

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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

18-P-627

COMMONWEALTH

vs.

ALEC K. ALMEIDA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Alec K. Almeida, appeals from a District Court order after a hearing on his violation of probation imposed on charges of violating an abuse prevention order, G. L. c. 209A, § 7; threatening to commit a crime, G. L. c. 275, § 2; and malicious destruction of property worth over \$250, G. L. c. 266, § 127. He challenges the judge's finding that he violated his probation by committing a new offense, that of violating a second abuse prevention order. The defendant also contends the judge erred in including a no-contact probationary condition in the sentence she imposed. Concluding that the second abuse prevention order against the defendant was not transparently invalid and that the no-contact provision was reasonably related to a proper probation purpose, we affirm.

1. Violation of probation. "As a general rule the defendant does not have the option to act in violation of a court order and then, in a subsequent criminal proceeding, assert as a defense that the order should not have been issued." Commonwealth v. Marrero, 85 Mass. App. Ct. 911, 912 (2014). Although the general rule admits of exceptions, the defendant here cannot take advantage of the principle that allows a collateral attack where "the injunction was transparently invalid or had only a frivolous pretense to validity." Id. at 912 n.4, quoting Fitchburg v. 707 Main Corp., 369 Mass. 748, 754 (1976). First, the defendant raised no collateral attack on the validity of the abuse prevention order at the probation violation hearing. To the contrary, the defendant objected to the admission of any evidence about the basis of the abuse prevention order. See Commonwealth v. Patton, 458 Mass. 119, 135 (2010) (issue not raised at violation hearing waived). Second, the defendant has not provided a transcript of the testimony that supported the abuse prevention order. Accordingly, we cannot determine whether the testimony at that hearing supported the issuance of the order. Cf. V.M. v. R.B., 94 Mass. App. Ct. 522, 524 (2018) (defendant not entitled to challenge basis for ex parte order once order after notice issued). On this record, there is no basis for concluding that the abuse prevention order was transparently invalid.

2. Condition of probation. "Courts have previously upheld conditions of probation that affect First Amendment [to the United States Constitution] rights so long as they are 'reasonably related to a valid probation purpose.'" Commonwealth v. Pereira, 93 Mass. App. Ct. 146, 153 (2018), quoting Commonwealth v. Power, 420 Mass. 410, 417 (1995). "A probation condition forbidding contact with . . . the victim has a clear rational relationship to [the principal goals of probation]: encouraging the defendant's acceptance of responsibility for the crime and protecting the victim, as a member of the public, from further harm, whether emotional, physical, or financial, at the hands of the defendant." Pereira, supra. Where the evidence before the judge suggested that the defendant committed statutory rape against the abuse prevention order plaintiff, and that the plaintiff had expressed the desire to kill herself and had to be hospitalized after her last encounter with the defendant, it is evident that a

prohibition on further contact of any sort was reasonably related to a valid probation purpose.

Order entered December 29,
2017, affirmed.

By the Court (Vuono,
Massing & Ditekoff, JJ.¹),



Clerk

Entered: April 23, 2019.

¹ The panelists are listed in order of seniority.