19-P-876 Appeals Court

COMMONWEALTH vs. CHRISTOPHER HENRY.

No. 19-P-876.

Suffolk. March 3, 2020. - August 14, 2020.

Present: Rubin, Maldonado, & Shin, JJ.

Assault and Battery by Means of a Dangerous Weapon. Robbery. Firearms. Controlled Substances. Practice, Criminal, Plea, Conduct of government agents, Assistance of counsel. Evidence, Guilty plea, Certificate of drug analysis. Constitutional Law, Assistance of counsel, Conduct of government agents, Plea.

Indictments found and returned in the Superior Court Department on June 21, 2011.

A motion to withdraw pleas of guilty and for a new trial, filed on July 21, 2015, was heard by Jeffrey A. Locke, J.

Amy Codagnone for the defendant.
Paul B. Linn, Assistant District Attorney, for the Commonwealth.

RUBIN, J. This is an appeal from an order denying the defendant's motion to withdraw his guilty pleas on nondrug-related charges tendered as part of a package plea deal that

included two drug charges in each of which the relevant drug certificates were signed on the "Assistant Analyst" line by Annie Dookhan. The Supreme Judicial Court has, as a result of Dookhan's misconduct, see Commonwealth v. Scott, 467 Mass. 336 (2014), vacated the conviction on the drug charge to which the defendant pleaded guilty as part of the deal and dismissed both it and the other drug charge, which was nol prossed. Under Commonwealth v. Lewis, 96 Mass. App. Ct. 354, 360-361 (2019), decided during the pendency of this appeal, we are required to affirm the order denying the motion to withdraw the guilty pleas on the other charges.

Background. An armed robbery occurred in front of an apartment building located in the Mattapan section of Boston around 9:10 P.M. on March 24, 2011.[1] Boston police officers responded to a call about the armed robbery and spoke with the victim. The victim reported that he had been approached by two males in front of the apartment building. The victim saw one male come out of the building; he then took a revolver out of his pocket and held the revolver to the victim's head. The

[1] The facts in this and the following paragraphs are taken from the Commonwealth's recitation of the facts that provided the basis for the defendant's guilty pleas, as well as from the findings of the judge (suppression judge) who, following an evidentiary hearing, denied the defendant's motion to suppress. The defendant's motion for reconsideration and his interlocutory appeal from that order were both denied.

other male took the victim's cell phone, wallet, silver ring, and about $575 in cash. The victim provided a physical description of the male who had held the revolver to his head and indicated that he had seen a person standing on the front balcony of one of the apartments in the building just before the robbery.

Based on this information and additional facts indicating that individuals living in apartment four of this building may have committed prior armed robberies or may have outstanding warrants[2] and that the balcony on which the victim saw someone standing just before the robbery was outside of apartment four, police officers went to apartment four and knocked on its door. When a woman answered the door, the officers identified themselves as police officers. The woman indicated that she lived in the apartment. The officers, still outside the door, then learned from one of the other two women in the apartment

[2] After interviewing the victim, the officers found that in November of 2010, Boston police officers had searched apartment four and had arrested two individuals there for an armed robbery. One of those individuals was known to police to possess a shotgun. There was also an outstanding arrest warrant for another man who listed the address of the apartment building as his. (These individuals were not found to be present at the apartment when the police arrived on March 24, 2011.) The suppression judge found that where the officers (1) were investigating a recent armed robbery in this area, (2) knew of two men previously arrested in this apartment for a past armed robbery, and (3) knew one of those men was known to be armed with a shotgun, the officers were justified in entering the apartment without a warrant due to "real safety concerns."

that her boyfriend was in a bedroom; one of the officers asked her to have her boyfriend step out of the bedroom. The women said that he was changing his clothes. After several minutes, the officers asked the man, later identified as the defendant, to come out of the bedroom and identify himself. Because the man was taking much longer than necessary to change clothes, one officer entered the apartment due to officer safety concerns. When he entered the apartment, the defendant came out of the bedroom and identified himself.

At that point, the officer believed that the defendant matched the victim's description of the armed male who helped to rob him: a man standing about five feet, nine inches tall, with a dark complexion and shoulder length braids. The defendant had a dark complexion, was approximately though not exactly the height described, and appeared to wear his hair in braids.

Officers conducted a walk-through of the apartment and asked one of the women to retrieve weather-appropriate clothes for the defendant. She gave the officer a pair of jeans and the officer checked the pockets for weapons. In one of the pockets, the officer found a small bag of what appeared to be "crack" cocaine. The defendant was then arrested for possession of a class B substance. During a search following that arrest, the officers found more of what appeared to be crack cocaine in the defendant's shorts. These substances, believed to be crack

cocaine, were sent to the William A. Hinton State Laboratory Institute (State laboratory) and drug certificates signed by Dookhan reported them to contain cocaine.

After arresting the defendant on the drug charges, officers returned to apartment four with a search warrant. During the search, the officers found eleven plastic bags of what appeared to be cocaine. The substances in these bags were analyzed at the State laboratory, which issued a drug certificate signed by Dookhan that indicated the substances contained cocaine. The officers also found a loaded .22 caliber revolver and a box of .22 caliber ammunition in the bedroom from which the defendant had emerged. While police found no fingerprints on the revolver, they did recover a pair of black gloves from the apartment; the victim had indicated that the perpetrator holding the revolver wore black gloves. The Commonwealth represented during the defendant's plea hearing that the defendant's fingerprints were found on the box of ammunition.

After the defendant's arrest, officers prepared a photographic array including the defendant to show to the victim. The victim selected the photograph of the defendant as the person who had held the revolver to his head.

The defendant was charged in eight indictments[3] with the following offenses: armed robbery, in violation of G. L. c. 265, § 17 (indictment one); assault and battery by means of a dangerous weapon, in violation of G. L. c. 265, § 15A (indictment two); unlawful possession of a firearm, in violation of G. L. c. 269, § 10 (a), as an armed career criminal, G. L. c. 269, § 10G, and as a subsequent offense (indictment three); unlawful possession of ammunition, in violation of G. L. c. 269, § 10 (h) (indictment four); unlawful possession of a loaded firearm, in violation of G. L. c. 269, § 10 (n) (indictment five); possession of a firearm while in the commission of a felony, in violation of G. L. c. 265, § 18B (indictment six); possession of a class B substance, cocaine, with the intent to distribute, in violation of G. L. c. 94C, § 32A (c) (indictment seven); and violation of the controlled substance laws in a school zone, in violation of G. L. c. 94C, § 32J (indictment eight).

On July 13, 2012, the defendant pleaded guilty to the lesser included offense of robbery (indictment one); assault and battery by means of a dangerous weapon (indictment two); the lesser included offense of possession of a firearm without a

[3] The indictments are numbered consecutively "#001," "#002," etc., for example, "SUCR 2011-10599 INDICTMENT-#001." For ease, we refer to them as indictment one, two, etc.

license (indictment three); and possession of cocaine with the intent to distribute (indictment seven). The Commonwealth filed a nolle prosequi on each of the remaining charges. As per his plea deal the defendant was sentenced to from three years to three years and one day in a State prison (indictment one); two years' probation from and after his sentence on indictment one (indictment two); from three years to three years and one day in a State prison, to run concurrently with his sentence on indictment one (indictment three); and from three years to three years and one day in a State prison to run concurrently with his sentence on indictment one (indictment seven). Based on these guilty pleas, the defendant was also found to have violated his probation from a 2008 conviction; he was ordered to serve two and one-half years in a house of correction, to run concurrently with his other sentences. Because the defendant was given credit for time served, he was eligible for release from prison and was discharged on June 3, 2014 -- less than two years after his plea.

The defendant subsequently discovered that the two drug certificates relevant to the cocaine charges were signed on the assistant analyst line by Annie Dookhan. See Scott, 467 Mass. 336 (detailing Dookhan's misconduct). The defendant filed a motion to withdraw his pleas. While that motion was pending, on April 19, 2017, his conviction of possession of a class B

substance with the intent to distribute was vacated and both of the drug charges were dismissed with prejudice by order of the Supreme Judicial Court. After an evidentiary hearing, a judge of the Superior Court (motion judge), other than the plea judge, denied the motion to withdraw the remaining guilty pleas. The defendant has now appealed from that order.

Discussion. The pleas that the defendant seeks to withdraw were entered in nondrug cases resolved along with the Dookhan-tainted drug charges in a package plea deal. "[W]hen a defendant seeks to vacate a guilty plea as a result of underlying government misconduct, rather than a defect in the plea procedures, the defendant must show both that 'egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea' and that 'the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice.'" Scott, 467 Mass. at 346, quoting Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). Under Scott, supra at 352, "in cases in which a defendant seeks to vacate a guilty plea under Mass. R. Crim. P. 30 (b) as a result of the revelation of Dookhan's misconduct, and where the defendant proffers a drug certificate from the defendant's case signed by Dookhan on the line labeled 'Assistant Analyst,' the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in the defendant's case."

Although the threat of prosecution in what turns out to be a Dookhan-tainted drug case may well lead a defendant to plead guilty to other charges as well as to the Dookhan-tainted drugs charges in a package plea deal, subsequent to the briefing in this case our court held in Lewis, 96 Mass. App. Ct. at 360-361, that to determine a defendant's entitlement to the conclusive presumption contained in what is referred to as the "first prong" of the Ferrara-Scott analysis, we ask whether Dookhan committed misconduct in relation to the particular "charge" to which the defendant seeks to withdraw his plea. Here, as the charges with respect to which the defendant seeks to withdraw his guilty pleas are not the Dookhan-tainted drug charges, but the other charges to which he pleaded as part of the plea deal that included resolution of the Dookhan-tainted charges, we are required under Lewis to conclude that he is not entitled to the presumption articulated in Scott.

At argument, recognizing the stumbling block presented by Lewis to the defendant's claim, the defendant's counsel argued that even without the presumption, the first prong of a claim for withdrawal of a plea based on egregious government misconduct has been met here. Under Ferrara, 456 F.3d at 289-290, the defendant must show that egregiously impermissible conduct preceded his plea, implicating due process concerns. "[U]nder the first prong of the analysis, the defendant must

demonstrate that the misconduct occurred in his case." Scott, 467 Mass. at 350. The obstacle the defendant faces is the very one that led the Supreme Judicial Court in Scott to articulate a conclusive presumption rather than requiring a case-by-case assessment: there is no way for him to show that Dookhan engaged in misconduct in his case. As Scott, supra at 351-352, recognized:

> "In cases arising out of Dookhan's misconduct, however, such a nexus may be impossible for the defendant to show. Unlike the government misconduct in Fisher or Ellis, Dookhan, who was the only witness to her misconduct in most instances, has indicated that she may not be able to identify those cases that involved proper testing and those that involved 'dry labbing' or other breaches of protocol. See [Commonwealth v.] Ellis, 432 Mass. [746,] 764 [(2000)]; [United States v.] Fisher, 711 F.3d [460,] 463 [(4th Cir. 2013)]. Additionally, Dookhan appears to have been motivated primarily by a desire to appear highly productive, not by a desire to target particular defendants she can now identify. Thus, even if Dookhan herself were to testify in each of the thousands of cases in which she served as primary or secondary chemist, it is unlikely that her testimony, even if truthful, could resolve the question whether she engaged in misconduct in a particular case. What is reasonably certain, however, is that her misconduct touched a great number of cases."

We therefore conclude, in the absence of any evidence that egregious government misconduct occurred in relation to the defendant's robbery, assault and battery by means of a dangerous weapon, and possessing a firearm without a license charges, that the defendant has not met this burden. Consequently, there was no error in the denial of his motion.

Were we to find that the defendant was entitled to the presumption, or had otherwise satisfied the first prong of Ferrara, we would nonetheless affirm the judge's order denying the motion to withdraw the guilty pleas. The charges with respect to which the defendant now seeks to withdraw his pleas included armed robbery, a conviction for which would have exposed him to a maximum sentence of imprisonment for life, G. L. c. 265, § 17; assault and battery by means of a dangerous weapon, which carried a maximum sentence of ten years in State prison, G. L. c. 265, § 15A; and unlawful possession of a firearm, G. L. c. 269, § 10 (a), as an armed career criminal, G. L. c. 269, § 10G, and as a subsequent offense, G. L. c. 269, § 10 (d), which carried a maximum sentence of fifteen years in State prison. If he went to trial, the defendant also faced possible convictions on the charges of possession of a firearm while in the commission of a felony, which carried a mandatory minimum sentence of five years, G. L. c. 265, § 18B, and unlawful possession of a loaded firearm, which could have added an additional two and one-half years after his sentence for possession of a firearm without a license, G. L. c. 269, § 10 (n). Although the charge with respect to which the evidence was strongest, the ammunition charge, G. L. c. 269, § 10 (h), carried only a maximum penalty of two years, the defendant faced a substantial risk, even if not a certainty, of conviction on

the more serious charges. This is true despite the fact that when the defendant's investigator interviewed the victim, he reported that he was only sixty to seventy percent certain of his photograph identification of the defendant. The defendant also faced two and one-half years in a house of correction if his probation, which he was on at the time of the alleged commission of the other crimes, was revoked, which it could have been based on any of the charges against him, as a probation violation need only be proved by a preponderance of the evidence. See Commonwealth v. Eldred, 480 Mass. 90, 101 (2018).

The motion judge erroneously considered the fact that the defendant had admitted at his plea colloquy the facts underlying each of his guilty pleas in determining the probability that the defendant would have accepted this plea even had he known of Dookhan's misconduct and its implications for the drug charges. See Scott, 467 Mass. at 358 (motion judge must "determine whether, in the totality of the circumstances, the defendant can demonstrate a reasonable probability that had he known of Dookhan's misconduct, he would not have admitted to sufficient facts and would have insisted on taking his chances at trial" [emphasis added]). Cf. Commonwealth v. Lavrinenko, 473 Mass. 42, 61 n.22 (2015) ("The question is not whether the defendant was satisfied with the plea bargain at the time, . . . but whether there is a reasonable probability that . . . a

reasonable person in the defendant's position would have chosen to go to trial"). The motion judge's finding that the defendant's testimony was not credible when he said that the drugs charges were the driving force behind his decision to plead, however, has not been shown to be clearly erroneous. Given the lengthy incarceration the defendant potentially faced, the plea deal gave him credit for the time that he had served awaiting trial and assured his release less than two years thereafter. Consequently, were we to reach the question, we would conclude that the defendant has not shown a reasonable probability that had he known of Dookhan's misconduct, he would not have pleaded guilty to the charges before us. Scott, supra at 356.

The defendant also argues on appeal that evidence of Dookhan's misconduct constitutes withheld or newly discovered evidence that requires us to vacate his guilty pleas. For the same reasons that we conclude that the defendant has not shown a reasonable probability that he would not have pleaded guilty, these arguments must fail. As this court held in Commonwealth v. Antone, 90 Mass. App. Ct. 810, 821 (2017), "[w]here we have found that . . . the defendant had failed to satisfy his burden of demonstrating a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct, we similarly conclude that he has not satisfied his burden on his

prosecutorial nondisclosure and newly discovered evidence claims concerning that same misconduct."

In his motion to withdraw his guilty pleas, the defendant also argued that his plea counsel provided him ineffective assistance because, he alleges, counsel did not inform him that, if he were convicted of additional crimes in the future, he would be subject to certain sentencing enhancements as a result of having pleaded to and been found guilty of these charges. The defendant, however, has not provided us with any support for his claim that counsel, in order to be considered constitutionally effective, must inform the defendant of these sentencing enhancements that may apply to him, were he to be convicted of more crimes in the future. At least on the record before us, the defendant has not demonstrated that counsel's failure to inform him of these relatively remote contingent possible consequences constitutes "behavior . . . falling measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Accordingly, there is no basis to vacate the order on this ground.

Order denying motion to withdraw guilty pleas and for a new trial affirmed.