COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1023

COMMONWEALTH

vs.

SILVINO FONTES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury-waived trial in the District Court, the defendant was convicted of operating under the influence of intoxicating liquor (OUI), second offense. G. L. c. 90, § 24 (1) (a) (1).[1] On appeal, the defendant contends that (1) he did not validly waive his right to a jury trial in either phase of the bifurcated trial, and (2) because the Commonwealth did not prove that he had an attorney during the proceeding leading to his first OUI conviction, the Commonwealth did not produce sufficient evidence of that prior conviction. We affirm.

Background. Before trial began, the judge conducted a colloquy with the defendant, as follows:

> Q.: "Okay. Mr. Fontes, I understand that you've discussed this case with your attorney."

[1] The judge found the defendant not guilty of negligent operation of a motor vehicle, and not responsible for a passing violation, a marked lanes violation, and speeding.

A.: "Yes, I did."

Q.: "Are you satisfied with his representation?"

A.: "Yes."

Q.: "Okay. As a result of this particular case, it's on for trial today for a jury trial. I understand that it is your position right now to do a jury waiver, is that correct?"

A.: "Yes."

Q.: "You've discussed it fully with your attorney?"

A.: "Yes, we did."

Q.: "You're satisfied with his representation?"

A.: "Yes."

Q.: "No threats or promises have been made. You're doing this freely and voluntarily. Is that correct?"

A.: "Yes, I do."

Q.: "All right. That's allowed."

A.: "Thank you."

The defendant, defense counsel, and the judge also signed a jury waiver form as mandated by G. L. c. 263, § 6.

Following the first phase of the trial, the judge found the defendant guilty of the underlying offense. Immediately after the clerk read the finding, the second phase commenced. The judge found the defendant guilty of OUI, second offense. This appeal followed.

Discussion. 1. Jury waiver. The defendant contends that he did not validly waive his right to a jury trial before either phase of the trial.

a. Underlying substantive offense phase. "The judge's task [in a colloquy] is to 'satisfy himself that any waiver by the defendant is made voluntarily and intelligently.'" Commonwealth v. Pavao, 423 Mass. 798, 800-801 (1996), quoting Ciummei v. Commonwealth, 378 Mass. 504, 509 (1979). "We review to determine whether the colloquy, together with the defendant's signature on the waiver form and defense counsel's certification that he informed the defendant of his rights . . . provided a sufficient basis for the judge to accept the defendant's waiver of a trial by jury." Commonwealth v. Ridlon, 54 Mass. App. Ct. 146, 147 (2002). Because the defendant did not object to the colloquy at trial, we review for a substantial risk of a miscarriage of justice. See id. at 147-148, citing Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967).

Here, although the colloquy was sparse, in conjunction with the jury waiver form it was adequate to support the defendant's waiver. The judge ensured that the defendant had consulted with his attorney regarding the jury waiver and had not been threatened or promised anything in return for the waiver. The defendant's demeanor during the colloquy also provided evidence of his mental state. See Commonwealth v. Onouha, 46 Mass. App.

Ct. 904, 905 (1998). Furthermore, the judge could rely on defense counsel's certification that he had explained to the defendant the rights the defendant would forgo by waiving a jury trial. Commonwealth v. Hernandez, 42 Mass. App. Ct. 780, 785 (1997). "Here, the judge had not only the signed forms, but also the defendant's acknowledgment that he talked to his lawyer about the waiver, that he was satisfied and knew what he was doing, and that his waiver was willing and voluntary." Ridlon, 54 Mass. App. Ct. at 149-150.[2]

Although we conclude that this waiver was adequate, we note that following the guidelines for jury waivers set forth in E.B. Cypher, Criminal Practice and Procedure § 31:13-14 (4th ed. 2014), would conserve judicial and prosecutorial resources by forestalling inquires like the one in this case.

b. Subsequent offense. The defendant next contends that he did not validly waive his right to a jury trial in the second phase of the trial because the judge did not engage in a second colloquy or obtain a second waiver form. Guided by this court's reasoning on this issue in Commonwealth v. Saulnier, 84 Mass. App. Ct. 603 (2013), we conclude there was no error.

[2] Cf. Commonwealth v. Abreu, 391 Mass. 777, 778 (1984) (colloquy inadequate when it consisted only of question, "Felix Abreu, do I understand that you have waived your right to trial by jury and you want to have the case heard by a single justice through the interpreter").

In Saulnier, as here, the defendant faced a bifurcated trial on an OUI charge with an underlying offense phase and a penalty phase. 84 Mass. App. Ct. at 607. "[T]here was one trial and one charge, split into two components only because the prior offenses related solely to the penalty phase." Id. at 610. At the outset of the single trial, the judge began the colloquy in question by acknowledging the defendant's request "to [waive] a jury trial in this case." Id. at 607. Defense counsel later declined the judge's offer for a further jury waiver procedure before the second phase of the trial. Id. at 610. As here, the defendant in Saulnier

> "did not file a motion for a new trial and presented nothing, in affidavit form or otherwise, to indicate that he did not understand that he had a right to a jury trial on the subsequent offense portion of the charge, or that he would have chosen such a trial, or what he might have hoped to accomplish in such a trial. It is difficult to see that a jury trial might have made a difference for him. The nature of the subsequent offense portion of the trial that took place, which was largely a legal argument . . . would not have lent itself to credibility or other arguments one would expect to make to a jury."

Id. The facts of this case closely resemble those in Saulnier. Here, the trial judge began the bifurcated trial with a reference to "this case" before conducting the colloquy. After finding the defendant guilty of the underlying offense, the judge then moved immediately on to the penalty phase, assessing only the evidence of the prior offense before imposing a sentence. Although the judge here did not engage in a second

jury waiver procedure before proceeding to the penalty phase, this court previously noted in Saulnier that such a requirement "would elevate form over substance." Id., quoting Hernandez, 42 Mass. App. Ct. at 786. We discern no error here.

3. Sufficiency of the evidence. The defendant also contends that his conviction of a subsequent offense cannot stand. He argues that the Commonwealth put forth insufficient evidence of his prior OUI conviction because the records the Commonwealth submitted did not indicate whether he had counsel during the prior OUI case.

The Supreme Judicial Court "has held that a defendant generally is presumed to have been represented by (or to have waived) counsel in prior proceedings that resulted in a conviction, and the Commonwealth need not come forward with proof on the point unless the defendant first makes a showing that the conviction was obtained without representation by or waiver of counsel." Commonwealth v. McMullin, 76 Mass. App. Ct. 904, 905 (2010), citing Commonwealth v. Saunders, 435 Mass. 691, 695-696 (2002). Here, the defendant has not made that showing. Although the docket in his prior case does not have any checkmarks on boxes that indicate appointment, denial, or waiver of counsel, that absence of evidence is not evidence of absence. Furthermore, the docket in the prior case contains a notation that the defendant's second court date was continued

"w/interp/app counsel," suggesting that both an interpreter and appointed counsel were present then. The evidence was sufficient.

Judgment affirmed.

By the Court (Neyman, Henry & Singh, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: November 22, 2019.

[3] The panelists are listed in order of seniority.