

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-1017

COMMONWEALTH

vs.

KEVIN APONTE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted of possession of a class B substance (cocaine) with intent to distribute, subsequent offense; possession of a class B substance (fentanyl) with intent to distribute, subsequent offense; unauthorized possession of class E substances (gabapentin and anabolic steroids); and failing to stop for a police officer. On appeal, he argues that the evidence was insufficient to prove that he possessed the cocaine and fentanyl, which were found in a plastic bag in the street immediately after his arrest. We affirm.

"We review the denial of a motion for a required finding of not guilty to determine, 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt.'" Commonwealth v. Long, 90 Mass. App. Ct. 696, 699 (2016), quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). The Commonwealth may prove these elements through circumstantial evidence and reasonable inferences drawn therefrom. Commonwealth v. Ortega, 441 Mass. 170, 174 (2004). Such inferences need not be necessary or inescapable; "[i]t is enough that from the evidence presented a jury could, within reason and without speculation, draw them." Commonwealth v. Gonzalez, 47 Mass. App. Ct. 255, 257 (1999). However, a conviction may not "rest upon the piling of inference upon inference or conjecture and speculation." Commonwealth v. Gonzalez, 475 Mass. 396, 407 (2016), quoting Commonwealth v. Swafford, 441 Mass. 329, 343 (2004).

The jury could have reasonably inferred that the bag of drugs in the street had been thrown from the defendant's vehicle "during the brief moment in the chase" between when Officer Richard Gaucher lost sight of the vehicle and caught up with it after rounding the bend on Colonel Bell Drive. Commonwealth v. Jefferson, 461 Mass. 821, 826 (2012). The defendant came to a stop on the front lawn of 57 Colonel Bell Drive, and the drugs were found within walking distance, in front of 97 Colonel Bell Drive. The plastic bag in the street was not damaged and was warmer than the cold night air; "a jury reasonably could have inferred from the location of the [bag] . . . that it had only

recently landed there." Id. No other vehicles or pedestrians were seen on that stretch of road. See Commonwealth v. Duncan, 71 Mass. App. Ct. 150, 154 (2008).

Additional evidence tied the drugs to the defendant. The cocaine was packaged in smaller baggies, consistent with distribution. In the center console of the vehicle -- which was registered to the defendant and which he was driving -- the police found a digital scale and a package of sandwich bags. The defendant had \$780 cash on his person. See Commonwealth v. Madera, 76 Mass. App. Ct. 154, 159 (2010) (possession of box of sandwich bags, digital scale, and large amount of cash consistent with drug distribution). The defendant's passenger was preparing a syringe to ingest heroin or fentanyl. Together, this evidence strongly supported the inference that the defendant controlled the drugs discovered in the road moments later, and that he possessed them for the purpose of distribution.

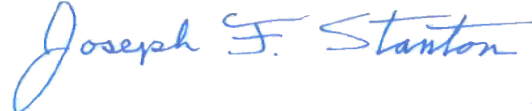
Finally, when spotted by Gaucher, the defendant quickly drove away, ignoring the officer's blue lights and verbal instructions. Not only could the defendant's flight be considered general evidence of consciousness of guilt and permit an inference of unlawful possession, see Commonwealth v. Whitlock, 39 Mass. App. Ct. 514, 519 (1995), the jury could also have reasonably inferred that the defendant fled from the police

precisely so that he could throw away the drugs he feared the police would find. See Jefferson, 461 Mass. at 826-827.

The verdicts were not based on mere conjecture or speculation. Rather, the Commonwealth presented strong circumstantial proof that the defendant possessed the drugs found in the plastic bag on the street. See Commonwealth v. Mojica, 59 Mass. App. Ct. 925, 926 (2003) ("Needless to say, if the defendant dropped the heroin, he must have first possessed it").

Judgments affirmed.

By the Court (Green, C.J.,
Massing & Lemire, JJ.¹),



Clerk

Entered: March 12, 2020.

¹ The panelists are listed in order of seniority.