COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-968

COMMONWEALTH

vs.

TITUS A. CARTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

While on probation for previous convictions, the defendant, Titus A. Carter, was charged with possession with intent to distribute a class E drug. As a result of this new case, he was found to be in violation of his probation. He was ordered to serve the balance of his sentences arising from previous drug and motor vehicle offenses. A different judge subsequently allowed a motion to suppress the class E drugs seized in the new case, and the defendant moved unsuccessfully for reconsideration of the order revoking his probation. On appeal, the defendant contends that the motion to reconsider should have been allowed because the exclusionary rule applies to probation violation proceedings when the police officers involved in the new case knew or should have known the defendant was on probation. 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), citing Commonwealth v. Durling, 407 Mass. 108, 111-112 (1990). We likewise review the denial of a motion for reconsideration for an abuse of discretion.[1] See Commonwealth v. Gonsalves, 437 Mass. 1022, 1022 (2002); Commonwealth v. Pagan, 73 Mass. App. Ct. 369, 374 (2008).

In determining whether the Commonwealth has met its burden to show a probation violation, the judge may consider evidence seized in violation of the Fourth Amendment to the United States Constitution or art. 14 of the Declaration of Rights. "When the police officers involved in the illegal search and seizure neither know nor have reason to know of the search victim's status as probationer, the deterrent value of excluding the evidence from a probation revocation proceeding is absent." Commonwealth v. Olsen, 405 Mass. 491, 494 (1989). See

[1] The defendant's notice of appeal states that he appeals from both the revocation of probation and the denial of the motion to reconsider. The notice of appeal was timely as to the latter but untimely as to the former. See Commonwealth v. Christian, 429 Mass. 1022, 1023 (1999); Commonwealth v. Ferguson, 63 Mass. App. Ct. 909, 909 (2005). See also Mass. R. A. P. 4 (b), as appearing in 481 Mass. 1606 (2019). It makes no matter in this instance, as the defendant's appeal is premised solely on the theory that the judge hearing the probation violation matter should have reconsidered the violation finding based on the subsequent suppression decision in the prosecution of the new charge. See Commonwealth v. Cronk, 396 Mass. 194, 198 (1985).

Commonwealth v. Wilcox, 446 Mass. 61, 66 (2006). In Olsen, however, the court "expressly [left] open the question whether the police officer's knowledge of the probationer's status would compel a different result." Olsen, supra at 496.

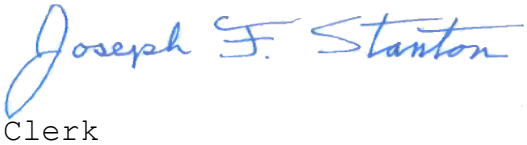
Seizing on the open question, the defendant asserts that because he was known to the officers who searched and arrested him on the charge underlying the new case, and because they had the opportunity to run a background check on him from their unmarked police car, they either knew or should have known he was a probationer at the time of the search. On the record before us, this leap is too vast. The judge ultimately determined that "the fact that the police were familiar with the defendant and that the defendant was well known to them does not, without more, allow the Court to infer that the police knew, or had reason to know, the probationary status of the defendant." Even though the defendant was known to the officers, that fact, standing alone, does not compel the inference that they knew he was on probation. See Bukin, 467 Mass. at 521 ("It is the exclusive province of the hearing judge to assess the weight of the evidence"); Pagan, 73 Mass. App. Ct. at 374 (credibility is for motion judge on reconsideration). Implicit in the judge's legal ruling was the factual finding that the officers did not run the background check until after the defendant was searched and handcuffed. This finding was not

clearly erroneous. See Commonwealth v. Tate, 34 Mass. App. Ct. 446, 450 (1993).

Accordingly, on the record before her, the judge did not make "a clear error of judgment in weighing the factors relevant to the decision" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). There was no abuse of discretion.

Order denying motion to reconsider affirmed.

By the Court (Wolohojian, Sullivan & Ditkoff, JJ.[2]),



Clerk

Entered: October 14, 2021.

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