

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-826

COMMONWEALTH

vs.

RONNIE M. HARRIS.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in 1975, the defendant was convicted of murder in the second degree, assault with intent to murder, and unlawful possession of a firearm. In very brief summary, the facts were that the nineteen year old defendant engaged in a street confrontation over drugs and fired a firearm at two people. One he missed; the other he killed. A fuller description of the facts may be found in the decision of the Supreme Judicial Court, which affirmed the defendant's convictions on direct appeal and included plenary review under G. L. c. 278, § 33E.² See Commonwealth v. Harris, 376 Mass. 201

¹ Since his indictment, the defendant has legally changed his surname to Salaam.

² At the time, convictions of murder in the second degree were entitled to plenary review. See Commonwealth v. Billingslea, 484 Mass. 606, 613 (2020) ("After the 1962 amendment until 1979,

(1978). The defendant was sentenced to life in State prison on his murder conviction,³ and remained incarcerated until 1989, when he was released on parole. He was returned to prison in 2018 after he was charged with committing an indecent assault and battery on his stepdaughter twenty years earlier,⁴ and was sentenced to serve two years. He currently remains incarcerated at the Massachusetts Correctional Institution at Norfolk (MCI-Norfolk).

In August 2019, the defendant filed his first motion pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), seeking to vacate his convictions and for a new trial. That motion was denied on March 24, 2020, in a detailed memorandum of decision and order. However, because of staffing limitations in the Superior Court clerk's office due to COVID-19, the order was not docketed until April 10, 2020. As a

a capital case under § 33E was one in which a defendant was tried on an indictment for murder in the first degree and convicted of murder in either the first or second degree"). "In 1979, § 33E was amended to eliminate special review by [the Supreme Judicial Court] of convictions of murder in the second degree based on indictments charging murder in the first degree. St. 1979, c. 346, § 2." Billingslea, supra.

³ On the conviction of assault with intent to murder, the defendant was sentenced to eight to ten years, concurrent with the murder sentence; the possession conviction was placed on file.

⁴ He was also charged with a second incident of indecent assault and battery that allegedly took place in 2006, but was acquitted of that charge.

result, when defense counsel filed an emergency motion to stay based on Mass. R. Crim. P. 31, as appearing in 454 Mass. 1501 (2009), and Christie v. Commonwealth, 484 Mass. 397, 400 (2020), she did not know that the rule 30 motion had already been denied. The Superior Court judge denied the emergency motion to stay based primarily on the fact that she lacked jurisdiction to consider it given that the rule 30 motion had already been decided. The defendant filed a timely notice of appeal on April 10, 2020.

The defendant then filed an emergency motion pursuant to Mass. R. A. P. 6, as appearing in 481 Mass. 1608 (2019), with the single justice of this court, which the single justice denied in a brief order on April 30, 2020. Before us now is the defendant's appeal from the single justice's order.⁵ Because the Commonwealth had not filed an opposition to the defendant's emergency motion to stay in the trial court, nor had it filed one with the single justice, we solicited (and received) a response from the Commonwealth. Although not solicited, we also received two further responses from the defendant. After considering the materials that were filed in the trial court, those that were filed with the single justice, and those that have been filed in this appeal, we affirm.

⁵ The single justice allowed the defendant's motion to file a late notice of appeal.

"The power to stay a sentence pending appeal 'may be exercised by the sentencing judge, by a single justice of the Appeals Court, or by a single justice of [the Supreme Judicial Court].'" Christie, 484 Mass. at 400, quoting Commonwealth v. Allen, 378 Mass. 489, 496 (1979). "When considering the merits of a motion to stay the execution of a sentence, a judge should consider two factors. First is whether the appeal presents 'an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.' [Allen, supra at 498], quoting Commonwealth v. Levin, 7 Mass. App. Ct. 501, 504 (1979). See [Commonwealth v. Cohen (No. 2), 456 Mass. 128, 132 (2010)].

Second, the judge should consider 'the possibility of flight to avoid punishment; potential danger to any other person or to the community; and the likelihood of further criminal acts during the pendency of the appeal.' Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980)." Christie, supra. "In ordinary times, in considering the second factor, a judge should focus on the danger to other persons and the community arising from the defendant's risk of reoffense. See [Cohen (No. 2), supra; Hodge (No. 1), supra]. In these extraordinary times, a judge deciding whether to grant a stay should consider not only the risk to others if the defendant were to be released and reoffend, but also the health risk to the defendant if the defendant were to

remain in custody. In evaluating this risk, a judge should consider both the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the specific risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus." Christie, supra at 401-402. Whether presented in the trial court, or here, the decision whether to grant a stay is within the sound discretion of the judge or justice. Cohen (No. 2), supra.

The defendant contends that the appeal from the order denying his rule 30 (b) motion raises several issues that offer some reasonable possibility of success on appeal. Specifically, the defendant identifies the following appellate issues. First, he contends that the jury were improperly instructed regarding the Commonwealth's burden of proof because the instructions referred several times to "moral certainty." Second, he contends that the instructions regarding malice were erroneous in various respects and that they shifted the burden of proof. See Sandstorm v. Montana, 442 U.S. 510 (1979). The Commonwealth concedes error to the extent the instructions ran afoul of Sandstrom.

With the exception of his argument based on Sandstrom (which announced a new, retroactive, rule), the defendant's

arguments are subject to the preclusive effect of the Supreme Judicial Court's § 33 plenary review during his direct appeal. See Commonwealth v. Smith, 460 Mass. 318, 320 (2011). The defendant's argument based on Sandstrom is not estopped by the Supreme Judicial Court's plenary review, and we accept the Commonwealth's concession of error with respect to that portion of the instructions. However, in considering whether the issue presents some possibility of a successful decision on appeal from the order denying his rule 30 (b) motion, we have taken into the account the standard of review, as explained in Commonwealth v. Repoza, 400 Mass. 516, 519 (1987), and Francis v. Franklin, 471 U.S. 307, 315 (1985), which requires that the error be placed in context of the instructions as a whole and the theory of defense at trial.

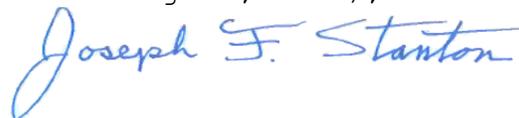
We have carefully considered the materials submitted by the parties, including the materials that were filed below. We have also considered the judge's decision on the rule 30 (b) motion. In addition, we have accepted the defendant's criminal and life history as he has presented it, including his time as a "model" prisoner, and his success during his twenty-nine years of release on parole. We have also accepted that the defendant is sixty-five years old, and that he has various medical conditions that place him at heightened risk of serious illness or death should he contract COVID-19. We have also considered that the

Commonwealth has not been successful at keeping MCI-Norfolk free of COVID-19, nor is there any guarantee that it will be able to do so in the future. We have also taken note that the Commonwealth has not shown that the defendant would present a risk of flight or to others were he to be released pending appeal, nor does the Commonwealth contest his age and medical risk factors. In other words, the second and third factors of Christie weigh in the defendant's favor in considering whether his sentence should be stayed pending appeal.

However, in light of our views on the first factor, we conclude that the single justice did not abuse his discretion in denying the defendant's emergency motion for stay pending appeal and, after exercising our independent review, we reach the same conclusion ourselves.

Order of single justice
denying emergency motion to
stay sentence affirmed.

By the Court (Vuono, Meade &
Wolohojian, JJ.⁶),



Clerk

Entered: August 28, 2020.

⁶ The panelists are listed in order of seniority.