

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-1384

COMMONWEALTH

vs.

DILSSON HERNANDEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a joint trial in the Superior Court, Dilsson Hernandez and Eddy Paula were convicted of possession of fentanyl with intent to distribute.¹ Both defendants appealed, but only Hernandez's appeal is before us. Hernandez argues, among other things, error in the denial of his motion to suppress evidence seized by the police during a warrantless search of the vehicle he was driving on April 11, 2017, in the city of Lawrence.² We conclude that the motion to suppress

¹ The indictments charged the defendants with trafficking ten grams or more of fentanyl. Prior to trial, the Commonwealth filed a partial nolle prosequi reducing the charge to possession with intent to distribute.

² The motion to suppress was filed by Paula. Hernandez subsequently was permitted to join the motion.

should have been allowed and therefore vacate Hernandez's conviction.³

Facts. We summarize the facts as found by the motion judge, supplemented by uncontroverted facts from the record that have been explicitly or implicitly credited by the motion judge. Commonwealth v. Jones-Pannell, 472 Mass. 429, 431 (2015).

On the afternoon of April 11, 2017, Sergeant Matthew Aumais of the Massachusetts State Police and Officer Michael Alverado⁴ of the Department of Correction,⁵ both members of the State Police gang unit for the North Shore, were working undercover on Thorndike Street in Lawrence. The area was known for illegal narcotics activity. Aumais had made numerous drug-related

³ Hernandez also claims that his trial should have been severed from Paula's, that the judge improperly admitted opinion testimony from a police officer who was a percipient witness, that the evidence was insufficient to prove that he had constructive possession of the drugs found in the car, and that the judge erred in failing to instruct the jury to give separate consideration to the evidence against each defendant. He further claims that the prosecutor engaged in misconduct during his cross-examination of Paula and in his closing argument. Lastly, he claims that the cumulative impact of all the alleged errors deprived him of his right to a fair trial. We need not address these issues as none of them are likely to occur at a second trial should one take place.

⁴ The officer's last name also is spelled Alvarado in the record before us.

⁵ The judge's findings refer to Aumais and Alverado as members of the Essex County Sheriff's Department. However, there is no dispute that Aumais was a sergeant with the State Police at the time of the events in question, and the motion hearing transcript indicates that Alverado was a correction officer at that time.

arrests in the area of Thorndike Street in the past and had made over 500 arrests for narcotics offenses in the Lawrence area in the preceding year. The two were in an old minivan watching for any narcotics activity when they saw a Ford Explorer with Arizona license plates drive by them and park about a block away on the same side of the street. About five minutes later, a Honda sedan drove onto Thorndike Street and parked between the minivan and the Explorer. The passenger in the Honda, later identified as Paula, got out of the car, took several steps toward the Explorer and then looked back nervously at the minivan. Paula returned to the Honda and spoke briefly to the driver, who turned out to be Hernandez. Thereafter, Paula walked to the passenger side of the Explorer and lowered his arm quickly into the car. Paula returned to the Honda and the Explorer drove away.

Aumais, an experienced narcotics investigator, believed that a street-level drug transaction had occurred and decided to stop the Honda. Aumais and Alverado pulled alongside the Honda at an angle so as to prevent it from moving. Aumais then approached the passenger side door and told Paula to get out of the car. Aumais saw a designer handbag between Paula's feet on the floor. Paula was nervous and sweating. Aumais pat frisked Paula and recovered seven "twists" containing a substance that he suspected was heroin and \$128 from Paula's pocket. At this

point, Paula was overcome with anxiety, so much so that Aumais feared that he might fall down.⁶ Paula was placed under arrest and directed to sit down on the curb. Meanwhile, Hernandez also was removed from the car and pat frisked, but nothing was found. By this time, Aumais learned from the other members of the task force who had followed the Explorer and stopped it a few blocks away that narcotics had been found and recovered. Aumais proceeded to search the Honda and found over \$1,100 in cash in the console between the front seats. He also searched the designer handbag that was on the front passenger side floor and found fifty-three twists of suspected heroin under some tissue paper.

On the basis of these facts, the motion judge concluded that even though Aumais did not see an object or money exchange hands when Paula reached inside the passenger window of the Explorer, Aumais's observation of that "quick interaction, as an experienced narcotics investigator, w[as] sufficient for him to infer and conclude that there was an apparent narcotics-related exchange." Thus, the judge reasoned, Aumais had probable cause to stop the Honda, give Paula an exit order and pat frisk Paula for weapons or contraband. The judge further determined that

⁶ Sergeant Aumais feared that Paula had swallowed narcotics and asked him whether he needed an ambulance, and Paula responded that he did not.

once Aumais recovered suspected heroin from Paula, there was probable cause to search the interior of the Honda and the designer handbag under the automobile exception to the Fourth Amendment to the United States Constitution's prohibition against warrantless searches.

Discussion. When we review an order on a motion to suppress evidence, we accept the motion judge's subsidiary findings of fact absent clear error and review independently his ultimate findings and conclusions of law. Commonwealth v. Jimenez, 438 Mass. 213, 218 (2002).

Hernandez argues that his motion to suppress should have been allowed because the police did not have probable cause to believe a drug transaction had occurred at the time they stopped the Honda. As an initial matter, although not addressed by the motion judge nor argued by the Commonwealth, we note that it is debatable whether the stop of the Honda amounted to an arrest for which probable cause was required. The facts as found by the motion judge indicate that the officers were justified in stopping the Honda and ordering Paula out of the car to conduct a threshold inquiry based on reasonable suspicion that Paula had engaged in a drug transaction. See, e.g., Commonwealth v. Stewart, 469 Mass. 257 (2014) (officer had reasonable suspicion to stop defendant to question him after observing what appeared to be drug transaction); Commonwealth v. Levy, 459 Mass. 1010,

1011-1012 (police had reasonable suspicion for stopping defendant after observing man make call on public telephone frequently used for drug transactions, drive away in Ford vehicle, stop in nearby residential area where man got out of Ford, and minutes later, Pontiac vehicle in which defendant was passenger, arrived, man got into Pontiac, which traveled about 200 yards, after which man returned to Ford; police subsequently stopped Pontiac, searched defendant and found cocaine in his boot). In any event, we need not decide whether the stop and exit order were justified based on reasonable suspicion because reasonable suspicion alone was not sufficient to permit Aumais to pat frisk Paula where there was nothing to suggest he was armed and dangerous.⁷ See Commonwealth v. Torres-Pagan, 484 Mass. 34, 36 (2020) ("During a stop for which there is constitutional justification, a pat frisk is permissible only where an officer has reasonable suspicion that the suspect is armed and dangerous" [citation omitted]). Consequently, the pat frisk of Paula was a search that was lawful only if it was supported by probable cause. We therefore turn to the question whether the police had probable cause to believe that a street-

⁷ We note the fact that Paula was nervous and sweating does not change our analysis. See Commonwealth v. Barreto, 483 Mass. 716, 722-723 (2019), and cases cited.

level drug transaction had occurred at the time Paula was searched. We conclude that they did not.

"[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. The officers must have entertained rationally more than a suspicion of criminal involvement, something definite and substantial, but not a prima facie case of the commission of a crime, let alone a case beyond a reasonable doubt" (quotations and citations omitted). Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992). In determining whether the record establishes that "the activity observed . . . fit[s] a 'pattern' or constituted a 'classic street level drug transaction'" sufficient to establish probable cause, "[r]easonable inferences and common knowledge are appropriate considerations" (citation omitted). Commonwealth v. Kennedy, 426 Mass. 703, 705, 707 (1998).

In determining whether probable cause existed, we consider "the whole 'silent movie' disclosed to the eyes of an experienced narcotics investigator," particularly where there was "a sequence of activity consistent with a drug sale at a place notorious for illicit activity in narcotics." Santaliz, supra at 242.

As the motion judge observed, this case presents a "close question." In reaching our conclusion that probable cause was lacking, we are mindful that "we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men [and women], not legal technicians, act." Commonwealth v. Sanders, 90 Mass. App. Ct. 660, 660-661 (2016), quoting Brinegar v. United States, 338 U.S. 160, 175 (1949). However, on balance, the facts known to the officers at the time Paula was searched are less compelling as those present in the cases on which the motion judge and the Commonwealth relied. For example, in Santaliz, 413 Mass. at 241-242, the court found the police had probable cause to believe a drug transaction had occurred where an experienced narcotics officer saw a "silent movie" sequence that included an actual exchange of an object for cash between two individuals at a location known for a high incidence of illegal drug activity. In Kennedy, 426 Mass. 703, the court found probable cause existed where an experienced officer saw an exchange of items between two individuals at a location known for drug activity and one of the individuals was known by the officer to have been arrested previously for selling drugs. Furthermore, in cases like this one where police have not seen an actual exchange of an item between the participants in a sequence consistent with a drug sale, probable

cause was found in part because the defendant was recognized by the arresting officer as a person with a prior involvement in illegal drug activity. See Sanders, supra at 665; Commonwealth v. Coronel, 70 Mass. App. Ct. 906 (2007).

Here, Aumais inferred but did not see an exchange between Paula and an occupant of the Explorer. Although our courts have not adopted a per se rule that requires an officer to actually see an object exchanged to have probable cause to arrest, seeing such an exchange "is an important piece of evidence that supports probable cause, and its absence weakens the Commonwealth's probable cause showing." Kennedy, 426 Mass. at 711. See Commonwealth v. Barreto, 483 Mass. 716, 721 n.5 (2019). In addition, neither Paula nor Hernandez were recognized by the officers as having prior involvement with illegal drugs as was the case in Sanders and Coronel.

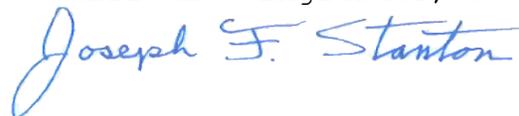
Commonwealth v. Montoya, 464 Mass. 566, 576-577 (2013), on which the Commonwealth also relies, is distinguishable. In that case, the court found there was probable cause to arrest the defendant when an experienced narcotics investigator observed the defendant transfer an object to the driver of another vehicle through a window in an area known for narcotics transactions and learned -- prior to stopping the defendant -- that the transferee was in possession of drugs. Here, by contrast, Aumais's interaction with Hernandez and Paula,

including the stop of the Honda and the search of Paula, occurred before other task force agents had informed Aumais that they had recovered drugs from the Explorer.⁸

Conclusion. Because Hernandez's motion to suppress should have been allowed, we vacate his conviction, set aside the verdict, and remand the case to the Superior Court to allow the Commonwealth to decide if it will enter a nolle prosequi or proceed with a new trial.

So ordered.

By the Court (Vuono,
Sullivan & Englander, JJ.⁹),



Clerk

Entered: January 7, 2021.

⁸ It bears noting that the Commonwealth defended against the motion to suppress solely on the ground that, at the time the police stopped the Honda, they had probable cause to do so. The Commonwealth did not argue that the evidence should not be suppressed because the police learned, after searching Paula, that one or more of the occupants of the Explorer were in possession of drugs that likely had been purchased from Paula. In other words, the Commonwealth never claimed that the evidence seized from the Honda was admissible under the inevitable discovery doctrine.

⁹ The panelists are listed in order of seniority.