

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-410

COMMONWEALTH

vs.

ANTONIO A. SANTOS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from an order of a Superior Court judge finding that he violated the terms of his probation by committing new criminal offenses: distribution of a class A substance, G. L. c. 94C, § 32 (a); distribution of a class B substance, G. L. c. 94C, § 32A (a); and conspiracy to violate the Controlled Substances Act, G. L. c. 94C, § 40. On appeal, the defendant argues that there was insufficient evidence for the judge to find that he had, in fact, committed a crime. We affirm.

"A determination whether a violation of probation has occurred lies within the discretion of the hearing judge." Commonwealth v. Bukin, 467 Mass. 516, 519-520 (2014). "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude that the judge made a clear error

of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (quotation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Background. The following information emerged at the probation surrender hearing. On December 10, 2018, a Brockton police detective in the narcotics unit observed a known drug user and an unknown man in a high crime area. The detective testified to having made firearms and narcotics arrests within a few hundred feet of the area, including seizing 500 grams of heroin in a nearby park. The man received a phone call, at which point he quickly walked away from the known drug user without speaking to her. The detective recognized this behavior as consistent with a drug deal. Shortly thereafter, a black rental car pulled up and the man entered the passenger side; the car traveled several hundred feet and the man exited the car. This was notable to the detective for two reasons: in his experience, over half of narcotics transactions involve rental vehicles as a way of obscuring the drug dealer's identity and short trips in a car are used to hide hand-to-hand transactions.

Another detective approached the man and showed him his badge, at which point the man fled. The man was apprehended after a short pursuit and 2.3 grams of fentanyl and 0.6 grams of crack cocaine were recovered along his path of flight where he

had been observed throwing something. The man had no currency on his person.

Meanwhile, the rental car was stopped and the driver was identified as the defendant. The detective was familiar with the defendant from prior narcotics cases. In the car, police found two cell phones, a bag of marijuana, a Foxwoods Casino receipt, \$438 banded together, and \$240 strewn on the passenger seat. The loose money was particularly noteworthy to the detective because the narcotics seized from the man who had briefly been in the car had a street value of almost exactly \$240. The defendant initially denied that anyone had been in the car. He later acknowledged that the man had been in his car, but claimed that the man had sold him marijuana. The defendant later reverted to his original assertion that no one had been in the car with him.

Discussion. "Any conduct by a person on probation which constitutes a violation of any of the conditions of his probation may form the basis for a revocation of that probation." Commonwealth v. Vargas, 475 Mass. 86, 93 (2016), quoting Commonwealth v. Durling, 407 Mass. 108, 112 (1990). If the revocation is based on a criminal violation, "there is no prerequisite that the probationer be convicted" (citation omitted). Commonwealth v. Emmanuel E., 52 Mass. App. Ct. 451, 453 (2001). The Commonwealth must prove a probation violation

by a preponderance of the evidence, not beyond a reasonable doubt. See Bukin, 467 Mass. at 520. A preponderance of the evidence exists "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there" (citation omitted). Commonwealth v. Hill, 52 Mass. App. Ct. 147, 154 (2001).

The defendant argues that, because the circumstances of the transaction are subject to interpretation, the Commonwealth did not prove a probation violation by a preponderance of the evidence. More specifically, he argues that it was equally possible that the unknown man had been the seller, rather than the purchaser, of the drugs. This argument, however, requires that the factfinder draw every inference in the defendant's favor when, instead, we take them in the light most favorable to the Commonwealth. See Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). Viewed in that light, the evidence permitted the judge to find that the defendant was the seller, not the buyer, of the drugs. Most simply, the unknown man ended up with drugs, and the defendant with cash. In addition, the drugs the unknown man discarded immediately after the transaction were worth exactly the amount found in loose cash on the passenger seat of the car driven by the defendant. Other evidence also

suggested that the defendant was the seller of the drugs. The defendant was driving a rental car, which the detective testified is customary practice for drug dealers seeking to hide their identities. See Commonwealth v. Coronel, 70 Mass. App. Ct. 906, 907 (2007) (officer observations, in context of probable cause determination, allowed "reasonable inference" that drug deal had taken place). The short "ride to nowhere" was also significant. See, e.g., Commonwealth v. Alvarado, 93 Mass. App. Ct. 469, 471 (2018). In addition, the unknown man's conduct was consistent with setting up a drug transaction, and he was accompanied by a known drug user in a high crime area known to the detective for narcotics violations.

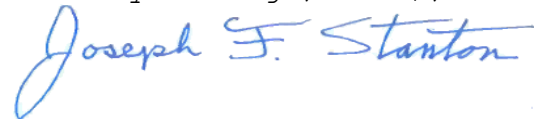
The defendant's alternative interpretations of the events do not convince us that the hearing judge abused his discretion. The defendant argues that the same evidence could have supported an inference that he had cash on him because he had been gambling at Foxwoods Casino, or that the man in the car had been paying off a debt. Neither of these alternatives explains why the loose cash in the car almost exactly equaled the street value of the recovered drugs, and they are undercut by the defendant's shifting versions of events. See Commonwealth v. Sumners, 93 Mass. App. Ct. 260, 263 (2018) ("False statements to police may be considered as consciousness of guilt if there is other evidence tending to prove the falsity of the statements")

[citation omitted]). The judge's decision to draw the inferences urged by the Commonwealth was not "outside the range of reasonable alternatives" in light of the evidence presented. L.L., 470 Mass. at 185 n.27.

Accordingly, the order revoking probation and imposing sentence is affirmed.

So ordered.

By the Court (Wolohojian,  
Henry & Singh, JJ.<sup>1</sup>),



Clerk

Entered: February 4, 2021.

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<sup>1</sup> The panelists are listed in order of seniority.