

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-1025

COMMONWEALTH

vs.

PATRICK ONEIL.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A jury convicted the defendant of operating under the influence of intoxicating liquor (OUI), negligent operation of a motor vehicle, and leaving the scene of property damage. On appeal, the defendant contends that the police unlawfully entered his home, and as a result, the motion judge erred in failing to suppress statements made following the entry. We affirm.

Background. We summarize the pertinent facts as found by the motion judge.<sup>2</sup> On October 3, 2013, at approximately 1:30

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<sup>1</sup> Consistent with our practice, we have spelled the defendant's name as it appears in the complaint.

<sup>2</sup> The defendant initially moved to suppress his statements on the ground that they were made without the benefit of Miranda warnings. An evidentiary hearing was held, and his motion was denied. The defendant subsequently filed the present motion, but the parties agreed that a second evidentiary hearing was not necessary. Accordingly, the judge's findings of fact were drawn

A.M., Officer Christopher Aker responded to a single vehicle car accident located on Rockland Street in Easton. Upon arriving at the scene, Officer Aker observed a blue Volvo that appeared to have crashed into a rock wall and a utility pole, before losing a tire and coming to a rest at 15 Rockland Street. The Volvo had no occupants at the time of Officer Aker's arrival. A nearby resident, who did not witness the accident, informed Officer Aker that he observed a young man with facial hair, wearing a flannel shirt and jeans, walking away from the vehicle. Officer Aker conducted a query of the vehicle's license plate number and discovered that the vehicle was registered to Joseph O'Neill at 31 Heritage Drive.

Officer Timothy McPeck arrived at the scene shortly thereafter, and also observed a blue Volvo that seemingly had crashed into a wall and a pole, with damage to the vehicle's front end. After speaking to Officer Aker and obtaining the description of the person seen walking away from the vehicle, Officer McPeck drove around the area searching for anyone who could have been driving or occupying the vehicle at the time of the accident. When his search was unsuccessful, Officer McPeck drove to the address where the crashed vehicle was registered.

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from the evidence presented at the hearing on the defendant's first motion to suppress.

Officer McPeck, who was in uniform at the time, knocked on the front door of 31 Heritage Drive, and a man, later identified as the defendant, answered the door. Officer McPeck observed that the defendant had facial hair and was wearing a backwards flannel shirt and brown sweatpants. He further observed that the defendant was sweating, had slurred speech, and smelled moderately of alcohol. While standing on the front steps of the home, Officer McPeck informed the defendant that a vehicle registered to Joseph O'Neill had been in an accident. The defendant told the officer that Joseph<sup>3</sup> was his father and confirmed that he lived at that address. Officer McPeck asked to see Joseph to confirm that he was not injured, and the defendant suggested that such an inquiry was not necessary. Officer McPeck repeated the request, but the defendant did not respond. Officer McPeck then asked the defendant whether it was possible that another person was driving the vehicle, and the defendant responded by turning around and placing his hands behind his back.

Officer McPeck asked the defendant why he was placing his hands behind his back, and the defendant stated, "I was driving the car." Though the defendant was not in custody at the time,

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<sup>3</sup> Because the defendant and the defendant's father share a last name, we refer to the defendant's father by his first name where necessary to avoid confusion.

Officer McPeck advised him of his Miranda rights. Officer McPeck did not place the defendant under arrest at this point, but instead told the defendant that he still wished to speak with the defendant's father, Joseph. The defendant informed the officer that he wanted to cooperate with him, and that he would go and retrieve his father.

The defendant then retreated inside the home, leaving the front door wide open. The defendant turned a corner where Officer McPeck could no longer observe him from where the officer stood on the front steps. In response, Officer McPeck crossed over the threshold of the home and stepped into the foyer area.<sup>4</sup> There, the officer waited for the defendant and his father to return to the front door area.

The defendant and his father, Joseph, came down the stairs, and entered the foyer where Officer McPeck stood. Officer McPeck explained why he had come to the residence, and Joseph informed him that he was not aware that his son had taken the car that evening. Joseph told Officer McPeck that he and the defendant had been drinking earlier while watching a game on television.<sup>5</sup> At some point, another officer, Sergeant Boone,

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<sup>4</sup> The officer testified, and the motion judge credited, that he entered the home to ensure his own safety because he could no longer see the defendant.

<sup>5</sup> The defendant's father's statements were not admitted against him at trial.

arrived at the scene, and he joined the defendant, the defendant's father, and Officer McPeck in the foyer area of the home. Neither the defendant nor his father instructed either officer to leave the home.

Officer McPeck asked the defendant if he wished to speak with him, and reminded him, without readvising him, of his Miranda rights. The defendant responded by stating, "I'm drunk, I drove, okay?" The defendant further explained that he had six or seven beers, left his home to visit a friend, lost control of the vehicle, and ultimately crashed. The police subsequently placed the defendant under arrest for OUI and leaving the scene of property damage.

Discussion. "On review of a 'ruling on a motion to suppress, we accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his [or her] ultimate findings and conclusions of law'" (quotation omitted). Commonwealth v. Suters, 90 Mass. App. Ct. 449, 452 (2016), quoting Commonwealth v. Scott, 440 Mass. 642, 646 (2004).

"Under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, the police are not authorized to enter a home unless they act on the basis of (1) voluntary consent; (2) probable cause and exigent circumstances; or (3) an objectively

reasonable belief that there is an injured person or a person in imminent danger of physical harm inside the home who requires immediate assistance" (citations omitted). Suters, 90 Mass. App. Ct. at 452.

We agree with the defendant that the police were not justified in entering his home without a warrant. The Commonwealth argues that the defendant implicitly consented to the entry. While consent may be implicit, the Commonwealth bears the burden of demonstrating consent that was "freely and voluntarily given" by showing that the consent was "unfettered by coercion, express or implied, and [was] also something more than mere 'acquiescence to a claim of lawful authority.'" Commonwealth v. Rogers, 444 Mass. 234, 237 (2005), quoting Commonwealth v. Voisine, 414 Mass. 772, 783 (1993). "In meeting its burden of establishing voluntary consent to enter, the Commonwealth must provide us with more than an ambiguous set of facts that leaves us guessing about the meaning of [the] interaction and, ultimately, the occupant's words or actions." Id. at 238. The Commonwealth has failed to meet its burden.

Here, Officer McPeck did not request to enter the home, nor did he state his intention to do so. See Rogers, 444 Mass. at 240 (citing cases where implicit consent has been found in response to "what could reasonably be construed as a request to enter by the police or an explicit disclosure of their

purpose"). The officer merely asked the defendant if he could speak with his father, and the defendant responded by stating that he would go and get him. Though the defendant left the door fully open when he went to do so, this act, by itself, is insufficient to infer voluntary consent to enter. See id., citing Holmes v. State, 347 Ark. 530, 540 (2002) (occupant's opening door and stepping back in response to question about where officers could talk with occupant was marked by "uncertainty and lack of clarity" and did not constitute consent to enter). Moreover, the defendant's subsequent failure to object to the officer's presence inside of the home "suggests nothing more than 'mere acquiescence to a claim of lawful authority'" (quotation omitted). Commonwealth v. Komnenus, 87 Mass. App. Ct. 587, 591 (2015), quoting Commonwealth v. Tyree, 455 Mass. 676, 695 (2010).

In addition, we note that there were no other justifications for the officer's entry. While it is undisputed that Officer McPeck possessed probable cause to arrest the defendant prior to his entry into the home, there were no exigent circumstances. See Commonwealth v. Cataldo, 69 Mass. App. Ct. 465, 473 (2007) ("[T]o satisfy the exigent circumstances prong, . . . an officer must show that he had an objectively reasonable belief that evidence will be removed or destroyed, or that there is a danger to his life or to the lives

of others"). Contrary to the motion judge's conclusion, a generalized concern for officer safety is insufficient to permit the police to enter a home without a warrant.<sup>6</sup> See Tyree, 455 Mass. at 689-690. Finally, Officer McPeck did not possess an objectively reasonable belief that anyone inside of the home was injured and required immediate assistance such that a warrant was not required. Prior to the entry, the defendant had already admitted that he, and not his father, had been driving the vehicle at the time of the accident, and there were no apparent concerns about the defendant being injured, and certainly not any concerns about a serious injury. See Commonwealth v. DiGeronimo, 38 Mass. App. Ct. 714, 722-725 (1995).

However, our inquiry does not end with our conclusion that the warrantless entry was unlawful. To determine whether the defendant's statements were nevertheless admissible, we consider whether they were obtained by "exploiting the illegality or [obtained] by means sufficiently distinguishable to dissipate the taint." Commonwealth v. Manning, 44 Mass. App. Ct. 695, 698

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<sup>6</sup> The motion judge compared the officer's entry to a protective sweep conducted incident to arrest and concluded that it was lawful based on concerns for officer safety. However, even a limited protective sweep can be conducted incident to arrest only where the officers demonstrate a "reasonable belief based on 'specific and articulable facts' that the area could harbor a dangerous individual." Commonwealth v. Colon, 88 Mass. App. Ct. 579, 581 (2015), quoting Commonwealth v. Matos, 78 Mass. App. Ct. 156, 159 (2010).

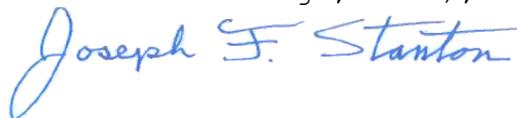
(1998), quoting Commonwealth v. Fredette, 396 Mass. 455, 458-459 (1985). In doing so, we look to several factors "including (1) Miranda warnings, (2) the temporal proximity of the arrest and the confession, (3) the presence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct." Commonwealth v. Avellar, 70 Mass. App. Ct. 608, 617 (2007), quoting Commonwealth v. Bradshaw, 385 Mass. 244, 258 (1982).

The defendant was advised of his Miranda rights prior to the officer's entry, and was reminded of those rights while the police were inside of the home. Further, prior to the entry, the defendant had already confessed that he was the individual driving the car at the time of the accident, which provided the police with probable cause to arrest him. Officer McPeck did not, however, immediately arrest the defendant but asked instead to speak with the defendant's father, the registered owner of the vehicle. Once inside the home, with the defendant's father present, Officer McPeck then simply asked the defendant if he wished to speak with him, and the defendant volunteered that he had driven while drunk. See Kommenus, 87 Mass. App. Ct. at 593-594 (absent police interrogation or prompting, defendant's spontaneous disclosure of cocaine possession constituted intervening circumstance between unlawful entry and consent to further search home).

Significantly, there is nothing to suggest that the officer's conduct was particularly flagrant, or that Officer McPeck sought to exploit or gain any advantage by stepping inside the home.<sup>7</sup> See Kommenus, 87 Mass. App. Ct. at 593-594. Rather, the motion judge explicitly credited the officer's testimony that he entered the home for safety purposes only. Under the circumstances of this case, we conclude that the defendant's statements were not the product of police misconduct, but rather his own free will, and as such suppression was not required. Because suppression of the defendant's statements "would hardly have served an important demonstrative purpose of deterring the police from future malfeasance," Commonwealth v. Chongarlides, 52 Mass. App. Ct. 366, 377 (2001), quoting Commonwealth v. Shipps, 399 Mass. 820, 830 (1987), the motion to suppress was properly denied.

Judgments affirmed.

By the Court (Sullivan,  
Desmond & Singh, JJ.<sup>8</sup>),



Clerk

Entered: April 7, 2021.

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<sup>7</sup> The officer did not attempt to engage in any search of the home, nor did he attempt "to frighten or intimidate the defendant into making a confession." See Commonwealth v. Chongarlides, 52 Mass. App. Ct. 366, 377 (2001).

<sup>8</sup> The panelists are listed in order of seniority.