

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-695

COMMONWEALTH

vs.

ADMILSON PEREIRA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a hearing, a District Court judge found that the defendant, Admilson Pereira, had violated the terms of his probation by committing two new crimes. The defendant argues that the judge improperly considered hearsay contained in police reports documenting the new crimes. Because the judge did not abuse her discretion in concluding that the hearsay was substantially reliable, we affirm.

Background. On September 18, 2019, the defendant pleaded guilty in the Brockton District Court to charges of assault by means of a dangerous weapon (two counts), negligent operation of a motor vehicle, leaving the scene of a motor vehicle collision after causing personal injury, and leaving the scene after causing property damage. For those convictions he was sentenced to concurrent six-month terms in the house of correction,

followed by eighteen months' probation. The defendant also admitted to sufficient facts for crimes including receiving a stolen motor vehicle, and was placed on eighteen months' probation. His conditions of probation included that he obey all laws, report to his probation officer as required, and notify her of any change of address.

A notice of probation violation issued alleging that on January 10, 2020, the defendant failed to report to his probation officer, and that on January 15 the probation officer went to his residence and was told that he did not live there. In February 2020, the defendant admitted to those violations of his probation, and his probation conditions were amended to require global positioning system (GPS) monitoring.

In April 2020, a notice of probation violation issued alleging that on March 23, 2020, the defendant had been charged in the Dorchester Division of the Boston Municipal Court with a new crime, assault by means of a dangerous weapon (Dorchester case). As a result, the defendant was held without bail, but then was released as a result of the COVID-19 pandemic. His conditions no longer included GPS monitoring.

In November 2020, the notice of probation violation was amended to add that on October 13, 2020, the defendant had been charged in the West Roxbury Division of the Boston Municipal

Court with another new crime, assault by means of a dangerous weapon, a gun (West Roxbury case).

On December 29, 2020, a final surrender hearing was held before the judge who had accepted the defendant's pleas and admissions to sufficient facts. At the hearing, the defendant objected on hearsay grounds to the admission of police reports pertaining to his Dorchester and West Roxbury cases. The police reports pertaining to the Dorchester case documented that two female victims had reported that the defendant's companion had hit each of them with a broken beer bottle, and the defendant had tried to hit one of the victims with the butt end of a firearm. Defense counsel argued that the victims' statements were uncorroborated because no firearm was ever recovered, and injuries that police noted to one victim were from the beer bottle. Defense counsel also argued that those victims had submitted affidavits "crafted by the attorney in that matter . . . that the event did not occur, and that any statements that were given to the police were taken out of context." In response, the probation officer pointed out that at the time of the offense the defendant "was on GPS, and his points placed him in that area." The judge ruled, "As to . . . the Dorchester [p]olice [r]eport, I am going to find that sufficiently reliable to be admitted."

In the police reports pertaining to the West Roxbury case, a different female witness reported that the defendant had pointed a firearm at someone else. Police spoke to the defendant, who said that someone had disrespected his girlfriend and threatened to slap her and to punch the defendant in the face. A bystander found a .22 caliber bullet nearby and turned it over to police. Defense counsel argued that that victim was biased against the defendant, and the defendant's girlfriend would testify that he never assaulted the victim. The judge admitted those police reports "de bene until I hear from the witness."

The defendant's girlfriend testified that at about 2:47 A.M. on October 11, 2020, she was at a party with the defendant, who perceived that another man had disrespected her. At first the man left, but then he returned and threatened to hit the girlfriend, who was pregnant, in her stomach. The defendant "got him," but they never touched each other and the defendant never pulled a gun on anybody. Based on the girlfriend's testimony, the judge ruled that the police reports pertaining to the West Roxbury case were admitted conclusively.

The judge concluded that the defendant had violated his probation by committing two new offenses.¹ On the charge of

¹ The judge also found that the defendant had violated probation by having failed to report to his probation officer and to

receiving a stolen motor vehicle, the judge revoked the continuance without a finding and sentenced him to nine months in the house of correction; on his other convictions, the judge imposed the twelve-month balance of his suspended sentences.

Discussion. The defendant argues that the judge improperly relied on hearsay contained in the police reports from the Dorchester and West Roxbury cases, and absent that hearsay there was an insufficient basis to find that he violated his probation.

In probation revocation proceedings, the Commonwealth bears the burden of proving by a preponderance of the evidence that the probationer violated the terms and conditions of probation. See Commonwealth v. Bruno-O'Leary, 94 Mass. App. Ct. 44, 47 (2018). Pursuant to Rule 7 of the Massachusetts Rules of the District and Municipal Courts for Probation Violation Proceedings (2015), hearsay is admissible at probation revocation proceedings, and the judge may rely on it if it is substantially reliable. See Commonwealth v. Ogarro, 95 Mass. App. Ct. 662, 668 (2019). In determining whether hearsay is substantially reliable, the judge may consider a nonexhaustive list of factors, including:

inform her of his whereabouts. As mentioned above, the defendant had admitted to those violations. He does not raise on appeal any issue about them.

"whether that evidence (1) is based on personal knowledge and/or direct observation, rather than on other hearsay; (2) involves observations recorded close in time to the events in question; (3) is factually detailed, rather than generalized and conclusory; (4) is internally consistent; (5) is corroborated by any evidence provided by the probationer; (6) was provided by a disinterested witness; or (7) was provided under circumstances that support the veracity of the source (e.g., was provided under the pains and penalties of perjury or subject to criminal penalties for providing false information)."

Rule 7(b). See Ogarro, supra. See also Commonwealth v. Costa, 490 Mass. 118, 125 (2022). A hearsay statement need not satisfy all of those criteria to be substantially reliable. See Commonwealth v. Patton, 458 Mass. 119, 133 (2010). See also Commonwealth v. Grant G., 96 Mass. App. Ct. 721, 725 (2019). We review the judge's assessment of the reliability of that evidence for an abuse of discretion. See Ogarro, supra.

The judge did not abuse her discretion in relying on hearsay in both sets of police reports. As to the Dorchester case, the witness's statement that the defendant had tried to hit her with the butt end of a firearm was made based on her direct observation of that incident and soon after it. See Ogarro, 95 Mass. App. Ct. at 669. That statement was corroborated in part by statements of both victims reporting that the defendant's companion hit both victims with a beer bottle, and police observations of the resulting injuries. The hearsay was also corroborated in part by GPS data showing that

the defendant was present at the incident.² Cf. Commonwealth v. Thissell, 457 Mass. 191, 195-199 (2010) (violation of stayaway condition of probation; GPS data were substantially reliable hearsay).

The police reports in the West Roxbury case documented a witness's statement that the defendant had pointed a gun at someone else. The witness made that statement based on her direct observation of the event and soon after it. See Ogarro, 95 Mass. App. Ct. at 669. That the witness reported an assault that the defendant had committed upon someone else added to the reliability of her statement. Cf. id. at 668-669 (victim who reported defendant's beating her was "interested party"). Further, the witness's statement was corroborated by the defendant's own admission to police that he had been angry at a male party guest for disrespecting his girlfriend, and his girlfriend's testimony to the same effect. It was also corroborated by the bystander's discovery of the bullet.

The defendant argues that the judge improperly relied on the hearsay contained in the police reports because the probation officer did not show good cause for not calling witnesses to testify at the probation revocation hearing.³ The

² The defendant did not object to the probation officer's testimony about the GPS data.

³ The hearing took place on December 29, 2020. Asked by the judge if she would call any witnesses, the probation officer

short answer is that "a finding of substantial reliability is itself sufficient to demonstrate good cause." Commonwealth v. Bukin, 467 Mass. 516, 522 (2014). See Commonwealth v. King, 71 Mass. App. Ct. 737, 740 (2008). Nor do we discern a violation of the defendant's due process rights as a result of the admission of the police reports. Cf. Costa, 490 Mass. at 126 (no due process violation in admitting victim's statements in grand jury minutes, private investigator's reports, and affidavit).

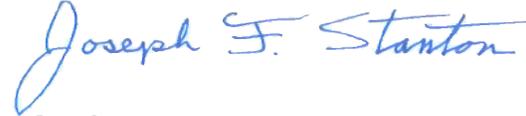
The defendant also finds fault with the absence of written findings by the judge that the hearsay in the police reports was substantially reliable. As mentioned above, the judge stated on the record that she found that the Dorchester police report was "sufficiently reliable to be admitted," and admitted the West Roxbury police report "de bene until I hear from the [defendant's] witness." Although written findings are preferable, that absence was not fatal to the admissibility of the hearsay, because the judge's oral findings, when transcribed, satisfied the requirement of a written statement by the fact finder. See Patton, 458 Mass. at 136; King, 71 Mass. App. Ct. at 739 n.5 (2008).

replied, "The summonses did go out, assuming it's the holidays, . . . there are no witnesses here today." The defendant objected to the admission of the police reports on hearsay grounds, but did not object to the absence of the witnesses or seek a continuance to obtain their testimony.

Conclusion. The order entered on December 29, 2020,
revoking probation and imposing sentence, is affirmed.

So ordered.

By the Court (Sullivan,
Blake & Grant, JJ.⁴),



Clerk

Entered: November 21, 2022.

⁴ The panelists are listed in order of seniority.