

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-1136

COMMONWEALTH

vs.

PATRICK S. COYNE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from the denial of his motion, pursuant to Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001), for relief from unlawful restraint, and the denial of his motion, pursuant to Mass. R. Crim. P. 30 (b), to withdraw his guilty plea and for new trial. The case is unusual in that the Commonwealth does not dispute the various errors to which the defendant points. Instead, the crux of this appeal is whether the errors require -- as the defendant argues -- that he be permitted to withdraw his plea and that the indictment for violating the Armed Career Criminal Act (ACCA), G. L. c. 269, § 10G (a), be dismissed with prejudice. As explained further below, we conclude that the appropriate remedy in the unusual circumstances presented is to remand the case for resentencing in accordance with this decision.

Background. Based on a shooting incident that occurred on May 19, 2016, the defendant was charged in separate indictments with (1) being an armed career felon, in violation of the ACCA, G. L. c. 269, § 10G (a); (2) illegal possession of a firearm, subsequent offense, in violation of G. L. c. 269, §§ 10 (a) & (d); (3) possession of ammunition without a firearm identification card, in violation of G. L. c. 269, § 10 (h) (1); and (4) discharging a firearm within 500 feet of a building, in violation of G. L. c. 269, § 12E.

On August 30, 2016, after reaching an agreement with the Commonwealth as to a joint sentencing recommendation, the defendant pleaded guilty to all four indictments. The agreed-upon sentencing recommendation was that the defendant be sentenced to (1) six to ten years in State prison on the ACCA charge, (2) five to six years in State prison on the firearm possession (subsequent offense) charge, (3) two years in the house of correction on the ammunition charge, and (4) ninety days in the house of correction on the charge of discharging a firearm. All of the sentences were to be served concurrently with the sentence on the ACCA charge. The joint recommendation was presented to the judge by the prosecutor, and was confirmed by both the defendant and his counsel. In addition, the defendant confirmed that he understood that he would be pleading to "four" indictments. The judge then conducted a plea colloquy

about which no claim of deficiency is made, and the defendant pleaded guilty to all four charges. He was sentenced in accordance with the joint recommendation.

A little more than three years later, on October 22, 2019, the defendant filed the two motions that underlie this appeal. The first motion was made pursuant to Mass. R. Crim. P. 30 (a), and argued that the court lacked jurisdiction to impose judgment on the ACCA indictment because it identified his predicate conviction as "armed assault," which is not a recognized crime. The second motion was made pursuant to Mass. R. Crim. P. 30 (b), and argued that the ACCA indictment should be dismissed with prejudice because the prosecutor "knowingly or with reckless disregard for the truth," made misstatements to the plea judge and the grand jury regarding the defendant's prior criminal history. More specifically, the prosecutor had misstated to the grand jury that the defendant had previously been convicted on two charges of armed assault with intent to murder, and he had also misstated to the judge during the plea hearing that the defendant had previously been convicted of one charge of the same crime. In fact, the defendant had never been convicted of armed assault with intent to murder; he had only one conviction of the lesser included offense of assault with intent to kill.

The Commonwealth acknowledged the errors in the prosecutor's presentation to the grand jury and to the judge,

and also acknowledged the misnomer of the predicate crime in the ACCA indictment. But the Commonwealth argued that the prosecutor's misstatements were unintentional (an assertion it supported with an affidavit from the prosecutor), and that by pleading guilty the defendant had waived any nonjurisdictional errors in the indictment. However, the Commonwealth identified an additional error -- namely, that violating the ACCA should not have been charged as a freestanding crime, but rather as a sentencing enhancement. The Commonwealth proposed rectifying this by vacating the sentence on the ACCA charge and attaching it instead as an enhancement on the firearm possession (subsequent offense) charge.

The judge accepted the Commonwealth's arguments, denied both of the defendant's motions, and, in his order on the rule 30 (a) motion, "clarif[ied]" the sentence to attach the ACCA sentence to the firearm possession charge, and to "relabel" the ACCA charge as a "notice of enhancement."

This appeal followed where, in addition to the arguments he raised below, the defendant argues that the judge erred in attaching the ACCA enhancement to the firearm possession charge because that charge was already subject to a subsequent-offense sentencing enhancement. This additional error, he contends, is another reason why the ACCA charge should be dismissed with prejudice. The Commonwealth now acknowledges that two

sentencing enhancements cannot be applied to the same offense, but urges that the solution is for us to remand the case, whereupon the judge should amend the ACCA charge to attach to the ammunition charge rather than to the firearm charge to which the Commonwealth previously argued it should apply.

Discussion. Although the number and nature of prosecutorial missteps in this case is of serious concern, we are not persuaded by the defendant's argument that the solution is to vacate his plea and dismiss the ACCA charge with prejudice. We address each of the defendant's arguments in turn.

First, we are not persuaded by the defendant's argument that the ACCA indictment must be dismissed because it fails to allege a crime. The defendant is correct in general that "[n]o court has jurisdiction to sentence a defendant for that which is not a crime." Commonwealth v. Andler, 247 Mass. 580, 582 (1924). It is also true that "the ACCA does not identify a 'freestanding crime'; rather, it provides sentence enhancements, based on prior offenses, for [certain violent crimes and serious drug offenses]." Commonwealth v. Wentworth, 482 Mass. 664, 668 (2019). However, where -- as here -- the ACCA sentencing enhancement has been mistakenly charged as a free-standing crime, the Supreme Judicial Court has held that the correct remedy is for the judge to amend the indictment so that the

sentencing enhancement is attached to the indictment charging the defendant with a substantive crime. See Commonwealth v. Miranda, 441 Mass. 783, 787-790 (2004) (holding that trial judge did not err by amending defendant's indictment, postverdict, to include repeat offender sentencing enhancement as second count on indictment for underlying substantive crime). This court has adopted this procedure in a case similar to this one, involving a sentencing enhancement under the ACCA and guilty pleas to other substantive offenses. See Commonwealth v. Sylvia, 89 Mass. App. Ct. 279, 288-289 (2016).

Second, the defendant argues that the ACCA indictment is defective because it lists "armed assault" as the predicate violent crime offense for the ACCA sentencing enhancement, and armed assault is not a crime that exists in the Commonwealth. It is true that the crime of armed assault, simpliciter, is unknown in this Commonwealth.¹ However, it does not follow that the ACCA indictment should be dismissed. "A complaint or indictment will not be dismissed . . . 'if the offense is charged with sufficient clarity to show a violation of law and to permit the defendant to know the nature of the accusation against him.'" Commonwealth v. Canty, 466 Mass. 535, 547

¹ Instead, the defendant was previously convicted, after a plea, of assault with intent to kill, in violation of G. L. c. 265, § 29.

(2013), quoting Commonwealth v. Fernandes, 430 Mass. 517, 519-520 (1999). Furthermore, an indictment "shall not be dismissed or be considered defective or insufficient if it is sufficient to enable the defendant to understand the charge and to prepare his defense; nor shall it be considered defective or insufficient for lack of any description or information which might be obtained by requiring a bill of particulars." G. L. c. 277, § 34.

Here, the "armed assault" language did not stand alone in the ACCA indictment. Instead, the indictment specified that the predicate conviction came out of Berkshire Superior Court, gave the date of conviction, and provided the docket number of the earlier case. This was sufficient to give the defendant fair notice of the charge against him, and the facts of the predicate conviction being used to support the application of the ACCA sentencing enhancement. See Commonwealth v. Gonzalez, 22 Mass. App. Ct. 274, 284-285 (1986) (indictment was sufficient where it informed defendant he was being charged under repeat offender statute, and specified specific prior charges and dates of convictions). Moreover, at the plea colloquy, the defendant affirmatively agreed to the prosecutor's recitation of facts, including facts having to do with the defendant's 2003 conviction of assault with intent to kill. As the Commonwealth points out in its brief, had the defendant not understood the

charge against him, or disagreed about the facts surrounding his previous conviction, he could have asked for a bill of particulars or moved to dismiss the indictment prior to tendering his guilty plea. See Wentworth, 482 Mass. at 669 (defendant could have asked for a bill of particulars, and "[t]hat the indictment failed to list the three predicate offenses relied upon does not render it defective, as the defendant was provided fair notice of the charge and the accompanying sentence enhancement based upon three previous convictions of violent crimes or serious drug offenses").

Third, the defendant argues that the ACCA indictment should be dismissed in light of the prosecutor's misstatements to the grand jury about his criminal history. Although we do not condone the prosecutor's misstatements, absent a showing that false information was deliberately or recklessly presented to the grand jury, dismissal was not required. See Commonwealth v. Salman, 387 Mass. 160, 166 (1982). Moreover, G. L. c. 277, § 47A, provides that "any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised prior to trial and only by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure," and the "failure to raise any such defense or

objection by motion prior to trial shall constitute a waiver thereof." See Commonwealth v. Berrios, 84 Mass. App. Ct. 521, 524 (2013), quoting Commonwealth v. Fanelli, 412 Mass. 497, 500 (1992) ("A defendant's guilty plea, made knowingly, voluntarily and with the benefit of competent counsel, waives all nonjurisdictional defects in the proceedings prior to the entry of the guilty plea").

Likewise, dismissal is not required based on the prosecutor's misstatement during the plea hearing. "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice."² Commonwealth v. Cinelli, 389 Mass. 197, 210 (1983). The defendant cannot make out a showing of prejudice here: he was in fact convicted of assault with intent to kill, a suitable predicate offense for the ACCA sentencing enhancement, and the sentence imposed on the defendant -- not less than six and not more than ten years in

² The defendant's reliance on Commonwealth v. Hernandez, 421 Mass. 272 (1995), for the proposition that "[d]ismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct," id. at 277, is misplaced. The Supreme Judicial Court did say that, but Hernandez dealt with the Commonwealth's willful failure to comply with a lawful discovery order in a criminal trial, not with sloppy but arguably merely negligent statements before a grand jury. And, in any event, Hernandez vacated the dismissal of the criminal complaint and remanded for a determination whether the prosecution's failure caused the defendant "irreparable prejudice" (citation omitted). Id. at 279.

State prison -- was well within the guidelines set out in the ACCA for a defendant who has been previously convicted of one violent crime. See G. L. c. 269, § 10G (a) (a defendant with one previous conviction for a violent crime who is charged under the ACCA shall "be punished by imprisonment in the state prison for not less than three years nor more than 15 years").

The defendant next argues that his guilty plea for violating the ACCA must be vacated and the indictment dismissed because there was insufficient evidence that he had been previously convicted of the predicate offense of armed assault with intent to murder. There appear to be two components to this argument: first, that there was insufficient evidence presented to the grand jury; second, that the Commonwealth's factual recitation during the plea hearing was insufficient. As to the first of these, the defendant's subsequent plea waived his challenge to the sufficiency of the evidence presented to the grand jury. Even were that not the case, though, although it is true that the defendant was not convicted of armed assault with intent to murder (as charged in the indictments presented to the grand jury), he pleaded guilty to the lesser included offense of assault with intent to kill, and that sufficed to establish a predicate "violent crime" for purposes of the ACCA. General Laws c. 140, § 121, defines "violent crime" as:

"any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another."

Assault with intent to kill, to which the defendant pleaded guilty in 2003, fits that statutory definition of a "violent crime." See G. L. c. 265, § 29.

To the extent the defendant's argument rests on the prosecutor's misstatement to the judge during the plea hearing, it fails for similar reasons. Although the prosecutor misstated that the previous conviction was for armed assault with intent to murder (rather than intent to kill), he accurately described the facts underlying the conviction: that after a fight at a party, the defendant shot someone. The judge conducted a comprehensive plea colloquy with the defendant, and after the prosecutor's recitation of the facts, asked the defendant if he understood the facts recited (the defendant answered that he did), if the defendant disagreed with any of the facts (he did not), and if the facts as recited were true (the defendant said they were).

Finally, we turn to the defendant's argument that the ACCA sentencing enhancement was erroneously attached -- at the

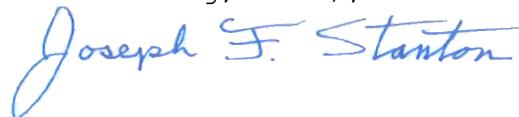
Commonwealth's urging -- to the firearms possession charge, which already carried a subsequent-offense enhancement. The Commonwealth agrees this was error. See Commonwealth v. Richardson, 469 Mass. 248, 254 (2014). The defendant asks for his "original sentence" to be "reinstated" (presumably meaning that the ACCA sentencing enhancement should be dropped entirely), while the Commonwealth asks that the problem be rectified on remand by attaching the ACCA enhancement to the ammunition charge. We are disinclined to adopt either approach. Instead, we find support for a better course in Commonwealth v. Boyd, 474 Mass. 99 (2016) -- in which the court held that, where the Commonwealth fails to exercise its discretion to pick just one sentencing enhancement prior to sentencing, that discretion then rests with the sentencing judge; whichever enhancement provision the judge picks "survives" for purposes of the sentence and any appeal, and the enhancement that is not picked is effectively dismissed. See id. at 104 ("That is, the judge's initial sentencing of the defendant under the ACC statute effectively dismissed the second offender portion of the indictment").

Conclusion. For these reasons, we affirm the order denying the defendant's rule 30 (b) motion, and so much of the order on the defendant's rule 30 (a) motion as denied the motion for relief from unlawful restraint. So much of the order on the

rule 30 (a) motion as applied the ACCA enhancement to the firearm possession charge is vacated, and the matter is remanded for resentencing. On remand, the judge should choose which sentencing enhancement (either ACCA or subsequent offense) shall apply to the firearms conviction and resentence the defendant accordingly; the enhancement not selected shall effectively be dismissed. Regardless of which enhancement the judge chooses to apply to the conviction, the sentence on that charge cannot exceed the five-to-six year sentence to which the defendant agreed when he tendered his plea.³ Also on remand, the judge should amend the sentences on the ammunition charge and on the charge of discharging a firearm so that they do not run concurrently with the sentence entered on the erroneous free-standing ACCA conviction.

So ordered.

By the Court (Vuono,
Wolohojian &
Hershfang, JJ.⁴),



Clerk

Entered: November 22, 2021.

³ Although it is true that the defendant knew that the structure of the joint sentencing recommendation would result in an overall period of incarceration of six-to-ten years, it remains that he agreed to a specific sentence of only five-to-six years on the already-enhanced firearm charge, and that the judge told him that he would be permitted to withdraw his plea should the judge exceed the joint recommendation.

⁴ The panelists are listed in order of seniority.