

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

20-P-570

COMMONWEALTH

vs.

HECTOR GARCIA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Hector Garcia, appeals from the order denying his emergency motion for release from an unlawful sentence pursuant to Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001). Specifically, he argues that the risk of exposure to COVID-19 resulting from his incarceration amounts to cruel and unusual punishment thereby rendering his jail sentence illegal under the Eighth Amendment to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights. We affirm.

Background. On October 23, 2017, a jury found the defendant guilty of armed robbery in violation of G. L. c. 265, § 17; assault and battery upon a public employee in violation of G. L. c. 265, § 13D; and threatening to commit a crime in violation of G. L. c. 275, § 2. The judge sentenced the

defendant to a six-to-seven-year prison sentence for the armed robbery conviction, and to three years' probation on the remaining convictions, the probation portion of the sentence to run from and after the committed sentence for armed robbery. The defendant, who is fifty-one years of age, is currently serving the final year of the armed robbery sentence at the Massachusetts Correctional Institute at Shirley (MCI-Shirley).

On April 22, 2020, the defendant filed a motion for relief from unlawful restraint or, in the alternative, to stay the execution of his sentence pending his appeal from the order denying his motion for a new trial in the Superior Court. On May 4, 2020, the motion judge, who was also the trial judge, denied the defendant's motion.¹ We note that the defendant appealed the order denying his motion for a stay of execution of sentence to a single justice of this court; the single justice denied the request for a stay and ordered that his appeal from the order denying his rule 30 (a) motion be expedited. The defendant does not challenge the order denying his motion for a stay; we therefore review only the order denying the defendant's motion for relief from unlawful restraint.

¹ The motion judge's rulings focused primarily on the stay; regarding the legality of the sentence, he explained that "[t]here is no basis to disturb the sentence. It is lawful."

Discussion. As an initial matter, it may be that rule 30 (a) is not the appropriate vehicle to raise to raise a claim under the Eighth Amendment or art. 26. The defendant's quarrel is not with the sentence when imposed but with the conditions of his current confinement. See rule 30 (a) ("Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts" [emphasis added]). However, in an abundance of caution, we address the merits of the defendant's argument.

Rule 30 (a) permits a defendant to seek relief from an illegal sentence. See Commonwealth v. Walters, 479 Mass. 277, 280 (2018) ("Our review of criminal sentences is limited. Commonwealth v. Coleman, 390 Mass. 797, 804 [1984]. This court will review a sentence only to determine if it is illegal or unconstitutional. Commonwealth v. Molino, 411 Mass. 149, 155 [1991]"). Here, the defendant argues that the exposure to COVID-19 resulting from his incarceration amounts to cruel and unusual punishment, rendering his jail sentence illegal and unconstitutional under art. 26 and the Eighth Amendment. "To succeed on an Eighth Amendment claim, a [defendant]-inmate must

demonstrate that (1) a prison's conditions of confinement present 'a substantial risk of serious harm'; and (2) prison officials acted with 'deliberate indifference' to inmate health or safety'" (citation omitted). Torres v. Commissioner of Correction, 427 Mass. 611, 613-614 (1998).

As an initial matter, because there can be no real dispute that limits on physical distancing in prisons during the COVID-19 pandemic have increased the risk of contracting the virus in prisons, incarceration presents a "substantial risk of serious harm" (citation omitted). Foster v. Commissioner of Correction (No. 1), 484 Mass. 698, 718 (2020). Accordingly, we turn to whether prison officials acted with deliberate indifference to inmate health or safety.

Recently, in Foster (No. 1), 484 Mass. 698, the Supreme Judicial Court addressed the merits of a similar claim, brought by a class of inmates, alleging that the conditions of their confinement exposed them to unreasonable risks from the COVID-19 pandemic. The case turned on whether the plaintiffs demonstrated that prison officials acted or failed to act with deliberate indifference. Id. at 718-719. In other words, the question was whether the Department of Correction (DOC) knew of and disregarded an "an excessive risk to inmate health or safety." Id. at 717, quoting Farmer v. Brennan, 511 U.S. 825, 837 (1994). The court held that "[w]here the risk of serious

harm is substantial, but prison officials have undertaken significant steps to try to reduce the harm and protect inmates . . . [it is unlikely that] deliberate indifference on the part of the DOC [will be able to be established] regarding their conditions of confinement as a result of the pandemic." Foster (No. 1), supra at 720, 724. In reaching its conclusion, the court detailed the significant measures taken by the DOC in addressing the pandemic.² See id. at 704-710. In particular, the court considered the number of confirmed cases at MCI-Shirley, and the fact that MCI-Shirley (a "medium security" institution) is at eighty-one percent of its operational capacity and 121 percent of its design capacity. Id. at 704 n.11.

The defendant cites to nothing that the DOC could be doing at MCI-Shirley but is not doing, beyond those steps that the court considered in Foster (No. 1).³ See 484 Mass. at 704-710

² The court relied, in part, on the findings submitted by a Superior Court judge who, by special assignment, conducted a series of evidentiary hearings, took limited testimony from all parties over three days, and collected affidavits. Foster (No. 1), 484 Mass. at 700-701.

³ The defendant asserts that the DOC is not following protocols from the Centers for Disease Control for congregant-living facilities by canceling all time out of doors; failing to arrange for individual as opposed to group showers; failing to disinfect or even to wipe down frequently touched surfaces; failing to refill pump bottles of hand sanitizer, apparently as a sanction for inmates using it up too quickly (which the staff characterize as "stealing" hand sanitizer); failing to supply cleaning and disinfectant products to inmates who want to clean

(particularly, sections entitled "Physical distancing"; "Facility sanitation and personal protective equipment"; "Entrance screenings and quarantines"; "Testing"; and "Decreasing population"). See also id. at 739 (Gants, C.J., concurring); id. at 721-722 (canceling outdoor time reduces inmates congregating in close contact with each other). Accordingly, because the defendant has failed to establish deliberate indifference, his Eighth Amendment claim fails.

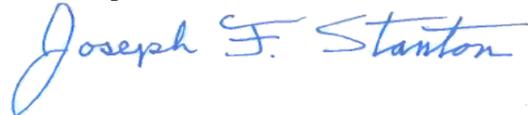
For identical reasons, we reject the defendant's contention that the motion was improperly denied under art. 26. In Foster (No. 1), 484 Mass. at 716, the court noted specifically that it has "not held that art. 26 provides greater protections with respect to conditions of confinement than does the Eighth Amendment," stating, however, that "the rights guaranteed under art. 26 'are at least equally as broad as those guaranteed under the Eighth Amendment,'" Torres, 427 Mass. at 615-616, quoting Michaud v. Sheriff of Essex County, 390 Mass. 523, 534 (1983). A prisoner seeking relief under art. 26 "must point to both (1) a condition or situation which poses a substantial risk of serious harm; and (2) facts establishing that a prison official

their cells; failing to enforce mask wear among staff members who interact with prisoners; continuing to "double-bunk" prisoners in eight by twelve cells; continuing to maintain occupancy at 121 percent of design capacity; failing to isolate infected and exposed individuals; and failing to implement "comprehensive test-and-trace."

has knowledge of the situation and ignores it" (citation and quotations omitted). Torres, supra. As previously discussed, the defendant has failed to provide evidence of the second requirement. Consequently, the judge properly denied the defendant's motion.

Order denying motion for
release from unlawful
restraint affirmed.

By the Court (Hanlon, Sacks &
Singh, JJ.⁴),



Clerk

Entered: June 29, 2020.

⁴ The panelists are listed in order of seniority.