

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

19-P-1030

COMMONWEALTH

vs.

MALCOM DESIR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial in the District Court, the defendant, Malcom Desir, appeals from his convictions of carrying a firearm without a license, G. L. c. 269, § 10 (a); possession of ammunition without a firearm identification (FID) card, G. L. c. 269, § 10 (h) (1)<sup>1</sup>; and failure to stop for a police officer, G. L. c. 90, § 25.<sup>2</sup> The judge sentenced the defendant to eighteen months in the house of correction on the first count and one year of probation, on and after the committed sentence, on the second count. On the third count, failure to stop for a police officer, the judge did not impose a sentence, and instead placed the matter on file for six months.

---

<sup>1</sup> The only ammunition at issue is that found in the firearm.

<sup>2</sup> The defendant was also found not responsible for a civil infraction.

The defendant appeals from the order denying his pretrial motion to dismiss each of the criminal charges for lack of probable cause, the trial judge's postverdict order denying his motion for a required finding of not guilty as to each of those charges, and the judgments. As we conclude that the application for complaint failed to establish probable cause for the charge of failure to stop for a police officer, that verdict must be set aside, and that count of the complaint is to be dismissed. On the two possession charges, the judgments are affirmed.

1. Motion to dismiss the complaint for lack of probable cause. "[A] motion to dismiss a criminal complaint for lack of probable cause is decided from the four corners of the complaint application." Commonwealth v. Huggins, 84 Mass. App. Ct. 107, 111 (2013), quoting Commonwealth v. Bell, 83 Mass. App. Ct. 61, 62 (2013). "The complaint application . . . must contain sufficient evidence to establish the identity of the accused and probable cause to arrest him." Bell, supra at 63. We review a judge's ruling on a motion to dismiss for lack of probable cause de novo. See Commonwealth v. Humberto H., 466 Mass. 562, 566 (2013).

The defendant argues that the facts presented in the application for complaint were insufficient to establish probable cause that he "knowingly possessed" either the firearm or the ammunition found loaded into it, see G. L. c. 269, § 10

(a), (h), or that he knowingly failed to stop in response to a police officer's signal to do so. See G. L. c. 90, § 25. Due to the fact-intensive nature of the claims before us, we reserve a comprehensive review of the evidence for our sufficiency discussion, infra, while in addressing probable cause we provide only those facts included in the application for complaint that are necessary for us to reach our conclusions.

a. Illegal possession of firearm.<sup>3</sup> "Proof of constructive possession requires the Commonwealth to show 'knowledge coupled with the ability and intention to exercise dominion and control.'" Commonwealth v. Romero, 464 Mass. 648, 653 (2013), quoting Commonwealth v. Brzezinski, 405 Mass. 401, 409 (1989). Evidence of the defendant's knowing possession of the pistol is similar to the evidence of possession approved in Commonwealth v. Jefferson, 461 Mass. 821 (2012). Notably, here, as in Jefferson, the defendant fled in his vehicle from officers approaching on foot and briefly was out of their view; retracing the defendant's route, the police found a pistol on the ground along the flight path. See id. at 823-824. As in Jefferson, the gun here was found in a readily-visible location, suggesting "that it would not have remained there for long without being

---

<sup>3</sup> The defendant does not challenge that the pistol at issue was a working firearm, nor that at the time of these events, he was not licensed to carry firearms. See G. L. c. 269, § 10 (a), (h).

reported or removed," and was in a position "consistent with where it would have landed had it been thrown from the . . . window of the vehicle" while the vehicle was out of sight of the police. See id. at 826.

As the court noted in Jefferson, the defendant's acceleration away from the police when they approached permitted an inference that he did so in order to give himself an opportunity to dispose of the pistol without being seen. See id. at 826-827. His flight was also some evidence of consciousness of guilt.<sup>4</sup> See Commonwealth v. Grayson, 96 Mass. App. Ct. 748, 751 (2019) (articulating proposition that flight may serve as evidence of consciousness of guilt); Commonwealth v. Summers, 93 Mass. App. Ct. 260, 264 (2018) (flight as "'plus' factor" supporting inference of intent to exercise dominion and control over contraband). But cf. Commonwealth v. Evelyn, 485 Mass. 691, 708, 709 (2020), citing Commonwealth v. Warren, 475 Mass. 530, 539, 540 (2016) ("significantly discount[ing] weight" of "nervous and evasive behavior," in addition to flight from police by African-American man, as evidence of consciousness of

---

<sup>4</sup> In his reply brief, the defendant raises a new argument that he was the victim of racial profiling by the police. The issue is waived, as it was not raised in the trial court, nor in the defendant's primary brief, and so was not preserved. See, e.g., Commonwealth v. Hampton, 64 Mass. App. Ct. 27, 33 n.8 (2005) ("arguments raised for the first time in a reply brief are waived").

guilt due to demonstrated "pattern of racial profiling" by Boston Police Department).

The fact that no one saw the defendant in possession of the firearm, or disposing of it, does not vitiate the probable cause determination as to possession. See generally Jefferson, 461 Mass. at 826-827. See also Commonwealth v. Gouse, 461 Mass. 787, 795 (2012) (possession and knowledge susceptible of proof by circumstantial evidence). We are satisfied that the application for complaint demonstrated probable cause to believe that the defendant violated G. L. c. 269, § 10 (a).

b. Illegal possession of ammunition. The charge of possession of ammunition was based on the ammunition discovered in the pistol. Accordingly, the same evidence supporting probable cause for possession of the pistol itself supports probable cause for possession of the ammunition with which it was loaded. The evidence of the defendant's knowledge that the firearm was loaded, see Commonwealth v. Johnson, 461 Mass. 44, 52, 53 (2011) (understanding G. L. c. 269, § 10 (h), to contain implicit knowledge requirement), while circumstantial, was sufficient to support the judge's probable cause determination.<sup>5</sup> See Commonwealth v. Grandison, 433 Mass. 135, 141 (2001). There

---

<sup>5</sup> Neither party disputes that "it was not possible to discern merely by observation whether the pistol . . . was loaded." Grayson, 96 Mass. App. Ct. at 752, quoting Commonwealth v. Brown, 479 Mass. 600, 608 (2018).

was evidence that the defendant had the gun with him in the car and that it was "cocked," with a round in the chamber, supporting the conclusion that the defendant had the weapon in his possession and ready for immediate use. See Grayson, 96 Mass. App. Ct. at 753 n.10 (indicators that firearm "was intended to be ready for immediate use and thus that it was known to be loaded" circumstantial evidence of knowledge); Commonwealth v. Mitchell, 95 Mass. App. Ct. 406, 419 (2019) ("It is reasonable to infer that one who brings a gun to a location knows whether or not it is loaded"). Additionally, the police report's reference to the defendant's past involvement with gun violence was evidence from which the judge could have inferred that the defendant had some familiarity with firearms. Cf. Grayson, supra at 753 (evidence of defendant's familiarity with firearms relevant factor in determining whether defendant knew firearm in his possession was loaded); Commonwealth v. Resende, 94 Mass. App. Ct. 194, 200-201 (2018) (same).<sup>6</sup> We conclude that these factors were sufficient to establish probable cause for knowing possession of the ammunition found in the pistol.

---

<sup>6</sup> There was also evidence of the defendant's motive for possessing a loaded gun in the report's statement that the defendant was a member of a specific gang that "had problems with" another gang, and that the defendant's home had been previously shot at.

c. Failure to stop for police. As we noted, supra, although the jury convicted the defendant of failure to stop for a police officer, the judge did not sentence him on that charge; instead, the judge placed the charge on file until December 26, 2018.<sup>7</sup> See Mass. R. Crim P. 28 (e), 453 Mass. 1501 (2009). The charge was never removed from the file, and the defendant was never sentenced on that conviction. Under rule 28 (e), a judge, with both parties' consent, may "file a case after a guilty verdict . . . without imposing a sentence." "Ordinarily, we do not consider appeals from indictments placed on file," Commonwealth v. Chappee, 397 Mass. 508, 523 (1986), because in the absence of a sentence, the judgment is not final. See Commonwealth v. Delgado, 367 Mass. 432, 438 (1975). Here, however, we discern in the record valid reasons why the Commonwealth did not raise the question whether this aspect of the defendant's appeal is properly before us, and exercise our discretion to consider the appeal from the conviction, notwithstanding the fact that no sentence was imposed.<sup>8</sup> The defendant argues that the police report failed to establish

---

<sup>7</sup> Defense counsel acknowledged the judge's decision to file the conviction, and did not object.

<sup>8</sup> On this record, it is not clear that the filing of the conviction was properly formalized. See Mass. R. Crim. P. 28 (e) (requiring judge to inform defendant in open court of specific consequences of filing and defendant to file written consent to filing and its terms).

probable cause to believe that the defendant knew either that the undercover detectives were police officers at the time that they attempted to stop him, or that the detectives had "signaled [him] to stop." See G. L. c. 90, § 25. Although the application for complaint provided probable cause to believe that the defendant knew that the detectives were police officers,<sup>9</sup> we do not discern in the report probable cause to believe that the officers "signaled [the defendant] to stop" before pulling alongside the defendant's car at the intersection of Snell Avenue and Riverview Street and showing him their badges.<sup>10</sup> Compare, e.g., Commonwealth v. Gray, 423 Mass. 293, 295 (1996) (use of unmarked vehicle's strobe lights and display of badge by plain-clothes detective sufficient to signal defendant to stop); Commonwealth v. Ross, 73 Mass. App. Ct. 181, 184 (2008) (activation of siren and lights with "repeated attempts to pull alongside the vehicle and at least one request to pull over" effective signal to stop).

---

<sup>9</sup> The report attached to the application for complaint states that when the detectives got out of their unmarked vehicle and began walking toward the defendant's car, each of the detectives had his badge displayed "clearly." This was sufficient. Compare Commonwealth v. Gray, 423 Mass. 293, 295 (1996) (insufficient notification of being told to stop by police officer where detective was in plain clothes and badge was not displayed on outside of garment).

<sup>10</sup> According to the report, the undercover vehicle that the defendants were driving was not equipped with emergency lights; the report is silent about whether the vehicle had a siren.



On this evidence, we cannot say that the judge had probable cause to believe that the defendant failed to stop. Cf. Gray, supra; Ross, supra. Accordingly, as to the charge of failure to stop for a police officer, the judge should have allowed the defendant's motion to dismiss.

2. Motions for required finding of not guilty. At trial, the defendant moved for a required finding of not guilty at the close of the Commonwealth's case and again at the close of all of the evidence.<sup>11</sup> The motions were denied. Paralleling his challenges to the motion judge's probable cause determination, the defendant argues that there was insufficient evidence to support a finding that the defendant had knowledge or control of the firearm or ammunition that he was charged with possessing. We disagree.

In reviewing the denial of a motion for a required finding of not guilty, "we consider the evidence introduced at trial in the light most favorable to the Commonwealth, and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Oberle, 476 Mass. 539, 547 (2017), citing Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). "The inferences that support a conviction 'need only be reasonable and possible;

---

<sup>11</sup> The defendant rested without presenting any evidence.

[they] need not be necessary or inescapable.'" Commonwealth v. Waller, 90 Mass. App. Ct. 295, 303 (2016), quoting Commonwealth v. Woods, 466 Mass. 707, 713 (2014).

At approximately 9:25 A.M. Brockton Police Detectives Bell and Mercurio were conducting undercover surveillance in an unmarked truck when they noticed a grey Infiniti driven by the defendant, whom they both recognized from prior interactions. The defendant looked toward Bell and directly at Mercurio. His eyes widened in recognition, his head snapped forward, then he looked away and continued to drive. The detectives followed in the truck, watching as the defendant "rolled through" a stop sign at an intersection.

The detectives learned that the Infiniti was registered to the defendant at his home address; the defendant drove to that address and stopped there. The detectives pulled in behind the Infiniti and got out of the truck with their badges visibly displayed. Upon approaching the vehicle, Mercurio saw the defendant, using the side mirror of his car, look through the partially-open driver's side window at Mercurio's chest area, and then back up into Mercurio's eyes. Before the detectives could say anything to him, the defendant drove away, fleeing at high speed. The detectives ran back to the truck and followed the defendant's car, briefly losing sight of the defendant after he turned onto Snell Avenue before coming to a complete stop.

Bell then retraced the defendant's route on Snell Avenue. A bystander directed him to a gun lying in the open, on the sandy dirt shoulder of the road. The bystander had seen the defendant's car pass by, followed fifteen to twenty seconds later by the undercover truck. The bystander had not seen anything thrown from the defendant's car, though he walked his dog in the same area two or three hours earlier, and had not seen a gun there at that time.

The gun was a semiautomatic pistol. The ground around the gun was disturbed; in places, the top layer of soil, wet from the previous night's rain, was scraped up to reveal the dry soil beneath. Although there was wet dirt and sand on the side of the gun closest to the ground, the upward facing side of the gun was clean and dry, and there was no moisture on the magazine found in the gun. The gun was loaded, with its slide forward, "cocked" and ready to fire. Both chambering a round and cocking the gun required the user to take specific action.

a. Illegal possession of firearm. We agree with the trial judge that these facts are very close to those in Jefferson, and that for the reasons articulated in Jefferson, the evidence was sufficient to support the defendant's conviction of illegal possession of a firearm. See Jefferson, 461 Mass. at 826-827. The circumstances under which the gun was found, with the evidence of the defendant's flight from Bell and Mercurio, whom

he recognized to be police officers, was sufficient to prove possession of the gun. See id.; Gouse, 461 Mass. at 795-796; Grayson, 96 Mass. App. Ct. at 751; Summers, 93 Mass. App. Ct. at 264. Any inconsistencies in the testimony at trial were for the jury to resolve. See Commonwealth v. Hill, 387 Mass. 619, 624 (1982).

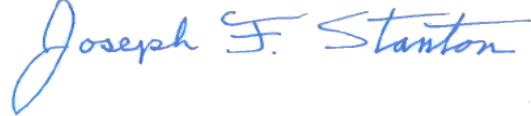
b. Illegal possession of ammunition. The evidence of the defendant's possession of the gun was also sufficient to show his possession of the ammunition within it. As to knowledge of the ammunition, the jury heard evidence that the gun was found cocked, loaded, and with a round in the chamber, which requires the user to take affirmative action. That evidence was, while circumstantial, sufficient to satisfy the knowledge element of the offense. See Commonwealth v. Bennett, 424 Mass. 64, 67 (1997) (circumstantial evidence competent to establish guilt); Commonwealth v. Gilbert, 423 Mass. 863, 868 (1996), quoting Commonwealth v. Beckett, 373 Mass. 329, 341 (1977) ("An inference drawn from circumstantial evidence 'need only be reasonable and possible; it need not be necessary or inescapable'").

Conclusion. On the charge of failure to stop for a police officer, the verdict is set aside, and that count of the

complaint is to be dismissed. On the two possession charges,  
the judgments are affirmed.<sup>12</sup>

So ordered.

By the Court (Meade, Kinder &  
Hand, JJ.<sup>13</sup>),



Clerk

Entered: October 16, 2020.

---

<sup>12</sup> Based on our determination that the application for complaint failed to demonstrate probable cause to believe that the police signaled the defendant to stop before he actually did so, we need not and do not reach the question of the sufficiency of the evidence on this charge.

<sup>13</sup> The panelists are listed in order of seniority.