

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-754

COMMONWEALTH

vs.

SEAN F. SPROWL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Sean F. Sprowl, appeals from his conviction, after a jury-waived trial, of operating a motor vehicle under the influence of drugs.<sup>1</sup> Because insufficient evidence was presented to establish that the use of a narcotic drug or a stimulant substance resulted in the defendant's impairment, we reverse.

Background. We summarize the trial evidence in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). On April 13, 2017, at 2:30 P.M., State Police Trooper Jonathan O'Loughlin conducted a

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<sup>1</sup> The defendant raises no arguments on appeal regarding his convictions of negligent operation of a motor vehicle and leaving the scene of property damage, or the findings that he was responsible for three civil infractions. The judge allowed the defendant's motion for a required finding of not guilty on the charge of possession of a class B substance with intent to distribute.

motor vehicle stop for speeding. As a result, both the trooper's cruiser and the vehicle were stopped in the breakdown lane of Route 3 in Plymouth County. The cruiser's lights were activated, and the weather was clear and sunny.

As the trooper returned to his cruiser from speaking with the driver, he observed a black sport utility vehicle (SUV) about one hundred yards away traveling in the breakdown lane at approximately sixty miles per hour, which was the speed limit on Route 3. The trooper got into his cruiser and attempted to put on his seatbelt as the SUV approached. He then observed the SUV swerve, miss the cruiser by a couple of inches, and hit the passenger's side mirror of the other stopped vehicle. The SUV did not stop, and the trooper did not observe the SUV's brake lights activate.

The trooper pursued and pulled over the SUV a short distance away. The trooper approached the SUV with his gun drawn and ordered the driver, who was the defendant, to put his hands on the steering wheel; the defendant complied and the trooper placed him in handcuffs on the ground outside the SUV. No other occupants were present in the vehicle.

While the trooper had his weapon pointed at the defendant's face, the defendant did not show signs of excitement, animation, fear, or emotion. The defendant did not answer when the trooper inquired why the defendant did not stop and whether the

defendant realized that he had just hit another vehicle. When asked to identify himself, the defendant responded only with his first name. During their interaction, the defendant looked straight ahead. The defendant also appeared confused when the trooper asked him about the accident and seemed "distant." The defendant spoke in a monotone.

While conducting a patfrisk of the defendant, the trooper recovered a prescription bottle for oxycodone pills bearing the defendant's name, a cut plastic straw with a white, powdery residue, and \$631 from the defendant's front pants pocket. The bottle contained ninety-seven pills, thirteen of which were blue and eighty-four of which were light blue. The pills were later tested. One set contained fentanyl. The other contained methamphetamine, fentanyl, and clonazepam. Fentanyl is not the same substance as oxycodone, and both fentanyl and methamphetamine are class B controlled substances.

The trooper asked the defendant to perform certain roadside exercises to determine his sobriety. When asked, the defendant stated that he broke his back a few years prior in a car accident and that he had issues with his ankles, but that these injuries would not prevent him from performing the exercises.

During the walk and turn exercise, which involves walking heel-to-toe in a straight line for nine steps, turning, and walking back in the same manner, the defendant stumbled on the

second step, lost his balance, and took several steps to regain his balance. On his second attempt, he did the same thing on his third step. This performance was not to standard. During three attempts at the one-leg stand exercise, the defendant put his foot down after six seconds, four seconds, and five seconds. The defendant's demeanor throughout the roadside exercises was "[v]ery flat," and he showed no emotion.

Based on the trooper's training and experience, the defendant's performance on the roadside exercises, the circumstances of the accident, and the defendant's demeanor and affect, the trooper formed the opinion that the defendant was "under the influence of narcotics." The trooper was not a drug recognition expert, and he did not call a drug recognition expert to evaluate the defendant. The trooper had, however, received over forty hours of training on operating under the influence investigations at the State police academy, and he had previously undertaken over fifty such investigations, ten to twelve of which involved drugs. He testified that some signs of impairment caused by drugs, as opposed to alcohol, include constricted pupils, a particular odor, lack of animation, failure to understand the scope of the situation, and appearing distant in conversations. He further testified that drug use may cause individuals to be off balance, unsteady on their feet, and unable to walk in a straight line. However, he explained

that the signs of impairment vary based on the drug that is consumed.

State Police Trooper Eric Telford testified as a narcotics investigations expert. Trooper Telford explained that fentanyl in pill form is a counterfeit street drug typically sold as oxycodone. These pills are generally ingested first orally and then, as the addiction progresses, by snorting them using a full or cut straw, dollar bill, or pen cap. Trooper Telford opined that possession of the items like those recovered from the defendant's pocket was indicative of both personal use and distribution of drugs.

Discussion. In reviewing the denial of a motion for a required finding of not guilty, "we must consider whether, viewing the evidence in the light most favorable to the Commonwealth, . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Rivera, 425 Mass. 633, 647 (1997).

To prove the crime of operating a motor vehicle under the influence of a narcotic drug or a stimulant substance, "the Commonwealth was required to establish that the defendant (1) physically operated a vehicle; (2) on a public way; (3) while under the influence of a narcotic drug [or a stimulant substance]." Commonwealth v. Bouley, 93 Mass. App. Ct. 709, 712 (2018). See G. L. c. 90, § 24 (1) (a) (1). At issue here is

the third element, which is established by showing that the use of a narcotic drug or a stimulant substance "resulted in the 'impairment, to any degree, of an individual's ability to safely perform the activity in question.'" Bouley, supra, quoting Commonwealth v. Veronneau, 90 Mass. App. Ct. 477, 479 (2016).

Here, a rational judge could infer from the circumstances of the accident, Trooper O'Loughlin's observations of the defendant's demeanor and behavior, and the defendant's performance on the roadside exercises that the defendant exhibited signs of impairment. However, even assuming that the evidence also supported an inference that the defendant consumed the fentanyl or the methamphetamine or some combination of the substances recovered from his pocket, insufficient evidence was presented that the defendant's impairment was the result, at least in part, of such consumption, as was required to support a conviction.<sup>2</sup> See Bouley, 93 Mass. App. Ct. at 712; Commonwealth v. Reynolds, 67 Mass. App. Ct. 215, 217 (2006).

As the Commonwealth concedes, no evidence was presented on the effects of using fentanyl or methamphetamine, either separately or together.<sup>3</sup> Rather, the Commonwealth offered only

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<sup>2</sup> We note that no evidence was offered on the issue whether the defendant had either fentanyl, methamphetamine, or any other narcotic drug or stimulant substance in his system and, if so, in what concentration.

<sup>3</sup> Defense counsel objected when Trooper Telford was asked to describe the common characteristics of fentanyl users because

the lay testimony of Trooper O'Loughlin on the differences between intoxication caused by drugs in general, as opposed to alcohol. While the defendant did, in fact, display some of those characteristics, Trooper O'Loughlin also acknowledged that signs of impairment are not universal and instead vary based on the drug that is consumed. Cf. Commonwealth v. Daniel, 464 Mass. 746, 756 n.6 (2013) ("Manifestations of impairment may differ between subjects who are under the influence of liquor and those who are under the influence of marijuana, depressants, or stimulant substances").

In evaluating the sufficiency of that evidence, we are instructed by the cases concerning operating a motor vehicle under the influence of two other substances, alcohol and marijuana. With respect to alcohol, a police officer may offer a lay opinion regarding a defendant's level of sobriety or intoxication because the effects of alcohol intoxication are so well known that they are within the realm of common experience. See Commonwealth v. Gerhardt, 477 Mass. 775, 785-786 (2017); Commonwealth v. Canty, 466 Mass. 535, 544 (2013). In contrast, a lay opinion cannot be offered as to a defendant's sobriety or

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the Commonwealth only provided notice that the trooper would testify about the sale and distribution of drugs. Given that the Commonwealth abandoned that line of questioning after reviewing an e-mail exchanged in discovery, we do not consider Trooper Telford's partial answer, cut short by the objection, that persons high on fentanyl are "out of it, very slow."

intoxication on a charge of operating a motor vehicle under the influence of marijuana. See Gerhardt, supra at 786. This is so because "[n]o such general knowledge exists . . . as to the physical or mental effects of marijuana consumption, which vary greatly amongst individuals." Id.

By extension, and at least based on the record in this case, we are of the view that no such general knowledge exists as to the effects of fentanyl or methamphetamine.<sup>4</sup> Expert testimony -- or, at a minimum, some evidence -- on that issue was required to connect any displayed signs of impairment to the defendant's consumption of the substance or substances at issue.<sup>5</sup> See Commonwealth v. Shellenberger, 64 Mass. App. Ct. 70, 76

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<sup>4</sup> While not the thrust of the defendant's argument, we note that Trooper O'Loughlin's lay opinion that the defendant was "under the influence of narcotics," offered in response to the prosecutor's questions concerning the defendant's sobriety, was improper as the facts here provided an insufficient foundation for such opinion. See Gerhardt, 477 Mass. at 786.

<sup>5</sup> Unlike in Commonwealth v. Johnson, 59 Mass. App. Ct. 164, 172 (2003), the evidence here falls short of permitting an inference of impairment resulting from drug use based on the circumstances surrounding the accident and the defendant's behavior. See id. at 165-166 (defendant drove 150 feet off road into heavy brush for "no apparent reason," was "behaving erratically," had constricted pupils and slurred speech, "seemed confused and disoriented," gave unintelligible answers to questions and seemed to answer questions not asked, did not know how the accident happened or where he was, gave the incorrect time of day, and received medical treatment). See Reynolds, 67 Mass. App. Ct. at 218 ("While we agree that the element of ingestion may be proven by circumstantial evidence, the evidence and the inferences permitted to be drawn therefrom must be 'of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilt] beyond a reasonable doubt'" [citation omitted]).

(2005) (to sustain conviction of motor vehicle homicide by negligent operation, "expert testimony [required] indicating that the concentration of [amphetamine] in the defendant's system would impair her ability to operate a motor vehicle"). As no such expert testimony or other evidence on the issue was offered here, the conviction cannot stand.<sup>6</sup> Contrast Bouley, 93 Mass. App. Ct. at 712 (responding emergency medical technician testified that defendant exhibited classic symptoms of opioid overdose, was resuscitated by medication used exclusively for such overdoses, and defendant admitted having taken fentanyl); Reynolds, 67 Mass. App. Ct. at 219 (expert testimony offered on effect of narcotics and depressants taken in doses prescribed to defendant on central nervous system and skills related to driving).

Conclusion. The judgment of conviction of operating a motor vehicle under the influence of drugs is reversed, the

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<sup>6</sup> Because we determine that insufficient evidence was presented that the defendant's impairment was the result of drug use, we need not reach the defendant's remaining arguments, including that the judge improperly took judicial notice that fentanyl is a narcotic under G. L. c. 94C, § 1.

finding is set aside, and judgment shall enter for the defendant.

So ordered.

By the Court (Lemire, Singh & Englander, JJ.<sup>7</sup>),



Clerk

Entered: April 5, 2021.

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<sup>7</sup> The panelists are listed in order of seniority.