

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-610

COMMONWEALTH

vs.

NUNO ALVES.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

During the execution of a search warrant, police discovered a kilogram of cocaine, hidden within a chair in a closet of a bedroom that also contained items connected to the defendant. Following a jury trial, the defendant was convicted of cocaine trafficking. On appeal, he challenges the denial of his motion for a required finding of not guilty. He argues that, although there was some evidence of his connection to the apartment, it fell short of establishing his knowledge of the hidden contraband. After review of the trial record, we determine that the evidence was sufficient to establish the defendant's constructive possession of the cocaine and therefore affirm the defendant's conviction.

Discussion. "The test for sufficiency of the evidence is '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. Santana, 95 Mass. App. Ct. 265, 267 (2019), quoting Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). Constructive possession requires "proof of knowledge coupled with the ability and intention to exercise dominion and control." Commonwealth v. Tiscione, 482 Mass. 485, 494 (2019), quoting Commonwealth v. Dagraca-Teixeira, 471 Mass. 1002, 1004 (2015). "This proof may be established by circumstantial evidence, and the inferences that can be drawn therefrom." Tiscione, supra, quoting Dagraca-Teixeira, supra.

Here, the kilogram of cocaine was hidden in a chair on the third floor of a home, out of plain view. The Commonwealth presented the following pertinent evidence at trial. The home in which police found the cocaine was equipped with security cameras. A kitchen cabinet on the third floor contained digital scales and sandwich bags. The third floor laundry room contained a money counter and an antisurveillance instrument for detecting wiretaps or "bugs" (bug detector). A police expert testified that all of the above is consistent with a drug stash house.

The Commonwealth also presented the following evidence pertaining specifically to the defendant. Police found a credit card in the defendant's name, and club membership cards bearing

the defendant's name and picture, in the same bedroom as the cocaine. That bedroom also contained size fifteen sneakers and very large pants; the defendant stands about six feet nine inches tall. A witness testified that the defendant hired him to paint the home in which police later found the cocaine and that the witness met the defendant on the third floor to be paid for his painting work. Elsewhere in the home, police found a prescription in the defendant's name and paperwork displaying the defendant's name.¹

A rational fact finder could have drawn the following series of reasonable inferences. See Commonwealth v. Vega, 54 Mass. App. Ct. 249, 253 (2002), citing Commonwealth v. Dostie, 425 Mass. 372, 375-376 (1997) ("An inference is not improper just because it builds on an inference, if the primary inference is reasonable Each secondary inference [is also] a logical and reasonable conclusion from the prior inference"); Commonwealth v. Crimmins, 46 Mass. App. Ct. 489, 494 n.6 (1999).

¹ The defendant argues that the evidence showed that many people were in and out of the apartment and had use and control of it. Although there were some documents connected to other individuals, the bulk of the items were connected to the defendant and many of those items were recovered from the bedroom containing the cocaine. See Commonwealth v. Rarick, 23 Mass. App. Ct. 912, 912 (1986). Additionally, the Commonwealth proceeded on a joint venture theory, such that the presence or access of other individuals did not detract from the defendant's possession. See Commonwealth v. Carroll, 439 Mass. 547, 553 (2003).

The cameras, scales, bags, money counter, bug detector, and large quantity of cocaine found indicate the home was a stash house, as supported by police expert testimony. The prescription and paperwork place the defendant in the stash house, as more than a transient visitor. The painter's testimony places the defendant on the same floor as the cocaine, and shows the defendant conducted business on that floor and had control over the premises. The unusually large clothes -- corresponding to the defendant's unusually large stature -- place the defendant in the same room as the cocaine. The credit and club cards also place the defendant in the same room as the cocaine. See Commonwealth v. Romero, 464 Mass. 648, 653 (2013), quoting Commonwealth v. Albano, 373 Mass. 132, 134 (1977) ("presence, supplemented by other incriminating evidence, will serve to tip the scale in favor of sufficiency").

Supported by fair inference, the defendant's presence and possessions in the same stash house room as the cocaine -- as more than a transient visitor, and on a floor where he conducted other business -- is strong circumstantial evidence that the defendant knew where the cocaine was located, and that the defendant had the ability and intent to control the cocaine. See Romero, 464 Mass. at 653. Contrast Commonwealth v. Sespedes, 442 Mass. 95, 100 (2004) (although defendant had keys to vacant apartment where contraband was hidden in drop ceiling,

none of his belongings were found in same apartment as contraband). See also Tiscione, 482 Mass. at 494; Vega, 54 Mass. App. Ct. at 253. No more is needed. See Latimore, 378 Mass. at 677-678.

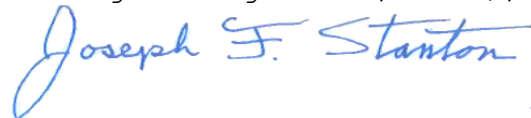
Moreover, we have affirmed drug convictions based on circumstantial evidence of constructive possession in comparable cases. See, e.g., Commonwealth v. Velasquez, 48 Mass. App. Ct. 147, 150 (1999) (conviction affirmed where, inter alia, evidence indicated apartment was a "drug trading post" and "utility and rent receipts in the name of [the defendant] proved his more than casual connection with the apartment"); Commonwealth v. Rarick, 23 Mass. App. Ct. 912, 912 (1986). Cf. Commonwealth v. Ormond O., 92 Mass. App. Ct. 233, 237 (2017) ("When we view the evidence in the light most favorable to the Commonwealth, the [defendant's] claim of mere presence is defeated by several facts, and the reasonable inferences drawn from those facts").²

² The defendant argues that, because the cocaine was hidden, even his strong connection to the bedroom containing the cocaine was insufficient to establish his knowledge of the cocaine secreted within the chair. Citing Commonwealth v. Croft, 345 Mass. 143 (1962), he posits that the evidence as to his knowledge "tends equally to sustain either of two inconsistent propositions" and therefore "neither of them can be said to have been established by legitimate proof." Id. at 145, quoting Commonwealth v. O'Brien, 305 Mass. 393, 400 (1940). That principle only applies when, even viewing the evidence in the light most favorable to the Commonwealth, a fact finder would have "to employ conjecture" in order to choose among the possible inferences. Commonwealth v. Tavares, 484 Mass. 650, 655 (2020), quoting Croft, supra. Here, where the evidence showed that the premises

Based on the evidence at trial, viewed in the light most favorable to the Commonwealth, a rational fact finder could have found the defendant constructively possessed the cocaine beyond a reasonable doubt. Thus the defendant was not entitled to a required finding of not guilty.

Judgment affirmed.

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



Clerk

Entered: June 2, 2020.

was used for the specific purpose of storing drugs, it does not require conjecture to reach the inference that the defendant knew the cocaine was hidden in the chair.

³ The panelists are listed in order of seniority.