

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

19-P-464

COMMONWEALTH

vs.

YANNICK Y., a juvenile.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The juvenile entered a conditional plea pursuant to Commonwealth v. Gomez, 480 Mass. 240, 252 (2018), and was adjudicated delinquent by reason of possession of a class D substance with intent to distribute, a school or park zone violation, carrying a firearm without a license, and possession of ammunition without a firearm identification (FID) card.<sup>1</sup> On appeal, the juvenile challenges the orders denying his motion to suppress evidence, and his related motion to reconsider. We reverse.

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<sup>1</sup> The charge in the delinquency complaint for trespass was dismissed with the parties' agreement.

Background. The following facts are derived from the testimony at the suppression hearing.<sup>2</sup> On June 7, 2018, at approximately 4:00 P.M., Detective Sergeant Joseph Beaulieu and Detective Sean O'Keefe of the Lawrence police department's gang unit responded to a call that a group was "hanging out" in front of a wooden two- or three-family home.<sup>3</sup> That residence is situated across the street from a park frequented by members of a particular gang. The identity of the caller was unknown, but the police had previously received multiple calls from the owner of the residence reporting "kids hanging out" on his property. Beaulieu explained that those reports usually pertained to the same group of individuals who were affiliated with the gang. The police advised the owner that if he did not want people on his property, he could post no trespass signs. Two such signs were posted on the property on the day at issue.

When the police arrived at the home, they observed the juvenile and two other individuals sitting on the front cement staircase to the home. Beaulieu recognized the juvenile and one of the other individuals as self-identified members of the gang; he did not recognize the third individual.

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<sup>2</sup> The judge explicitly credited the testimony of both witnesses. See Commonwealth v. Isaiah I., 448 Mass. 334, 337 (2007), S.C., 450 Mass. 818 (2008).

<sup>3</sup> In her findings, the judge erroneously listed the date as June 3, 2017. This does not affect our analysis.

Beaulieu and O'Keefe got out of their cars, displayed their badges, and approached. Beaulieu engaged the juvenile, informed him of the no trespass signs, and discussed "the problems we've been having over there." Beaulieu placed the juvenile under arrest for trespass. During a search incident to the juvenile's arrest, Beaulieu recovered one plastic baggie containing ten individually wrapped packages of marijuana, a digital scale, and a firearm.

At some point, the police confirmed that the juvenile and the other individual who was a self-identified gang member did not live at the residence. The juvenile, in fact, lived in the house next door, which was only steps away.

The third individual in the group who was previously unknown to Beaulieu was placed in handcuffs. However, the police learned that he lived in the home, so he was not arrested and was sent inside. The police did not ask the tenant whether the juvenile was allowed on the premises. The tenant testified that his grandfather owned the residence and posted the no trespass signs, the tenant and the juvenile grew up together, the juvenile regularly visited the house, the juvenile was welcome as a guest there, and the grandfather never expressed that the juvenile was not welcome.

Discussion. 1. Erroneous factual findings. As an initial matter, we do not consider two of the judge's factual findings

because they are clearly erroneous. See Commonwealth v. Rodriguez, 472 Mass. 767, 769 (2015) (appellate court adopts judge's factual findings absent clear error). See also Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 558-559 & n.1 (1994) (eliminating finding based on reading of transcript as clear error).

First, as both parties concede, the judge's finding that the juvenile and the other individual were known to Beaulieu as self-identified gang members "who often gathered at the [address of the multifamily home]" was clear error. Beaulieu clarified that he knew the juvenile not from gathering at the residence, but from the area and the park across the street which was a known "hangout" for the gang.

Second, the judge's finding that Beaulieu placed the juvenile under arrest only after learning that the juvenile did not live at the residence, and that the tenant did, is unsupported by any evidence in the record. Beaulieu never testified whether he discovered the information about where each of the three individuals lived before or after the arrest. While not dispositive on the issue, the tenant's testimony that he was placed in handcuffs but then released suggests that this information was learned only afterwards. Regardless, we eliminate the finding as to the timing of this discovery based on the absence of support in the record. See Commonwealth v.

Burton, 450 Mass. 55, 61 (2007) (finding is clearly erroneous if not supported by evidence).

2. Probable cause to arrest. The Commonwealth bears the burden of demonstrating that probable cause supported a warrantless arrest upon which a search was undertaken. See Commonwealth v. Chown, 459 Mass. 756, 763 (2011). "[P]robable cause exists where, at the moment of arrest, the facts and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Id., quoting Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992).

Here, the juvenile was arrested for trespass, which occurs when one "without right enters or remains [on the property] of another, . . . after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon." G. L. c. 266, § 120. See Commonwealth v. Wolf, 34 Mass. App. Ct. 949, 949 (1993) (statute applies to steps leading to building). "The phrase 'without right' . . . connote[s] the absence of any right, permission, or license recognized by law as permitting an entry into an area described by the statute" (quotation omitted). Commonwealth v. Alvarez, 480 Mass. 1017, 1019 (2018), quoting Wolf, supra at 951.

Considering the totality of the circumstances, the Commonwealth failed to meet its burden of demonstrating that probable cause existed to arrest the juvenile for trespass, because the police had inadequate information to believe that the juvenile was on the premises "without right." Alvarez, 480 Mass. at 1019. The Commonwealth presented no evidence that prior to the arrest the police officers conducted any sort of inquiry to determine whether any of the individuals lived in the residence or were present on the premises without right.<sup>4</sup> See Commonwealth v. Pridgett, 481 Mass. 437, 441-442 (2019) (arrest unlawful where police lacked probable cause as to one element of suspected crime and did not conduct inquiry of individual to gain more information). See also United States v. Struckman, 603 F.3d 731, 742-743, 746 (9th Cir. 2010) (accepting for purposes of analysis, but expressing doubt that probable cause existed to arrest where officer could have easily confirmed or dispelled suspicion that individual trespassing in backyard by asking few simple questions).

The Commonwealth also failed to demonstrate that in the absence of such an inquiry, they had specific information that

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<sup>4</sup> Even if the officers learned that the juvenile did not live at the residence, and that the tenant did, before the juvenile's arrest, as the judge found, that information would have provided an even stronger basis for the officers to conduct a further inquiry to determine whether the juvenile was an invited guest of the tenant.

the owner of the property sought to exclude the juvenile from the premises. Rather, at the time of arrest, the police were equipped only with information that the owner sought to exclude young people, including members of the same gang as the juvenile, from his property.<sup>5</sup> Contrast Commonwealth v. Richardson, 313 Mass. 632, 635-636 (1943) (owner told defendants to leave, called police, then told police officer who responded he did not want defendants in building); Commonwealth v. Nelson, 74 Mass. App. Ct. 629, 631 (2009) (officer recognized defendant whom he previously arrested and told to stay away from property).<sup>6</sup> That information standing alone was insufficient to provide probable cause to arrest the juvenile. See Commonwealth v. Heon, 44 Mass. App. Ct. 254, 256 (1998) (officer may consider

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<sup>5</sup> No evidence was presented that the owner himself ever identified the group that he complained of as members of the gang, or that the owner specified that he sought to exclude individuals from the property by virtue of their gang membership. Moreover, no evidence was presented either that the juvenile was part of the group that was the subject of the owner's previous complaints, or that the owner otherwise complained to the police about the juvenile's presence on the property. To the contrary, Beaulieu testified that he was unaware of any police officer ever speaking to the juvenile about "hanging out" at the residence.

<sup>6</sup> The cited cases are factually distinguishable and address whether sufficient evidence existed to convict for trespass rather than the significantly lower standard of probable cause to arrest. See Commonwealth v. Gallant, 453 Mass. 535, 541 (2009). However, it is notable that in both instances the police had specific information that the owner sought to exclude the defendant or defendants from the premises at the time of arrest.

defendant's membership in group but "is not entitled to conduct a [Terry-type] search merely because the defendant belongs to a group which is not outlawed"). Cf. Commonwealth v. Pierre P., 53 Mass. App. Ct. 215, 218-219 (2001) (no reasonable suspicion to stop juvenile dressed in gang colors observed with others similarly dressed and one known gang member at late hour in high crime area where residents and business owners previously complained of gang members in area).

To hold otherwise would permit the police to arrest an individual for trespass without taking the basic step of attempting to determine whether the individual was legally on the premises as a resident, invited guest, or otherwise. See Commonwealth v. Hood, 389 Mass. 581, 589 (1983) ("A tenant has a right to admit any visitor"). See also Restatement (Second) of Torts § 189 (1965) (tenant's guest has same privilege as tenant to use common areas at reasonable times in reasonable manner).<sup>7</sup>

Here, the police officers would have been justified in conducting a further inquiry to assess the group's reason for being present on the property. See Commonwealth v. Mathis, 76 Mass. App. Ct. 366, 369 & n.7 (2010) (police may request

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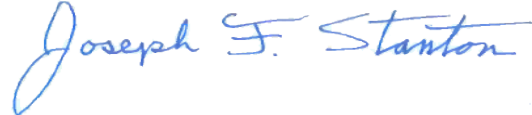
<sup>7</sup> Without any affirmative information that the owner sought to exclude the juvenile from the premises, we disagree with the judge that even as an invited guest of the tenant, the juvenile only would have been permitted to pass through the common areas of the building to reach the tenant's apartment and not to "linger or loiter" on the steps.



identification from individual in front of building with no trespass sign). Depending on the nature of that encounter, the police officers may or may not have then developed probable cause to arrest those present for trespass. See Pridgett, 481 Mass. at 441-442. Cf. District of Columbia v. Wesby, 138 S. Ct. 577, 587 (2018) (probable cause to arrest partygoers for trespass where they gave "vague and implausible responses" when asked who had given permission to be at house). However, the police did not do so here.<sup>8</sup>

Order denying motion to  
suppress evidence reversed.

By the Court (Sullivan,  
Henry & Hand, JJ.<sup>9</sup>),

  
Clerk

Entered: August 31, 2020.

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<sup>8</sup> For the same reasons, we reject the judge's alternative holding that the evidence should not be excluded because the officers reasonably concluded that the juvenile was trespassing at the time of the arrest.

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