

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-930

COMMONWEALTH

vs.

THOMAS A. SMITH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This is an expedited appeal from the order of a single justice of this court denying an emergency motion to stay execution of sentence pending appeal. For the reasons that follow, we affirm the order.

Background. A District Court jury convicted the defendant of assault and battery on a household member and assault and battery on an elderly or disabled person. He was sentenced to a two and one-half year sentence on the conviction of assault and battery of an elderly or disabled person, and four years of probation on the conviction of assault and battery on a household member. He is currently incarcerated at the Middlesex house of correction, and is due to be released in November of this year. Meanwhile, the defendant's appeal from the judgments is pending. See Commonwealth vs. Smith, Appeals Ct., No. 19-P-

998. The defendant filed an emergency motion for a stay of the execution of his sentence pending his appeal, based in significant part on the pendency of the COVID-19 pandemic. On August 3, 2020, after a District Court judge denied that motion and the defendant's motion for reconsideration, the defendant sought a stay from a single justice of this court. The single justice denied the defendant's motion for a stay on August 12, 2020, explaining her reasoning in a thoughtful, five-page memorandum and order. Before us now is the defendant's appeal from the single justice's order.

Discussion. We review the single justice's denial of the motion to stay for an abuse of discretion. See Commonwealth v. Cohen (No. 2), 456 Mass. 128, 132 (2010).

"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.' Commonwealth v. Allen, 378 Mass. 489, 498 (1979), quoting Commonwealth v. Levin, 7 Mass. App. Ct. 501, 504 (1979). . . . 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 v. Commonwealth, 484 Mass. 397, 400 (2020).

"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)], 456 Mass. at 132; Hodge [(No.1)], 380 Mass. at 855. 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, 484 Mass. at 401-402.

As she noted in her memorandum and order, the single justice denied the motion after "review[ing] the materials submitted by the defendant in support of his motion, the motion judge's decision, the Commonwealth's opposition, and the current COVID-19 infection statistics at the Middlesex [h]ouse of [c]orrection." We have reviewed the same material, as well as the additional memoranda submitted by the parties and the updated infections statistics for the Middlesex house of correction. We conclude, based on our review, that the single justice did not abuse her discretion.

With regard to the underlying merits, the defendant argues that his rights under the confrontation clause of the Sixth Amendment to the United States Constitution were violated by the introduction in evidence of statements that the victim of the

assaults made to police officers.¹ Those statements were made after the police responded to the scene where they found the defendant apparently pinning the victim, who is blind, to the floor. According to the trial transcript, after the police separated the victim from the defendant, the victim was still "yelling" for the police and in response to an officer asking what had happened, the victim stated that "he hit me," then identified "he" as the defendant, her husband of eleven years. The Commonwealth argues that even though the police had separated the defendant and the victim, the statements that the victim made qualify readily as "excited utterances." See Commonwealth v. Galicia, 447 Mass. 737, 744 (2006), quoting Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"). The Commonwealth also argues that a recent case cited by the defendant provides little support for the defendant's argument. See Commonwealth v. Rand, 97 Mass. App. Ct. 758, 765-767 (2019) (recorded 911 conversation in which victim told police that boyfriend assaulted her ruled

¹ At least in this emergency appeal, the defendant no longer presses the lead argument he presented to the motion judge and the single justice: the absence of a jury instruction on the doctrine of necessity.

nontestimonial, even though subsequent conversation between victim and responding officers where scene no longer volatile and defendant not present ruled testimonial). Nonetheless, and without expressing an opinion on the merits of the appeal, we will assume without deciding that the defendant has raised an appellate issue worthy of presentation to an appellate court.

The single justice concluded that the defendant posed a security risk if released. Indeed, the defendant acknowledges that his criminal record is "admittedly lengthy," and it indisputably includes multiple convictions of violations of abuse prevention orders and other crimes of violence, as well as adjudications of probation violations. If this were all the case presented, then the single justice's determination would clearly be within the scope of her discretion. The question before us is whether the risk presented by COVID-19 in this case takes the decision to deny a stay outside the scope of that discretion.

The single justice acknowledged that she considered the defendant's age (fifty-five),² which presented some elevated risk, while not by itself placing him in a high risk category. The defendant claims to suffer from hypertension, although he provided no medical documentation of that. Nonetheless, we will

² The defendant turned fifty-six years old shortly after the issuance of the single justice's order.

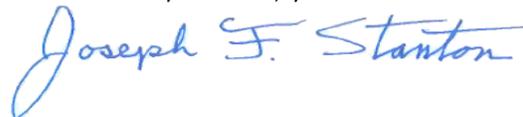
assume that he does in fact suffer from hypertension. The single justice noted, and the Commonwealth points out, that there also was no evidence whether the defendant's hypertension was being controlled by medication. We are not aware, however, of any study indicating that hypertension ceases to be a risk factor for those infected with COVID-19 if it is being controlled. Nor has either party presented any evidence on the issue. Nonetheless, even if the single justice's reliance on the absence of such evidence were error, we conclude that the order must be affirmed. Even assuming that, as a fifty-five year old with hypertension, the defendant faces an elevated risk of serious disease should he become infected with SARS-CoV-2, the single justice's decision to deny the defendant's motion for a stay of execution of sentence pending appeal did not fall outside the range of "reasonable alternatives," and therefore did not constitute an abuse of discretion. L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Although the single justice did not specifically discuss "the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff," we note that, while there were five known active COVID-19 cases at the Middlesex house of correction during the week that the defendant filed his motion for a stay with the single justice, that number had dropped to zero during the week that

she denied his motion.³ Christie, 484 Mass. at 401. (To the extent that the defendant relies on the fact that he is scheduled to be released in November of this year in any event, that fact cuts in both directions.)

In sum, even if we were to assume that the defendant has presented an issue worthy of appellate review, we conclude that the stay need not have been granted as a matter of law, when his claim is balanced with the safety and security risks respectively presented by his release or continued incarceration.

Order of single justice
denying motion to stay
sentence affirmed.

By the Court (Rubin, Milkey &
Hanlon, JJ.⁴),



Clerk

Entered: September 8, 2020.

³ See special master weekly reports, filed pursuant to Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court (No. 1), 484 Mass. 431, 448-449 (2020). According to a recent such report, there was one active COVID-19 case during the week of August 13 to 19, 2020, but that number returned to zero for the week of August 20 to 26, 2020. See special master report of August 27, 2020, <https://www.mass.gov/doc/sjc-12926-special-masters-weekly-report-8272020/download> [<https://perma.cc/N3XP-AHZY>].

⁴ The panelists are listed in order of seniority.