

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-953

COMMONWEALTH

vs.

ROBERT FOXWORTH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In 1992, the defendant, Robert Foxworth, was convicted after a jury trial in the Superior Court of murder in the second degree and sentenced to life imprisonment. He is presently serving that sentence at the Massachusetts Correctional Institution at Shirley (MCI-Shirley). He now appeals from a single justice order denying his petition to stay further execution of the remainder of his sentence. He claims that the single justice abused her discretion in denying his requests for relief. We affirm.

In April 2017, the defendant filed in the Superior Court a third motion for new trial, pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). That motion is still pending. The defendant contends that he supplemented that motion in February 2020, while the Commonwealth contends that

this filing was the defendant's fourth motion for new trial. The Commonwealth's response was originally due in May 2020 and is now due no later than September 30, 2020.

On April 8, 2020, the defendant filed in the Superior Court a motion to stay his sentence, citing Mass. R. Crim. P. 31 (a), as appearing in 454 Mass. 1501 (2009), based on the Supreme Judicial Court decision in Christie v. Commonwealth, 484 Mass. 397 (2020). In a comprehensive and thoughtful decision and order, the motion judge denied the motion. The defendant then filed a motion in this court to stay further execution of his sentence pursuant to Mass. R. A. P. 6 (a), as appearing in 481 Mass. 1608 (2019). A single justice conducted an independent review of the record. After considering all relevant factors, the single justice reached the same conclusion as the motion judge and denied the motion on August 6, 2020. The defendant filed a timely notice of appeal. On August 25, 2020, pursuant to Appeals Court Administrative Order 20-3(III)(3)(c), the defendant's expedited appeal from the single justice order denying his motion to stay further execution of his sentence was referred to this panel.

"When considering the merits of a motion to stay the execution of a sentence, a judge should consider two factors." Christie, 484 Mass. at 400. "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.'" Id., quoting Commonwealth v. Allen, 378 Mass. 489, 498 (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.'" Christie, supra, quoting Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980).

Because of the risk COVID-19 poses to inmates, the Supreme Judicial Court recently added a third factor.

"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 his 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. We review the denial of a motion to stay execution of a sentence for abuse of discretion. See Commonwealth v. Cohen (No. 2), 456 Mass. 128, 132 (2010).

In the present case, the defendant raises on appeal his claim that under Brady v. Maryland, 373 U.S. 83, 87 (1963), the government failed to disclose certain evidence, including that a confidential informant told a police officer that the

co-defendant bragged that he killed the victim. Though the single justice agreed with the motion judge that, on the current record, "it is not clear that the defendant can establish the requisite prejudice," the single justice concluded that the defendant's claim is at least worthy of presentation. We have reviewed the entire record before us and agree.

Even assuming, arguendo, that the defendant has shown "some reasonable possibility of a successful decision in the appeal" (citation omitted), Allen, 378 Mass. at 498, we are not persuaded that the defendant has established that he presents no danger to the community, and that he is not likely to commit additional criminal acts during the pendency of his appeal. See Hodge (No. 1), 380 Mass. at 855. We acknowledge that the defendant's release plan includes a suitable place to live and an employment plan, and that the defendant has improved his conduct in prison in more recent years. Nevertheless, these factors are outweighed by other factors, including but not limited to the seriousness of the offense in this case, the defendant's serious criminal history, including firearm offenses, and his lengthy disciplinary history while incarcerated. Indeed, the defendant violated his Federal probation conditions after obtaining release during the pendency of a Federal habeas corpus litigation.

As for the third consideration required under Christie, 484 Mass. at 401-402, we again discern no abuse of discretion in the determinations made by the single justice. We note the single justice's thorough and full consideration of the relevant factors, including but not limited to the defendant's age and medical condition (hypertension), mitigating factors, difficulties in social distancing during incarceration, unique difficulties faced by correctional institutions during this pandemic in keeping their populations safe, and the motion judge's determinations regarding these factors. We also note that there have been no confirmed cases of COVID-19 infection at MCI-Shirley since the week of June 22, 2020.

We therefore discern no abuse of discretion in the single justice's denial of the defendant's motion.

Order of single justice  
denying motion to stay  
further execution of  
sentence affirmed.

By the Court (Maldonado,  
Henry & Wendlandt, JJ.<sup>1</sup>),

  
Clerk

Entered: September 8, 2020.

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<sup>1</sup> The panelists are listed in order of seniority.