

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

14-P-418

COMMONWEALTH

vs.

GERALD WILLIAMS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, the defendant was convicted of unlawful possession of ammunition, unlawful possession of a class E substance (clonidine), reckless operation of a motor vehicle, and resisting arrest.<sup>1</sup> Thereafter, the defendant was convicted after a jury-waived trial of unlawfully possessing ammunition while having previously been convicted of one violent crime and one serious drug offense. See G. L. c. 269, § 10G(b).

On appeal, the defendant challenges the sufficiency of the Commonwealth's evidence regarding the identity of the pills upon which the charge of unlawful possession of a class E substance was based. He also asserts that because he was not charged with any offense concerning heroin, a photograph depicting bags of heroin containing the caption, "Image Description: heroin bags

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<sup>1</sup> The defendant was acquitted of receiving stolen property.

along sidewalk," should not have been admitted in evidence, and that the portions of the prosecutor's closing argument that related to the photograph were error that created a substantial risk of a miscarriage of justice.

The Commonwealth concedes, in light of our recent decision in Commonwealth v. Paine, 86 Mass. App. Ct. 432 (2014), that its proof at trial was insufficient to establish beyond a reasonable doubt that the pills found in the defendant's pocket were clonidine. We agree,<sup>2</sup> and therefore vacate the judgment regarding unlawful possession of a class E substance, but affirm the remaining judgments.

Background. Based on the evidence at trial, the jury could have found that at approximately 4:00 P.M. on August 23, 2012, Springfield police Lieutenant Robert Tardiff and another police officer were on patrol when Tardiff noticed that the license plate on a red BMW traveling ahead of him was loosely attached and askew. After running the license plate number through his computer and discovering that the plate had been reported stolen, Tardiff activated his cruiser lights and sirens in order to stop the BMW.

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<sup>2</sup> As in Paine, supra at 436, the pills in this case were identified solely based upon appearance. There was no chemical analysis, and no circumstantial evidence that would support an inference that the pills actually contained clonidine. Accordingly, Paine controls and compels reversal. Id. at 436-437.

Instead of stopping, the driver of the BMW, later identified as the defendant, accelerated and drove in the wrong travel lane at a high rate of speed down several side streets. The defendant came to a stop after colliding with a police cruiser being driven by other responding officers. He then jumped out of the BMW and ran away. A foot chase ensued. Along the way, the defendant was seen pulling wax paper bags out of his pocket, putting the contents in his mouth, and then spitting the bags onto the sidewalk. The defendant led the police into a swampy area where he eventually was arrested after a violent struggle. During the booking procedure, three nine millimeter bullets and three pills wrapped in a plastic baggie were found in the defendant's pants pocket. The officers also photographed the wax paper bags discarded by the defendant during the chase. Tardiff testified that the photograph depicted "the wax paper bags that were -- that I [saw the defendant] place into his mouth, spit and throw on the ground as he was running."

Discussion. The defendant did not object at trial to the admission of the photograph in question or to the prosecutor's references to the photograph in his closing argument.<sup>3</sup> We therefore review these allegations "to determine if there was error, and if so, whether the error alone, or the totality of

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<sup>3</sup> Instead, counsel objected to what he believed was the prosecutor's mischaracterization of the defendant's argument.

them, may have created a substantial risk of a miscarriage of justice." Commonwealth v. Wilson, 441 Mass. 390, 399 (2004).

Regarding the admission of the photograph, the Commonwealth appropriately concedes that the image description should have been redacted but argues that the photograph itself was admissible because it showed that the defendant discarded items from his pocket as he ran and, as such, demonstrated that he knowingly possessed and had control over the other items in his pocket, namely, the bullets. While this argument is somewhat attenuated, given the strength of the Commonwealth's evidence, we conclude that the error of admitting the photograph in evidence without redacting the image description did not create a substantial risk of a miscarriage of justice.

Next, the defendant argues that the prosecutor's references to the photograph during closing argument exceeded the bounds of proper argument. The challenged remarks are as follows:

"[b]ecause he still has the contraband on him and he knows he has contraband on him and continues to run. I'm not talking about the bags that you heard Mr. Williams was taking out of his pocket and chewing on and throwing to the ground. I'm not talking about those. He's not charged with anything about that. But I want you to take that into consideration, what he's doing as he's running from police. He is pulling bags out of his pocket, placing them in his mouth and throwing them on the ground. Contents gone. . . .

"Mr. Williams doesn't stop once those bags have been discarded, once he's chewed on them, eaten the contents, and thrown them. He continues running."

As previously noted, there was no objection. We conclude there was no error, and therefore no substantial risk of a miscarriage of justice.

The prosecutor specifically noted that the defendant was not charged with any crimes associated with the wax paper bags shown in the photograph, and instead urged the jurors to consider the photograph as evidence of the road conditions on the day of the defendant's arrest.<sup>4</sup> The prosecutor also fairly remarked that the photograph demonstrated the defendant's consciousness of guilt and intent to possess the items for which he was charged. "A prosecutor is entitled to argue the evidence and fair inferences to be drawn therefrom," Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 231 (1992), and it was fair to infer from the defendant's acts of discarding the packets while running from the police that he intentionally exercised control over the other items discovered in his pants pocket. Here, even if we were to assume error, which we do not, given "the evidence at trial, and the judge's instructions that closing arguments were not evidence, the statement[s] did not create a substantial risk of a miscarriage of justice." Commonwealth v. Staines, 441 Mass. 521, 537 (2004).

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<sup>4</sup> This statement was a fair response to defense counsel's assertions that "perhaps the roads were wet," and that absent evidence of the road conditions, the Commonwealth had failed to prove the defendant was operating his motor vehicle recklessly.

Conclusion. On the charge of unlawful possession of a class E substance, the judgment is vacated, the verdict is set aside, and judgment shall enter for the defendant. The remaining judgments are affirmed.<sup>5</sup>

So ordered.

By the Court (Cypher,  
Vuono & Grainger, JJ.<sup>6</sup>),

Clerk

Entered: August 28, 2015.

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<sup>5</sup> It is not necessary to remand this case for resentencing as the vacated sentence was to run concurrently with the sentence on count one.

<sup>6</sup> The panelists are listed in order of seniority.