

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-840

JAMES STEPHENS

vs.

COMMONWEALTH.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, James Stephens, appeals from a Superior Court jury verdict finding that he was not entitled to compensation for a wrongful conviction under G. L. c. 258D, § 1. On appeal he contends that (1) there was error in the jury instruction regarding the relationship between an offense to which he pleaded guilty and the conviction that was vacated, and (2) the jury's verdict was legally inconsistent. We affirm.

Background. Subsequent to the execution of a search warrant on his girlfriend's residence, the plaintiff was charged with (1) conspiracy to violate drug laws, G. L. c. 94C, § 32A (c); (2) falsely impersonating a person in an application for a motor vehicle license, G. L. c. 90, § 24B; and (3) possession of cocaine with intent to distribute, G. L. c. 94C, § 32A (c). In June 2008, a jury found the plaintiff guilty of counts two and

three. The plaintiff's convictions were subsequently vacated, and the case was remanded for a new trial. See Commonwealth v. Stevens,<sup>1</sup> 81 Mass. App. Ct. 1117 (2012) (unpublished decision issued pursuant to our former rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]). On remand, the plaintiff pleaded guilty to falsely impersonating a person in an application for a motor vehicle license. The jury found the plaintiff guilty of the distribution charge. See Commonwealth v. Stevens, 87 Mass. App. Ct. 1119 (2015) (unpublished decision issued pursuant to our former rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]). Once again, the plaintiff appealed, and the conviction was vacated, this time on sufficiency grounds. See id.

In May 2016, the plaintiff filed a civil suit seeking compensation for the erroneous drug conviction. The jury found that he was innocent of the distribution offense, but that the false license application offense arose out of or was connected to the narcotics charge. Accordingly, the jury returned a verdict in favor of the Commonwealth.

Discussion. Jury instructions. Entitlement to compensation under G. L. c. 258D turns, among other things, on a showing that the plaintiff "did not commit the crimes or crime charged in the indictment or complaint or any other felony

---

<sup>1</sup> Stephens was prosecuted under the name "Stevens," but he filed this action under the name "Stephens."

arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser included felony."

G. L. c. 258D, § 1 (C) (vi). The judge gave a comprehensive jury instruction regarding the relationship between the false license offense to which the plaintiff pleaded guilty, and the convictions that were later vacated on appeal.<sup>2</sup>

The plaintiff now asserts error in that instruction, specifically with respect to the definitions of "arising out of" and "connection." The plaintiff did not object at the time the

---

<sup>2</sup> The judge's instructions on the issue were:

"If . . . you find that there is some relationship between the two [charges], then you must decide whether the relationship meets at least one of two tests. The first test is whether the false application offense arises out of the facts supporting the narcotics charge.

"The phrase arised out of means that the false application offense originates from, grows out of, flows from, or has a connection with the narcotics charge. To find that the false application charge arises out of the narcotics charge you would have to find that the facts supporting the false application offense originate from, grow out of, flow from, or have a connection with the narcotics charge. If so, then you answer question yes. If not, then you still need to consider the second test.

"The second test asks whether the false application offense is reasonably connected to the facts, if any, supporting the narcotics charge. This test has three parts. You start by looking at what facts, if any, supported the narcotics charge, then you ask whether those facts are connected to the false application offense. If so, then the third step requires you to assess whether the connection is reasonable. For this purpose reasonable means that the connection is logical and meaningful rather than farfetched, trivial, or insubstantial."

instructions were given. See Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974). In fact, the plaintiff agreed that the instruction was correct.<sup>3</sup> Accordingly, this argument is waived on appeal. See Selmark Assocs. v. Ehrlich, 467 Mass. 525, 547 n.37 (2014) ("Our rules require that, to claim error in the jury charge on appeal, an objection must first be made before the trial court judge"). See also Composto v. Massachusetts Bay Transp. Auth., 48 Mass. App. Ct. 477, 480 (2000).

Even if the issue was preserved, it has not been made to appear that the judge's definition of "arising out of" was erroneous.<sup>4</sup> The plaintiff attempts to import a much narrower meaning to the words "arising out of" on appeal, claiming that the offenses should have a "peculiar" or "intrinsic" connection. Had the legislature wished to employ such a test, it could have selected other language. Arguably, the broad language of the

---

<sup>3</sup> In response to a jury question, plaintiff's counsel, in a discussion with the judge, agreed that the instruction was correct. He stated:

"And then, again, I note that the court used -- defined arise out of to mean that the false application offense originates from, grows out of, flows from, or has a connection with the charge -- the narcotics charges. And I think that's a sensible definition of arise out of . . ."

<sup>4</sup> The plaintiff urges us to review for a substantial risk of a miscarriage of justice. Substantial risk review is reserved for criminal cases. See Commonwealth v. Randolph, 438 Mass. 290, 294-295 (2002). We are unaware of any case applying this standard in a civil case for money damages and the plaintiff has not cited one.

statute reflects the legislature's intent in balancing the Commonwealth's interest in preserving its right to sovereign immunity against the competing interest in providing the wrongfully convicted with a mechanism for the recovery of damages. See Irwin v. Commonwealth, 465 Mass. 834, 840-843 (2013). However, in the absence of objection, we decline to reach the issue.

2. Legally inconsistent verdict. The plaintiff also contends that he is entitled to relief because the verdict was legally inconsistent. When a party is faced with an inconsistent jury verdict, the litigant "must request the judge to instruct the jury to reconsider their verdict before they are discharged and when there is time to correct any inconsistency." Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 466 (2003). "Failure to make such a timely request constitutes a waiver of any challenge to the verdict on the ground that it is inconsistent." Id. This rule applies with equal force to claims of legal inconsistency in civil cases. See Adams v. United States Steel Corp., 24 Mass. App. Ct. 102, 104 (1987). The jury were discharged without objection, and the argument is therefore waived on appeal.

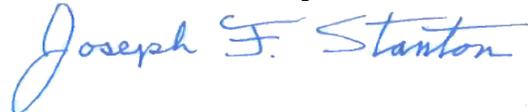
If we were to consider the merits of the claim, the plaintiff is still not entitled to relief. Reversal of a civil case on the grounds of a legally inconsistent verdict is a

rarity. "In determining whether there is an inconsistency in the jury's answers, the answers are to be viewed in the light of the attendant circumstances, including the pleadings, issues submitted, and the judge's instructions." Palriwala v. Palriwala Corp., 64 Mass. App. Ct. 663, 670-671 (2005), quoting Solimene v. B. Grauel & Co., KG, 399 Mass. 790, 800 (1987). The jury were permitted to conclude that the plaintiff tried to get a false license to conceal his identity, and that he wanted to conceal his identity because he was involved in drug distribution with others in the apartment. The jury could also have concluded that the plaintiff was innocent of possessing or distributing the drugs that were found by the police that day in his girlfriend's apartment. But that does not mean that the license application offense and the distribution charge were unrelated. The erroneous conviction statute permits plaintiffs to recover only if they can prove that they were innocent of the underlying crime (here distribution) and all other related felonies. See G. L. c. 258D, § 1 (C) (vi). Thus, the statute specifically contemplates situations such as this where one or

more convictions are vacated but other convictions remain intact.

Judgment affirmed.

By the Court (Sullivan,  
Desmond & Singh, JJ.<sup>5</sup>),



Clerk

Entered: July 19, 2021.

---

<sup>5</sup> The panelists are listed in order of seniority.