the "oldest case" because of discovery delays and litigation on the defendant's motion to suppress, the judge dismissed the case with prejudice. Id. at 911-913. We held that the judge abused his discretion, where there was no egregious misconduct by the Commonwealth or prejudice to the defendant to warrant dismissal. Id. at 912-913.

By contrast, in Burston, 77 Mass. App. Ct. at 418, we affirmed the allowance of the defendant's motion to suppress based on the Commonwealth's failure to produce police witnesses for a scheduled evidentiary hearing. The parties had agreed to the date of an evidentiary hearing on the defendant's motion, but the hearing was continued at the prosecutor's request due to illness. Id. at 412. On the next scheduled date, the prosecutor appeared and requested a continuance on the ground that he had not provided the defendants with all outstanding discovery and had not summonsed his police witnesses to attend. Id. at 412-413. When the case was called later that afternoon,

the prosecutor had made no effort to contact the witnesses and continued to cite the outstanding discovery as the reason why he could not go forward. Id. at 413. Considering the prosecutor's reliance on outstanding discovery to be pretext, and because the prosecutor had made no effort to produce witnesses, the judge allowed the motion to suppress. Id. at 413-414. We affirmed the allowance of the motion, contrasting Clegg, where "the judge lacked any factual basis for his implicit conclusion that the officer's absence lacked good cause," and Borders, because "the judge's frustration with the case's age was an inadequate justification for dismissal." Burston, 77 Mass. App. Ct. at 416.

The present case is more like Burston than Clegg or Borders.<sup>3</sup> The same witness failed to appear not just once, but for two scheduled hearing dates. The second time, although he had previously agreed to be present, he did not contact the prosecutor or offer any reason for his absence. The judge could reasonably conclude that the Commonwealth had failed to exercise

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<sup>3</sup> It is also unlike Super, 431 Mass. at 493, where the prosecutor "learned at approximately 4 P.M. on September 15 that the case was scheduled for trial on September 17." The prosecutor promptly contacted the Commonwealth's two witnesses, a civilian and a police officer, but learned that the officer would be away on vacation the day of the trial. Id. at 494. The court held that the judge abused his discretion in denying the Commonwealth's motion to continue, noting that the prosecutor exercised due diligence and that the short notice of trial made it "difficult, if not nearly impossible, for the witnesses to be available." Id. at 497.

due diligence to obtain available witnesses. See Burston, 77 Mass. App. Ct. at 417. Unlike in Clegg, the motion to suppress was supported by affidavit. Moreover, the allowance of the motion to suppress here is not "tantamount to dismissal with prejudice." Clegg, 61 Mass. App. Ct. at 201. The charges for negligent operation and speeding, which are based on conduct that occurred prior to the stop, are still viable.

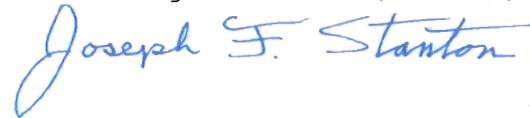
"The judge's disposition may have been severe but it was not abuse of discretion." Burston, 77 Mass. App. Ct. at 418. Although this court may have acted differently than the motion judge, "[i]t is not an abuse of discretion 'simply because a reviewing court would have reached a different result.'"

Commonwealth v. Espinal, 482 Mass. 190, 197-198 (2019), quoting  
L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Order denying motion to  
continue affirmed.

Order allowing motion to  
suppress affirmed.

By the Court (Meade,  
Massing & Desmond, JJ.<sup>4</sup>),



Clerk

Entered: May 22, 2020.

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<sup>4</sup> The panelists are listed in order of seniority.