

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-1522

COMMONWEALTH

vs.

RICHARD GRAVINESE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Defendant Gravinese appeals from an order of a District Court judge finding that he violated his probation, and directing him to serve the remaining seventeen months of a prior suspended sentence. The judge found, after an evidentiary hearing, that the defendant had committed assault and battery and larceny with respect to the victim, Norman Jeffrey. Jeffrey did not testify at the hearing, and there was no eyewitness testimony of the assault. Citing Commonwealth v. Durling, 407 Mass. 108 (1990), and its progeny, the defendant argues that the judge's order must be reversed because it is based on the uncorroborated and unreliable hearsay testimony of the police

officer that took Jeffrey's statement. For the following reasons, we affirm the order.

Background. In 2016, the defendant pleaded guilty to firearms offenses and was sentenced to two years in prison, with the final seventeen months suspended while he was placed on probation. The defendant allegedly violated that probation on November 5, 2017, outside the Jeanie Johnson Restaurant Bar (Bar) in the Jamaica Plain section of Boston.

The principal witness at the revocation hearing was Boston Police Officer Dervan. Taken in the light most favorable to the Commonwealth, Officer Dervan testified that he and his partner were dispatched to the Bar around 7:30 P.M. on November 5, for an assault and battery in progress, and they arrived within five minutes. Dervan spoke with the victim, Jeffrey, who had called the police. Jeffrey told Dervan that he had been eating inside the Bar with his eleven year old daughter, and that the defendant (whom he knew only as "Little Ritchie") had taunted him from outside the Bar, attempting to provoke a fight. Jeffrey told Dervan that he had a history with Little Ritchie --

notably, there had been an incident about a month earlier during which Little Ritchie had vandalized Jeffrey's car.

Jeffrey told Dervan that he came outside the Bar to call the police, looking to de-escalate the situation, at which point Little Ritchie assaulted him, including striking Jeffrey "several times . . . to the head area." Little Ritchie also ripped a silver necklace from Jeffrey's neck and stated, "Now I have a souvenir." Importantly, Dervan noted in his police report, and confirmed during cross-examination, that while speaking to Jeffrey, Dervan observed a "slight cut to [Jeffrey's] left forehead," with "fresh blood."

Based upon additional information supplied by Jeffrey, the police ultimately determined that "Little Ritchie" was the defendant, Richard Gravinese, and the Commonwealth thereafter sought to revoke the defendant's probation. The defendant did not testify at the revocation hearing. Jeffrey did not testify either. The prosecutor represented that Jeffrey was subpoenaed, but he did not appear.

The judge found a probation violation based upon "assault and battery and larceny from a person." During the hearing defense counsel objected to Dervan's testimony regarding Jeffrey's statements, and to the police report, on the ground that they constituted unreliable hearsay. Defense counsel also put in evidence Jeffrey's Board of Probation record, which showed that Jeffrey also was on probation for assault and battery at the time of the incident. The judge did not make any specific findings as to why he found Dervan's hearsay testimony reliable.

Discussion. Hearsay testimony is admissible and may be relied upon in probation revocation hearings, provided that the evidence is "reliable." Durling, 407 Mass. at 118.

"Unsubstantiated and unreliable hearsay cannot, consistent with due process, be the entire basis of a probation revocation.

When hearsay evidence is reliable, however, then it can be the basis of a revocation. In our view, a showing that the proffered evidence bears substantial indicia of reliability and

is substantially trustworthy is a showing of good cause obviating the need for confrontation." Id.

Reliability is determined based upon "the totality of the circumstances." Durling, 407 Mass. at 118. Cases following Durling have identified multiple factors to consider, including:

"(1) whether the evidence is based on personal knowledge or direct observation; (2) whether the evidence, if based on direct observation, was recorded close in time to the events in question; (3) the level of factual detail; (4) whether the statements are internally consistent; (5) whether the evidence is corroborated by information from other sources; (6) whether the declarant was disinterested when the statements were made; and (7) whether the statements were made under circumstances that support their veracity."

Commonwealth v. Hartfield, 474 Mass. 474, 484 (2016).

Applying these factors, we agree that the evidence was substantially reliable in this case.¹ Jeffrey's statements were based upon his direct observation as a victim of assault, were factually detailed, and were made within minutes of the assault occurring. Perhaps most importantly, however, Jeffrey's statements were corroborated by the personal observation of

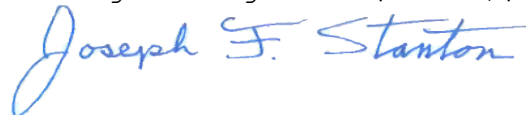
¹ The judge should make a finding "in writing or on the record" regarding the reliability of the hearsay that he relied upon. Hartfield, 474 Mass. at 485. No such finding was made here, although the finding is implicit in the judge's order. The defendant does not argue that the judge's order should be overturned on the ground that there was no express finding of reliability, and consequently we do not address the issue.

Officer Dervan, who witnessed a cut and fresh blood on Jeffrey's forehead. Indeed, Officer Dervan's conversation with Jeffrey was so close in time to the incident that it was Officer Dervan, not Jeffrey, who first noticed the cut.

Accordingly, this is not a case, as the defendant urges, where the Commonwealth "relied solely on unsubstantiated evidence." Jeffrey's statements that the defendant had just struck him in the head were validated by the nearly contemporaneous observations of Officer Dervan. While it is true that other indicia of reliability did not favor the Commonwealth here, we cannot say that the judge erred in finding, by a preponderance of the evidence, that the accused crimes occurred.²

Order affirmed.

By the Court (Maldonado,
Singh & Englander, JJ.³),



Clerk

Entered: March 30, 2020.

² The defendant suggests that the evidence indicated that Jeffrey may have been the aggressor, and that the defendant acted in self-defense. The record did not support such a finding.

³ The panelists are listed in order of seniority.