

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

13-P-944

COMMONWEALTH

vs.

JILLYAN FLAHERTY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was charged with possession of a Class C substance (Klonopin), in violation of G. L. c. 94C, § 34, and other offenses.¹ After an evidentiary hearing was held before a Boston Municipal Court judge on the defendant's motion to suppress evidence, the judge entered findings and rulings on the record denying the motion. The judge also provided written findings and rulings. The defendant filed a motion for reconsideration, which was denied. After a bench trial with stipulated facts, the defendant was convicted of possession of a Class C substance (Klonopin). The defendant now appeals her conviction. We affirm.

¹ The defendant was charged with two other offenses, trespass, in violation of G. L. c. 266, § 120, and possession of a class B substance, in violation of G. L. c. 94C, § 34. These charges were dismissed.

The defendant argues that the judge erred in denying her motion to suppress evidence, including evidence central to her conviction, Klonopin pills. The defendant contends that the arresting officer conducted an unlawful search because he had no reasonable suspicion to stop, seize, and search the defendant's person. The Commonwealth argues that there was no seizure in the constitutional sense, but if there was, the officer had reasonable suspicion to stop the defendant and then gained probable cause to arrest, allowing a subsequent search incident to arrest.

"In reviewing a ruling on a motion to suppress evidence, we accept the judge's subsidiary findings of fact absent clear error and leave to the judge the responsibility of determining the weight and credibility to be given oral testimony presented at the motion hearing." Commonwealth v. Wilson, 441 Mass. 390, 393 (2004). The only witness was Boston housing authority police Sergeant Kintigos, and the motion judge credited his testimony. He found that, when looking at all of the factors, including

"[the officer's] conclusion that the Defendant was trespassing on property that [he] was responsible for protecting, coupled with the Defendant's presence in a known drug habitat, the Defendant's presence with a known drug abuser, the Defendant's attempt to evade being stopped, and the Defendant's physical appearance (of a drug abuser),"

the officer had reasonable suspicion to make the threshold inquiry.² The defendant argues that each factor the judge considered to support reasonable suspicion does not alone create reasonable suspicion to stop. We note, however, that "[s]eemingly innocent activities taken together can give rise to reasonable suspicion justifying a threshold inquiry." Commonwealth v. Grandison, 433 Mass. 135, 139 (2001) (quotation omitted). We see no clear error and conclude that the judge did not abuse his discretion.

"An officer has the right to 'make a threshold inquiry where suspicious conduct gives the officer reason to suspect that a person has committed, is committing, or is about to commit a crime.'" Commonwealth v. Mathis, 76 Mass. App. Ct. 366, 373 (2010), quoting from Commonwealth v. Watson, 430 Mass. 725, 729 (2000). The officer must have "specific and articulable facts to support a reasonable suspicion of criminality;" he may not proceed on merely a hunch. Commonwealth v. Bostock, 450 Mass. 616, 621 (2008) (quotation omitted). "The test is an objective

² The judge also properly considered the officer's substantial experience and knowledge of the area from patrolling the development at issue for thirteen years and making hundreds of arrests (including many for drug violations). See Commonwealth v. Grandison, 433 Mass. 135, 139 (2001); Commonwealth v. Stephens, 451 Mass. 370, 384-385 (2008) (court considered officers' experiences with illegal drug transactions in area where events occurred).

one." Commonwealth v. Grandison, 433 Mass. at 139, quoting from Commonwealth v. Helme, 399 Mass. 298, 301 (1987). Assuming arguendo that the officer's command to the defendant, "Come back here," constituted a stop, see Commonwealth v. Barros, 435 Mass. 171, 176 (2001) (when the officer pointed at the defendant in front of two other officers, and said, "Hey you. I wanna talk to you. Come here," he conducted a stop as "he was communicating what a reasonable person would understand as a command that would be enforced by the police power"), we conclude that the officer had justification to do so. The factors noted by the judge, when viewed together, amount to the reasonable suspicion necessary for a stop. See Commonwealth v. Grandison, 433 Mass. at 139; Commonwealth v. Stephens, 451 Mass. 370, 384 (2008); Commonwealth v. Mathis, 76 Mass. App. Ct. at 369; Commonwealth v. Freeman, 87 Mass. App. Ct. 448, 451 (2015).

Without determining whether a search occurred, we agree with the judge's finding that the officer could inquire as to weapons and needles after he questioned the defendant and her companion about where they were coming from, who they were in the building with, and whether the companion lived there, and they were evasive in their answers and did not provide information on who they were visiting in the building. At that point, the officer had probable cause as to trespassing, and

therefore a search incident to arrest would have been proper. See Commonwealth v. Alvarado, 420 Mass. 542, 550 (1995). General Laws c. 276, § 1, permits police to search incident to a lawful arrest for evidence of the crime as well as any weapons the arrestee may use to resist arrest or attempt to escape. See Commonwealth v. Quilter, 81 Mass. App. Ct. 808, 810-811 (2012); Grasso & McEvoy, Suppression Matters Under Massachusetts Law § 12-1 [b][2], at 12-10 (2014). When the officer inquired as to whether the defendant and her companion had needles or weapons, and the defendant removed the hypodermic needle from her purse and discharged its contents onto the ground, that provided grounds for him to ask about whether she had any other drugs. See Commonwealth v. Mathis, 76 Mass. App. Ct. at 373-375 (officers had probable cause to arrest defendant after he told them he possessed illegal drugs). Therefore the officer did not violate the defendant's rights when he inquired as to other drugs and she produced the drugs at issue here, Klonopin. The defendant stipulated to her possession of Klonopin at trial.

Judgment affirmed.

By the Court (Cypher,
Trainor & Katzmann, JJ.³),

Clerk

³ The panelists are listed in order of seniority.

Entered: August 28, 2015.