

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-471

COMMONWEALTH

vs.

MANNY M., a juvenile.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a hearing pursuant to G. L. c. 119, § 72A (§ 72A), a Juvenile Court judge found no probable cause to believe that the juvenile¹ committed the crime of forcible rape of child. See G. L. c. 265, § 22A. The Commonwealth failed to timely appeal that decision, and a single justice of this court allowed the late appeal. The juvenile timely cross-appealed the single justice's order allowing the late appeal.² We agree with the juvenile that the Commonwealth's belated appeal from the order discharging him under § 72A was not excused by good cause.³

¹ We refer to him as "the juvenile," even though he is an adult, because the proceedings against him took place in the Juvenile Court, where the identities of those accused are confidential. See G. L. c. 119, § 60A.

² The appeal and cross appeal were consolidated by order of this court.

³ Perplexingly, the Commonwealth has not filed a reply brief or otherwise addressed the juvenile's cross appeal.

See Mass. R. A. P. 14 (b), as appearing in 481 Mass. 1626 (2019) (rule 14). Accordingly, we reverse the single justice's order and dismiss the Commonwealth's appeal.

The following procedural history is relevant. The juvenile was discharged pursuant to § 72A on May 29, 2019. Nearly six months later, on November 13, 2019, the Commonwealth filed its notice of appeal in the Juvenile Court. On December 16, 2019, the Commonwealth filed a motion to enlarge the time to file a late notice of appeal pursuant to rule 14 (rule 14 motion), which was allowed by the single justice on December 24, 2019.⁴ The single justice did not specifically address the juvenile's arguments opposing the late appeal. The juvenile thereafter filed a timely notice of appeal from the order of the single justice.

The governing procedural rules are straightforward. The Commonwealth had thirty days to appeal the § 72A order discharging the juvenile. Mass. R. A. P. 4 (b) (1), as appearing in 481 Mass. 1606 (2019). See Mass. R. Crim. P. 15 (a) (3), as appearing in 476 Mass. 1501 (2017) ("The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge discharging a person pursuant to G. L.

⁴ In relevant part, the single justice stated: "The notice of appeal filed in the trial court and entered on 11/13/19 is deemed timely as to the 5/29/19 order of the Juvenile Court that discharged the defendant under G. L. c. 119, s. 72A."

c. 119, § 72A"). Beyond the thirty-day appeal period, which clearly lapsed in this case, rule 14 (b) provides, in pertinent part, that "a single justice of the appellate court in which the appeal will be, or is, docketed for good cause shown may upon motion enlarge the time prescribed by these rules" for up to one year.⁵

We review the single justice's determination under rule 14 for abuse of discretion. See Commonwealth v. Barboza, 68 Mass. App. Ct. 180, 183 (2007). "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). Although we afford "great deference" to the single justice's exercise of discretion, "that deference is not unlimited." Vasquez v. Commonwealth, 481 Mass. 747, 751 (2019).

⁵ This court, or a single justice thereof, may, for "good cause shown, . . . suspend the requirements or provisions of any of these rules in a particular case, on such reasonable terms as the court or the single justice may order, on application of a party or on its own motion and may order proceedings in accordance with its direction." Mass. R. A. P. 2, as appearing in 481 Mass. 1603 (2019). As the Supreme Judicial Court has explained, the invocation of this rule "requires a showing of 'good cause' for suspension of the rules; moreover, the suspension of generally applicable procedural rules is an extraordinary, not an ordinary, event." Commonwealth v. Jordan, 469 Mass. 134, 143 (2014).

In the present case, we discern no basis on which to excuse the Commonwealth's failure to timely appeal the judge's order. The Commonwealth's rule 14 motion stated that the assistant district attorney handling this case was initially unaware that the order discharging the juvenile was appealable. See Troy Indus., Inc. v. Samson Mfg. Corp., 76 Mass. App. Ct. 575, 582 (2010) (good cause standard of rule 14 does not encompass counsel's failure to learn date judgment entered). A fair reading of the Commonwealth's rule 14 motion indicates that in September 2019, it learned that discharge orders pursuant to § 72A were appealable because it either pursued, or planned to pursue, appeals in two other cases involving such orders at that time.⁶ Curiously, the Commonwealth did not file a notice of appeal in this case until November 2019, approximately two months after it purportedly learned that § 72A orders were appealable. Even if we were to assume that an appeal taken in September 2019 would have been excused for good cause, we cannot understand why the notice of appeal was delayed for an additional two months -- particularly when two other appeals regarding the same issue and involving the same judge were timely appealed. See id. at 581, quoting Commonwealth v.

⁶ See Commonwealth v. Irvin I., 100 Mass. App. Ct. 33 (2021); Commonwealth v. Joe J., 100 Mass. App. Ct. 1101 (2021). Both appeals, which involved the same Juvenile Court judge as in the present case, were timely appealed to this court.

Trussell, 68 Mass. App. Ct. 452, 454 (2007) (good cause standard under rule 14 is "no less exacting" than the standard of "excusable neglect" set forth in Mass. R. A. P. 4 [c]).⁷ See also note 6, supra.

This case is unlike those in which the Supreme Judicial Court (SJC) has excused noncompliance with an unclear or confusing procedural rule. In Commonwealth v. Guaba, 417 Mass. 746, 748 (1994), for instance, the Commonwealth appealed from an order allowing a motion to suppress approximately six weeks after the judge's order was issued. The defendant argued that the single justice improperly allowed the late appeal. Id. at 749. The Commonwealth had appealed within thirty days of receiving the judge's decision, and argued that Mass. R. A. P. 4 (b) was unclear as to when the thirty day period began, i.e., from the date of the decision, or from the date the Commonwealth received the decision.⁸ Id. at 749-750. Agreeing with the

⁷ "'Excusable neglect' looks to 'circumstances that are unique or extraordinary'; . . . 'a flat mistake of counsel about the meaning of a statute or rule may not justify relief: relief is not extended to cover any kind of garden-variety oversight.'" Bernard v. United Brands Co., 27 Mass. App. Ct. 415, 418 n.8 (1989), quoting Feltch v. General Rental Co., 383 Mass. 603, 614 (1981).

⁸ In an affidavit, the Commonwealth attested that "the prosecutor was informed by a clerk in the Superior Court clerk's office that the delivery of the written decision constitutes official notification of the decision and that the thirty-day period for filing a notice of appeal begins when the parties were so notified." Guaba, 417 Mass. at 749.

Commonwealth, the SJC allowed the late filing because the rule was unclear as to when a notice of an interlocutory appeal should have been filed. Id. at 751. Accord Commonwealth v. Jordan, 469 Mass. 134, 145 (2014) (in spite of Commonwealth's late appeal and numerous procedural miscues, SJC addressed merits because "there sometimes has been a lack of clarity in the manner in which the single justices of this court have, in the past, applied the procedural rules governing the timeliness of interlocutory appeals of orders on motions to suppress").

Nor does the present case implicate considerations of a defendant's rights or judicial economy in deciding whether to allow a late appeal. For example, in Barboza, 68 Mass. App. Ct. at 181-182, a single justice of this court allowed the defendant's motion to file a late appeal nearly eleven months after sentencing. In rejecting the Commonwealth's challenge to the single justice's order, this court stated that, in a criminal case, the "good cause" determination should consider "the importance of the rights lost to the defendant should his motion for enlargement be denied," the reason for the delay, and notions of judicial economy.⁹ Id. at 184, quoting Commonwealth

⁹ Appellate counsel for the defendant attested that trial counsel stated that he had mailed a timely notice of appeal to the trial court; the notice was never received or docketed. Barboza, 68 Mass. App. Ct. at 181-182. This court emphasized the presumption of the "mailbox rule" in its analysis, which states that the mailing of a properly addressed letter is prima facie

v. White, 429 Mass. 258, 264 (1999). See White, supra at 264-265 (explaining importance of considering defendant's rights and interests of judicial economy when deciding whether to allow defendant's late appeal).

Although we recognize the importance of a victim's opportunity to be heard in matters involving serious allegations of rape, the Commonwealth was required to comply with the governing procedural rules. See Commonwealth v. Walters, 472 Mass. 680, 705 (2015). Absent a showing of good cause, the single justice was without discretion to excuse the Commonwealth's noncompliance with the timing requirement of Mass. R. A. P. 4 (b) by allowing the Commonwealth's rule 14 motion to pursue an appeal nearly six months after judgment had entered in the Juvenile Court. See Giacobbe v. First Coolidge Corp., 367 Mass. 309, 315-316 (1975) ("While the new [appellate] rules still include many time limitations for doing specified acts, they also include provisions giving the courts broad discretion and authority to permit a deserving party, on a showing of 'excusable neglect' or 'good cause,' to prosecute an appeal notwithstanding his failure to comply with a procedural

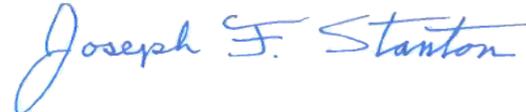
evidence of receipt by the addressee. See id. at 185, citing Eveland v. Lawson, 240 Mass. 99, 103 (1921).

time limitation").

The order of the single justice dated December 24, 2019, is reversed, and the Commonwealth's appeal is dismissed.

So ordered.

By the Court (Neyman, Sacks &
Lemire, JJ.¹⁰),



Clerk

Entered: July 21, 2021.

¹⁰ The panelists are listed in order of seniority.