

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-1677

COMMONWEALTH

vs.

ANTONIO O. DIAS, JR.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from a 2019 order of the District Court denying his motion to withdraw his 1996 guilty pleas involving charges of possession with intent to distribute controlled substances, among others. The defendant's motion was based on ineffective assistance of counsel, specifically counsel's failure to properly advise him of the immigration consequences of his pleas, pursuant to Padilla v. Kentucky, 559 U.S. 356 (2010).² The motion judge found that counsel's

¹ We note that the criminal complaints also list the defendant's name as Antonio Dias and Antonio O. Dias.

² This case is before us after remand from an earlier appeal. See Commonwealth v. Dias, 94 Mass. App. Ct. 1117 (2019). There, a different District Court judge had denied the defendant's motion for new trial on the basis of direct estoppel; he reasoned that the defendant's claim had been rejected in six prior motions for new trial. Id. A different panel of this court determined that the defendant's seventh motion for new

performance was "constitutionally deficient," but nonetheless denied the motion, determining that the defendant had failed to establish the requisite prejudice. We reverse.

Facts.³ The defendant was born in Portugal and came to the United States with his family when he was two years old. He became a lawful permanent resident of the United States on April 7, 1979. On November 8, 1996, the defendant was twenty years old and scheduled for trial on several criminal cases that had been pending in the District Court for alleged conduct when he was sixteen through eighteen years old. The defendant had no prior convictions. The trial date was the first time that counsel spoke to the defendant about the disposition of his cases. Counsel did not advise the defendant of (1) any potential motions to dismiss or suppress, (2) any potential defenses to the charges or (3) the potential penalties faced upon conviction.

trial was the first opportunity the defendant had to have his claim considered under the correct legal standard and that therefore he was entitled to have his motion decided on the merits. Id.

³ The facts are taken from the March 21, 2017 affidavit of the defendant, which the motion judge "adopt[ed]" in its entirety and explicitly found to be "credible." Although the defendant's plea counsel testified, the judge credited plea counsel's April 25, 2019 affidavit. The judge made no findings concerning plea counsel's testimony or that of any of the other witnesses presented at the hearing.

In a five-minute conversation, the defendant told counsel that he would not plead guilty to a gun charge because he believed that would result in deportation.⁴ One-half hour later, counsel returned to inform the defendant that the judge had dismissed the gun charge. In another five-minute conversation, the defendant stated that he would plead to the remaining charges, as long as it did not result in deportation. Counsel stated that he could resolve the remaining charges with a guilty plea and a two-year term of incarceration. The defendant agreed. After pleading guilty and serving his sentence, the defendant was deported to Portugal due to his convictions involving possession with intent to distribute controlled substances.

Discussion. We review the denial of the defendant's motion to withdraw his guilty pleas, treated as a motion for a new trial, for a significant error of law or other abuse of discretion. Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). "That discretion, however, 'is not boundless and absolute.'" Commonwealth v. Kolenovic, 471 Mass. 664, 672 (2015), quoting Commonwealth v. Genius, 402 Mass. 711, 714 (1988). "While we

⁴ The defendant had never been back to Portugal and did not speak Portuguese. He lived with his mother and siblings and had gone to school in the Brockton school system. Due to a disabling car accident, he relied on his family for support. His girlfriend was pregnant with his child.

will not disturb a judge's subsidiary findings which are warranted by the evidence, 'ultimate findings and conclusions of law, particularly those of constitutional dimensions, are open for our independent review.'" Commonwealth v. Cousin, 478 Mass. 608, 615 (2018), quoting Commonwealth v. Walter, 396 Mass. 549, 553-554 (1986).

Where a motion to withdraw guilty pleas is premised upon ineffective assistance of counsel, the defendant must show "serious incompetency, inefficiency, or inattention of counsel - - behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer -- and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." DeJesus, 468 Mass. at 178, quoting Commonwealth v. Clarke, 460 Mass. 30, 45 (2011).

There is no dispute on appeal that the motion judge correctly determined that the defendant met his burden to show that his counsel's performance was constitutionally deficient in that he failed to "provide the defendant with accurate advice concerning the deportation consequences of pleading guilty." Commonwealth v. Sylvain, 466 Mass. 422, 438 (2013). See Commonwealth v. Lys, 481 Mass. 1, 5 (2018) (deficient performance if counsel failed to inform client of "truly clear"

deportation consequence to pleading guilty to drug distribution charges).

The parties agree that the sole issue on appeal is whether the motion judge erred in his determination that the defendant was not prejudiced. To establish prejudice when seeking to withdraw a guilty plea on the ground of ineffective assistance, a defendant must show that a decision to reject the plea bargain would have been rational under the circumstances. See Clarke, 460 Mass. at 47. To prove rationality, the defendant bears the substantial burden of showing at least one of the following: (1) an available, substantial ground of defense that the defendant would have pursued if given proper advice about the pleas' dire immigration consequences; (2) a reasonable probability that the defendant could have negotiated a plea bargain that did not include those dire immigration consequences; or (3) special circumstances supporting the conclusion that the defendant placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty. Id. at 47-48.

If the defendant establishes at least one of these factors, the judge must then go on to evaluate whether, under the totality of the circumstances, there is a reasonable probability that a reasonable person in the defendant's circumstances would have gone to trial if given constitutionally effective advice.

Commonwealth v. Lavrinenko, 473 Mass. 42, 59 (2015). Factors to consider in the totality of circumstances analysis include the defendant's assessment of success at trial; the risks of going to trial rather than pleading guilty, including the risk that a conviction at trial would result in a sentence substantially more severe than the sentence offered through a guilty plea to a lesser charge; whether conviction at trial would result in a house of correction sentence or a lengthy State prison sentence; and the defendant's deportability on acquittal. See Lys, 481 Mass. at 11.

In considering these factors, it must be remembered that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen. See Lavrinenko, 473 Mass. at 58. For a noncitizen defendant, preserving his right to remain in the United States may be more important to him than any jail sentence. Id. Thus, "a determination whether it would be rational for a defendant to reject a plea offer 'must take into account the particular circumstances informing the defendant's desire to remain in the United States'" (citation omitted). DeJesus, 468 Mass. at 184. Indeed, in the nonexhaustive list of factors to be considered in the totality of circumstances, "special circumstances regarding immigration consequences should be given substantial weight." Lavrinenko, supra at 59.

Here, the motion judge reviewed the charges but made no finding on the defendant's presentation of available defenses and alternative pleas or the potential risks of going to trial versus accepting a plea.⁵ He bypassed consideration of all of the special circumstances presented, moving directly to a conclusion that the defendant in fact placed particular emphasis on immigration consequences in deciding whether to plead guilty.⁶ Nonetheless, in considering the totality of the circumstances, the judge noted the singular fact that the defendant was facing six charges at the time of the plea and concluded that the defendant had failed to prove that "a decision to reject every plea bargain would have been rational under the circumstances."

⁵ Although there was no finding concerning the defendant's potential exposure, it was undisputed that all of the charges were to be resolved in the District Court and therefore only a house of correction sentence was implicated.

⁶ We note that the motion judge stated that the defendant had established special circumstances "in that he recognized during the plea discussions with his attorney that a conviction on his gun charge would be deportable" and found that the defendant "placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." Special circumstances are those factors that support the conclusion that immigration consequences were important to the defendant's consideration of a plea -- essentially, the reason that deportation would be an especially harsh consequence. See Clarke, 460 Mass. at 47-48. The judge's finding that the defendant did not want to plead to a charge that would make him deportable allowed him to make the ultimate conclusion that immigration consequences were important to the defendant. It did not, however, involve any recognition of the actual special circumstances "informing the defendant's desire to remain in the United States" (citation omitted). Lavrinenko, 473 Mass. at 58.

In coming to this conclusion, the judge noted that the plea judge's November 13, 1997 memorandum and order, denying the defendant's first motion for new trial, was "instructive." The motion judge quoted the plea judge's finding that the defendant had not put forth specific and viable defenses to the charges, as well as the plea judge's conclusion that "there is nothing beyond mere speculation to suggest that a better result would have been obtained by some additional or better work by the trial counsel." The motion judge further quoted the plea judge's finding that the defendant exhibited some familiarity with immigration law, signed the tender of plea forms, and was given the statutory alien warnings (G. L. c. 278, § 29D) during the plea colloquy.

The motion judge erred in relying on the plea judge's findings and conclusions. First, although the motion judge stated that he was taking "judicial notice" of the plea judge's decision, he could not take judicial notice of "facts or evidence brought out at a prior hearing that are not also admitted in evidence at the current hearing." Mass. G. Evid., § 201 note (2020), quoting Commonwealth v. O'Brien, 423 Mass. 841, 848-849 (1996). See Care & Protection of Zita, 455 Mass. 272, 283 (2009) (improper for judge to take notice of facts from prior related hearing). Absent issue preclusion or some specific rule of admissibility, findings in one proceeding are

not evidence in a different proceeding. Care & Protection of Zita, supra at 282. Parties are entitled to an impartial magistrate and a decision based on evidence presented in the relevant proceeding. Id. at 283. Here, the motion judge made no independent findings concerning the totality of the circumstances. Rather, he adopted the plea judge's findings, which were necessarily based on a presentation that was not before him.

Moreover, the motion judge adopted the plea judge's rationale in concluding that the defendant was not prejudiced. The plea judge's ruling, however, was made long before Padilla and the subsequent Supreme Judicial Court jurisprudence. When the plea judge decided the defendant's first motion, "'counsel's failure to inform a defendant of the collateral consequences of a guilty plea [was] never' a violation of the Sixth Amendment [to the United States Constitution]" (citation omitted). Chaidez v. United States, 568 U.S. 342, 350 (2013). Likewise, it is now well established that statutory alien warnings provided by the court and in the tender of plea form are "not an adequate substitute for defense counsel's professional obligation to advise [his] client of the likelihood of specific and dire immigration consequences that might result from such a plea." Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 552 (2014), quoting DeJesus, 468 Mass. at 177 n.3.

In a post-Padilla ineffective assistance of counsel analysis, the question is not whether proficient representation would have resulted in a more favorable disposition. Rather, the question is whether a defendant, advised by counsel that a guilty plea would result in certain deportation, would have taken their chances at trial.⁷ See Lys, 481 Mass. at 11 n.8, quoting Lee v. United States, 137 S. Ct. 1958, 1966-1967 (2017) (Supreme Court found prejudice based on "dire" immigration consequences of guilty plea, noting that defendant "would have rejected any plea leading to deportation -- even if it shaved off prison time -- in favor of throwing a 'Hail Mary' at

⁷ It appears that the motion judge recognized this during the motion hearing, at least on this record. After defense counsel made the argument that it would have been reasonable for the defendant to proceed to trial had he known that any plea would result in certain deportation, the motion judge remarked: "Well, I think it's self-evident. No one would plead themselves into deportation. . . . No one would do that, I don't think." The motion judge went on to acknowledge the defendant's position: "Well, I think what you're saying is if he had the information, the appropriate information, he would've said 'I'm going to trial because I have nothing to lose. . . . Because if I don't, I'm getting deported, I might as well take a shot at it.'" The motion judge then analogized to the typical decision whether to plead guilty in a high stakes scenario: "It's like in a gun case in the District Court, you know, if you plead guilty you get 18 months, you might as well try it because you're going to get 18 months, right? . . . At least you have an opportunity for a not guilty." The motion judge returned to the high stakes involved when deportation is an issue: "I don't know of anyone who would knowingly plead themselves into deportation."

trial"). The motion judge's reliance on the plea judge's decision caused him to apply the wrong legal standard.

Additionally, the motion judge appeared to give no consideration to the defendant's special circumstances, despite the fact that the prejudice determination "rests on the totality of the circumstances, in which special circumstances regarding immigration consequences should be given substantial weight." Lavrinenko, 473 Mass. at 59 (failure to consider special circumstance of defendant's refugee status constituted error of law requiring reversal). Those circumstances, which the motion judge found to exist, included that the defendant came to the United States at the age of two, that he was a lawful permanent resident, that he had never returned to his country of origin and did not speak its language, that he was disabled and relied on his family in the United States for support, and that he had a girlfriend who was pregnant with his child. Additionally, the defendant placed paramount importance on deportation when he decided to plead guilty, as evidenced by his refusal to plead guilty to the only charge that he believed would make him deportable and his willingness to plead to anything as long as it did not result in deportation.

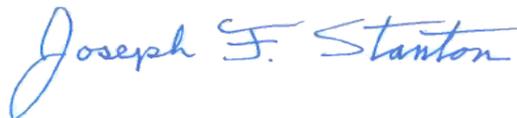
Given the facts properly found by the motion judge, essentially crediting all of the allegations in the defendant's affidavit, we conclude that the defendant met his burden of

establishing that a reasonable person in the defendant's circumstances would have gone to trial if given constitutionally effective advice. Lavrinenko, 473 Mass. at 59. Compare Lee, 137 S. Ct. at 1968 (reversing trial court's finding that defendant had not established prejudice where deportation was the "determinative issue" in plea discussions and defendant had strong connections to this country, having never returned to country of origin since leaving as a child). As the Court observed in Lee, "[n]ot everyone in [the defendant's] position would make the choice to reject the plea. But we cannot say it would be irrational to do so." 137 S. Ct. at 1969.

Accordingly, the order dated October 28, 2019, denying the defendant's motion to withdraw the guilty pleas is vacated, and an order shall enter allowing the motion. The judgments are vacated, and the findings are set aside.

So ordered.

By the Court (Wolohojian,
Henry & Singh, JJ.⁸),



Clerk

Entered: April 22, 2021.

⁸ The panelists are listed in order of seniority.