

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-171

COMMONWEALTH

vs.

ADRIAN S. FERNANDES.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, the defendant was convicted of unlawfully carrying a firearm in violation of G. L. c. 269, § 10 (a).¹ The gun in question was found behind a bush in a courtyard off a housing complex located in the Roxbury section of Boston. On appeal, the defendant contends that his motion to suppress the gun on which the conviction is based should have been

¹ The defendant was also charged with unlawfully carrying a loaded firearm, unlawful possession of ammunition, and trespassing. At the close of the Commonwealth's case-in-chief, the judge allowed the defendant's motion for a required finding of not guilty on the charge of unlawfully carrying a loaded firearm, and the jury returned a not guilty verdict on the charge of trespassing. After the jury was discharged, the defendant filed a renewed motion for a required finding of not guilty pursuant to Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995), which the judge allowed with respect to the conviction of unlawful possession of ammunition and denied with respect to the conviction that is the subject of this appeal (unlawfully carrying a firearm).

suppressed as the fruit of an unlawful patfrisk. He also claims that the evidence presented at trial was insufficient to prove the element of possession. Although the question is a close one, we conclude that the evidence was insufficient to sustain the defendant's conviction.² Accordingly, the conviction is reversed, the verdict is set aside, and judgment shall enter for the defendant.

Background. The evidence, considered in the light most favorable to the Commonwealth, permitted the jury to find the following facts. Shortly after midnight on October 16, 2018, four Boston police officers responded to a dispatch concerning a group of individuals who were drinking and being loud outside of an apartment building located at 70 Annunciation Road. Two officers, Joseph Starkey and his partner, were in plain clothes and approached the building on foot. The other two officers were in uniform and drove to the building from a different direction in a marked police cruiser. Officer Starkey observed a few individuals, including the defendant, outside the building, "hanging out." The defendant was wearing a hooded sweatshirt and had his hands in the pocket of the sweatshirt. The defendant was "holding [his hands] very tightly to his

² Given our conclusion, it is not necessary to address the merits of the defendant's arguments with respect to the denial of his motion to suppress.

waistband." Officer Starkey could not see what the defendant was holding, but based on his training and experience, he believed that the defendant was "attempting to conceal something." While Officer Starkey was observing the defendant, the police cruiser came down the street toward the building. The defendant stepped away from the group and appeared to look up the street in the direction of the cruiser. The defendant then turned, saw Officer Starkey approaching, and ran inside the building.

Officer Starkey immediately gave chase, but when he arrived at the front stairs of the building, the people who had been with the defendant "blocked [him]" and prevented him from entering the building.³ After about seven to ten seconds, Officer Starkey made his way up the stairs to the entry way and saw the defendant in the hallway. The defendant was walking back outside toward Officer Starkey. When the defendant saw Officer Starkey, he appeared nervous ("wide eyed") and said something to the effect of, "What, I don't have anything on me." Officer Starkey pat frisked the defendant for weapons and found none. Officer Starkey then left the defendant with the other officers and went into the building.

³ In describing the incident, Officer Starkey stated, "They blocked me and they kind of like shoulder bumped me and tried to stop me from going in [the building]."

The front entrance opened into a common hallway, which led to a rear door. Officer Starkey noticed that the rear door was ajar and walked through it to look for "discarded items." The rear door opened into a courtyard that was surrounded by more buildings that were part of the housing complex. Using his flashlight, Officer Starkey looked around and saw a firearm laying on some gravel behind a bush about seven to ten feet away from the rear door. The defendant, who did not have a license to carry a firearm and was only eighteen years old, was subsequently arrested. The firearm was recovered, photographed, and delivered to a detective for processing at the police station. The gun was a .40 caliber semiautomatic pistol with one bullet in the chamber and five more bullets in the magazine when it was recovered. The gun, magazine and all six bullets were tested for fingerprints, and none were found.

Discussion. In reviewing a claim of insufficient evidence, we consider "whether, after viewing the evidence in the light most favorable to the [Commonwealth], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original). Commonwealth v. Latimore, 378 Mass. 671, 677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979). To sustain a conviction under G. L. c. 269, § 10 (a), the Commonwealth was required to prove that the defendant knowingly possessed a firearm outside

of his residence or place of business absent compliance with the relevant licensing provisions.⁴ See Commonwealth v. Taylor, 486 Mass. 469, 473 (2020).

There is no evidence in this case of actual possession. The gun was never observed on the defendant's person, and no one saw the defendant toss the gun or an object resembling a gun into the courtyard. Nor was there any fingerprint or deoxyribonucleic acid evidence that connected the defendant to the gun. However, possession may be constructive, and, at trial, the Commonwealth proceeded solely on the theory that the defendant constructively possessed the gun. To prove constructive possession, the Commonwealth is required to show that the defendant had "knowledge coupled with the ability and intention to exercise dominion and control" over the firearm. Commonwealth v. Than, 442 Mass. 748, 751 (2004), quoting Commonwealth v. Sespedes, 442 Mass. 95, 99 (2004). The Commonwealth may, as it attempted to do here, prove an element of a crime by circumstantial evidence. Id. See Commonwealth v. Cotto, 69 Mass. App. Ct. 589, 592 (2007). "An inference drawn from circumstantial evidence need only be reasonable and possible; it need not be necessary or inescapable" (quotation

⁴ The Commonwealth also had to prove that that the gun the defendant possessed met the definition of a working firearm; however, this element is not at issue in this case.

and citation omitted). Cotto, supra. However, evidence is not sufficient if it requires piling "inference upon inference," or requires "conjecture and speculation." Commonwealth v. Merry, 453 Mass. 653, 661 (2009), quoting Corson v. Commonwealth, 428 Mass. 193, 197 (1998).

The Commonwealth contends that it met its burden of proof because the evidence permitted the jury to reasonably infer that the defendant was holding his hands tightly to his waist because he was concealing a gun, the defendant ran into the building to avoid the police, and the location of the firearm was consistent with where it would have landed had it been thrown from the rear door of the building into the courtyard. In addition, the defendant appeared nervous upon encountering Officer Starkey and said that he did not have anything on him. We acknowledge that it is possible that the defendant had a firearm in his waistband and that he ran into the building to throw it away upon seeing the police. Nevertheless, however plausible, we do not believe that an inference of possession, sufficient to establish guilt beyond a reasonable doubt, was permissible based on the evidence presented at trial.

To begin with, while the jury could reasonably infer that the defendant was concealing an item either in the pocket of his sweatshirt or in his waistband, we do not believe it was reasonable to infer that the item was a firearm. We note that

the police were dispatched to the scene to investigate drinking and boisterous behavior. There was no report of a firearm and Officer Starkey did not see a bulge or any object consistent with the size of a firearm when he observed the defendant. Moreover, Officer Starkey never opined, based on his training and experience, that the defendant's conduct was consistent with someone who was concealing a weapon.⁵ For example, he did not testify that an individual's waistband is an area commonly used to conceal firearms. Contrast Commonwealth v. Grayson, 96 Mass. App. Ct. 748, 751 (2019) (in evaluating sufficiency of evidence of possession of firearm court considered officer's testimony

⁵ We note that Officer Starkey did not testify, as the Commonwealth asserts in its brief, that he inferred that the defendant was trying to conceal a firearm. Nor did Officer Starkey testify at trial that he observed the defendant conduct "a security check for a firearm in his waistband." By contrast, at the hearing on the defendant's motion to suppress, Officer Starkey explained that he had received special training on the "characteristics of an armed gunman" and testified that "[t]ypically, if [someone is] carrying a firearm illegally, they'll keep it in their waistband." He further explained that certain movements like "[p]inning their arms or their hands towards their waistband" indicates an intent "to try to secure a firearm." In addition, Officer Starkey, who had participated in over twenty firearms investigations, had observed similar movements when he arrested individuals for unlawful possession of a firearm. He testified: "Most firearm arrests of people who were observed, and they'll make certain movements that lead us to believe that they're concealing a firearm." According to Officer Starkey, it was his experience that when people see the police, they get nervous and "do like a security check" to make sure that "the firearm maybe hasn't slipped down their pants or fallen out or just been moved around." Had Officer Starkey testified similarly at trial, the Commonwealth's case would have been much stronger.

that defendant's clutching of item in his waistband as he fled from police on his bicycle (steering with one hand) and on foot (still holding his hand to his waist) was action characteristic of persons carrying firearms). In sum, we are not persuaded that a jury reasonably could infer that the defendant was concealing a firearm based on Officer Starkey's trial testimony.

Next, although the jury reasonably could infer that the defendant ran inside the building when he saw the police cruiser, and it is true that our cases recognize that flight from the police gives rise to a reasonable inference of consciousness of guilt, see Grayson, 96 Mass. App. Ct. at 751, such evidence is not sufficient to meet the Commonwealth's burden of proving that the defendant had knowledge of the firearm, let alone that he had the intent to exercise dominion and control over it. Furthermore, under the circumstances presented, we discount the defendant's flight from the police as probative of consciousness of guilt. See Commonwealth v. Evelyn, 485 Mass. 691, 708-709 (2020), citing Commonwealth v. Warren, 475 Mass. 530, 539-540 (2016) (flight of African-American man from police not necessarily probative of consciousness of guilt). Here, as the Supreme Judicial Court has stated, we must consider that there are many reasons why an innocent African-American male might flee in order to avoid an encounter with the police and the fear of such an encounter may

lead to nervousness. Evelyn, supra at 709, citing Warren, supra at 540. Accordingly, even viewing the evidence in the light most favorable to the Commonwealth, we do not place much weight on the defendant's flight in assessing the sufficiency of the evidence.

Furthermore, we discount entirely the Commonwealth's argument that because the defendant was known to Officer Starkey and had never fled from him on prior occasions, the defendant's flight on this occasion supported an inference that he was "desperately trying to avoid police because he was in possession of an illegal firearm." There was no evidence presented at trial that defendant knew or recognized Officer Starkey. Nor was there any evidence about prior encounters between the defendant and Officer Starkey. In making this argument, the Commonwealth improperly relies on evidence presented at the hearing on the motion to suppress at which Officer Starkey testified that he would "occasionally run into [the defendant]" and have "casual conversation" that never led to the defendant fleeing.

Nor are we persuaded that the location of the firearm, even considered together with the other evidence presented at trial, including the defendant's nervousness and unprompted comment that he did not have anything on him, tips the scale in favor of sufficiency. The firearm was found in a courtyard to which many

people had access. No one observed the defendant in the courtyard or near the rear door leading to the courtyard. The rear door appeared to be slightly propped open, but the door was not observed opening or closing and the defendant was inside the building for seconds. In addition, there was nothing particular about the firearm that indicated it had recently landed where Officer Starkey found it, and because the firearm was behind a bush, it was not reasonable to infer that it would not have remained in the courtyard for long without being found.⁶

Contrast Commonwealth v. Jefferson, 461 Mass. 821, 826 (2012) ("a jury reasonably could have inferred from the location of the firearm in the middle of the walkway that it had only recently landed there, because it was in such plain view that it would not have remained there for long without being reported or removed"). Comparable cases have included relatively stronger circumstantial evidence. See Commonwealth v. White, 452 Mass. 133, 136 (2008) (evidence sufficient to infer possession of gun found inside air vent in hallway of car wash where eyewitness observed defendant holding gun when he entered hallway and defendant did not have it when he emerged); Grayson, 96 Mass.

⁶ The Commonwealth's assertion that the location of the firearm permitted the jury to infer that it could not have been there long without being reported or removed is belied by Officer Starkey's testimony that he did not see the firearm until he looked behind a bush with the aid of a flashlight.

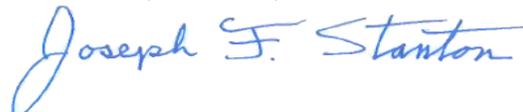
App. Ct. at 751 (evidence that defendant fled police while clutching item in his waistband and that firearm and his shoes were found along his path of flight was sufficient to allow jury to conclude that defendant knowingly possessed the firearm); Commonwealth v. Summers, 93 Mass. App. Ct. 260, 264-265 (2018) (evidence sufficient to convict defendant of carrying firearm unlawfully on charge arising from discovery of handgun inside backpack on floor of vehicle stopped by police and from which defendant, who was the sole occupant of the back seat, fled after employing a ruse, and defendant's statements upon his arrest provided a basis upon which a jury could infer defendant owned the backpack); Commonwealth v. Dyette, 87 Mass. App. Ct. 548, 552-553 (2015) (location of firearm along observed flight path from police, in conjunction with lying to police, and shedding and concealing clothing in garbage cans sufficient to infer possession); Commonwealth v. Gant, 51 Mass. App. Ct. 314, 322 (2001) (evidence sufficient to infer that defendant possessed firearm found in trash can located in restaurant restroom based on testimony that officer observed defendant leaning away from trash can and heard clanking sound).

As we have noted, the Commonwealth's theory of guilt is not implausible. At the same time, however, "to sustain the denial of a directed verdict, it is not enough for the appellate court to find that there was some record evidence, however slight, to

support each essential element of the offense; it must find that there was enough evidence that could have satisfied a rational trier of fact of each such element beyond a reasonable doubt." Latimore, 378 Mass. at 677-678. Ultimately, the jury could only reach a guilty verdict by relying on speculation regarding the defendant's actions. Accordingly, the defendant's conviction must be reversed.

The judgment is reversed, the verdict is set aside, and judgment shall enter for the defendant.

By the Court (Vuono, Rubin & Walsh, JJ.⁷),



Clerk

Entered: August 12, 2022.

⁷ The panelists are listed in order of seniority.