

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

21-P-369

COMMONWEALTH

vs.

JOHN SILVA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from an order of a Superior Court judge revoking his probation. The judge concluded that the defendant had violated the conditions of his probation by (1) committing a new criminal offense (unlawful possession of a firearm), (2) failing to provide verification of work, schooling, or community service, and (3) failing to pay probation supervision fees. On appeal, the defendant challenges the sufficiency of the evidence that he committed a new offense. We affirm.<sup>1</sup>

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<sup>1</sup> We note that the defendant does not challenge the two so-called "technical" violations of probation and that these also provide a basis for revoking probation. However, because it is not clear that the judge would have imposed the same sentence had he not found that the defendant more probably than not violated his probation by committing a new offense, we address the defendant's challenge to the sufficiency of the evidence.

Background. On June 15, 2017, the defendant pleaded guilty to multiple offenses and was sentenced to serve a term of incarceration followed by two years of probation. The defendant completed his prison term and was on probation when he was charged with new firearm offenses.<sup>2</sup> He was served with a notice of alleged probation violation and a final probation surrender hearing was held on January 29, 2021. Boston police officer Raphael Riordan, who had personal knowledge of the events upon which the new charges were based, testified at the hearing. We summarize the testimony as follows.

On February 17, 2020, at approximately 2:26 A.M., Officer Riordan and his partner were on patrol when they stopped a motor vehicle for traffic violations. There were two individuals in the car, the driver and the defendant, who was in the front passenger seat. Officer Riordan observed the defendant make a forward movement and, after using a "search light" to focus on the passenger side of the vehicle, Officer Riordan "could see [that] the [defendant] turn[ed] around to look at [the police],

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<sup>2</sup> Specifically, the defendant was charged with carrying a firearm without a license in violation of G. L. c. 269, § 10 (a); carrying a loaded firearm without a license in violation of G. L. c. 269, § 10 (n); possession of a large capacity firearm in violation of G. L. c. 269, § 10 (m); carrying a loaded firearm without a license, fourth offense, in violation of G. L. c. 269, § 10 (a), (d), & (n); possession of ammunition without an FID card in violation of G. L. c. 269, § 10 (h) (1); and a firearm violation with two prior violent/drug crimes in violation of G. L. c. 269, § 10G (b).

and then looked back quickly." While his partner was reviewing the occupants' driver's licenses and the vehicle's registration, Officer Riordan observed two liquor bottles and drinking cups in the vehicle. A check of the defendant's license revealed a history of firearm related offenses. Based on this information and Officer Riordan's observations, the driver and the defendant were ordered out of the car and then were pat frisked. During the patfrisk of the defendant, the police recovered a folding knife. The officers then conducted a protective sweep of the vehicle's passenger area, at which time they noticed the defendant "get very nervous" and "pac[e] back and forth." The police subsequently discovered a firearm in the vehicle's glove compartment, which was within arm's length of where the defendant had been sitting.

Based on the testimony described above and a review of body camera footage, the judge made the following findings of fact:

"Based on a preponderance of the evidence . . . I do find that there's sufficient evidence, and I do find the defendant responsible for the violation, which is characterized here as a new offense. I find that he's in close proximity to the glove compartment; the movement in the vehicle; the degree to which he is, in fact, demonstrating agitation while he's standing and watching the search being conducted in the vehicle -- and I was able to see that from a portion of the body cam footage -- is sufficient to tip the scale, and I do find him in violation of his probation because of the new offense relating to the firearm found in the vehicle."

Discussion. We review an order revoking probation for an abuse of discretion, Commonwealth v. Bukin, 467 Mass. 516, 519-520 (2014), and to determine "whether the record discloses sufficient reliable evidence to warrant the findings by the judge that [the probationer] had violated the specified conditions of his probation." Commonwealth v. Morse, 50 Mass. App. Ct. 582, 594 (2000). Where "revocation of probation [is] based upon a violation of criminal law, 'there is no prerequisite that the probationer be convicted.'" Commonwealth v. Emmanuel E., 52 Mass. App. Ct. 451, 453 (2001), quoting Rubera v. Commonwealth, 371 Mass. 177, 180-181 (1976). The judge revoking probation need only find by a preponderance of the evidence that the defendant committed a new criminal offense. See Bukin, supra at 520.

The defendant contends that the judge abused his discretion because there was insufficient evidence to support a finding that he constructively possessed the firearm recovered from the glove compartment. Thus, the defendant asserts, the Commonwealth failed to prove that he had violated his probation by committing a new crime. We disagree.

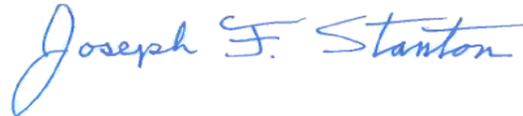
"To establish constructive possession, the Commonwealth must prove a defendant's (a) knowledge of the contraband; (b) ability to control it; and (c) intention to exercise control over it." Commonwealth v. Crapps, 84 Mass. App. Ct. 442, 444

(2013). Here, Officer Riordan testified that he and his partner stopped a vehicle in which the defendant was a passenger. Officer Riordan observed the defendant make a forward movement and, after activating a "search light" to illuminate the passenger side of the vehicle, Officer Riordan noticed the defendant glance at him and his partner before quickly turning back around. During a protective sweep of the vehicle's passenger compartment, the police noticed that the defendant was "very nervous" and "started pacing back and forth." The police subsequently recovered a loaded firearm in the vehicle's glove compartment, which was located within arm's reach of where the defendant had been seated. In addition, portions of Officer Riordan's testimony were corroborated by body camera footage of the incident. This evidence was sufficient for the judge to find by a preponderance of the evidence that the defendant had knowledge of the firearm, ability to control it, and intention to exercise control over it, thereby warranting a finding that the defendant had violated his probation. See Commonwealth v. Hill, 52 Mass. App. Ct. 147, 154 (2001) ("The standard of proof

in a probation revocation proceeding is the civil standard of preponderance of the evidence rather than the criminal standard of beyond a reasonable doubt").

Order revoking probation  
affirmed.

By the Court (Vuono,  
Sullivan & Lemire, JJ.<sup>3</sup>),



Clerk

Entered: August 5, 2022.

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<sup>3</sup> The panelists are listed in order of seniority.