COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1277

COMMONWEALTH

vs.

JOHN RIVERA.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On July 12, 2007, the defendant, John Rivera, pleaded guilty to possession of cocaine with intent to distribute, unlawful possession of a firearm, and unlawful possession of ammunition.[2] He was sentenced to two to three years in State prison, followed by three years of probation. On December 22, 2017, the defendant filed a motion to withdraw his guilty plea and for a new trial, claiming that his plea was involuntary and unintelligent due to the misconduct of Annie Dookhan at the William A. Hinton State Laboratory Institute, and that the Commonwealth failed to disclose evidence of Dookhan's

[1] We use the defendant's name as it appears on the indictments. See Commonwealth v. Rogers, 448 Mass. 538, 538 n.1 (2007).

[2] The Commonwealth filed a nolle prosequi on an indictment charging trafficking in heroin.

misconduct. A judge of the Superior Court denied the motion. This appeal followed. We affirm.

Discussion. "A motion to withdraw a guilty plea is treated as a motion for new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001)." Commonwealth v. Lavrinenko, 473 Mass. 42, 47 (2015), quoting Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). Motions for new trial "are committed to the sound discretion of the judge." Commonwealth v. Prado, 94 Mass. App. Ct. 253, 255 (2018). In Commonwealth v. Scott, 467 Mass. 336, 346-358 (2014), the Supreme Judicial Court articulated a new framework for analyzing a motion to withdraw a guilty plea in cases affected by Dookhan's misconduct. See Commonwealth v. Resende, 475 Mass. 1, 3 (2016). In Scott, the court adopted the two-part test articulated in Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). Resende, supra. "Under the first prong of the analysis, a defendant must show egregious misconduct by the government that preceded the entry of the defendant's guilty plea and that occurred in the defendant's case." Id. In cases where Dookhan's signature appears on the drug certificate, a defendant is "entitled to 'a conclusive presumption that egregious government misconduct occurred in the defendant's case.'" Id., quoting Scott, supra. Here, Dookhan was the confirmatory chemist for three of the four

drug samples. Accordingly, and as the Commonwealth acknowledges, the first Scott prong is satisfied.

Under the second prong, we apply a multifactor analysis to determine whether, based on the totality of the circumstances, the defendant has demonstrated a reasonable probability that he would not have pleaded guilty had he known of the government misconduct. Scott, 467 Mass. at 356-357. There are many factors identified in Scott that courts should consider, although not all will be relevant in each case, and some may carry greater weight than others. See Resende, 475 Mass. at 16. Additionally, a judge may also consider "whether the defendant had a substantial ground of defense that would have been pursued at trial or whether any other special circumstances were present on which the defendant may have placed particular emphasis in deciding whether to accept the government's offer of a plea agreement." Id. at 356. Ultimately, "the defendant must 'convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Id., quoting Commonwealth v. Clarke, 460 Mass. 30, 47 (2011).

We agree with the judge that the defendant did not meet his burden under the second prong. The judge found that the defendant failed to show that there was a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct. In so finding, the judge rejected the defendant's

affidavit filed in support of his motion as "self-serving." Further, plea counsel's statement in her affidavit that that she would have "sought additional discovery regarding Dookhan's misconduct to determine what [the defendant's] best option would have been with the evidence in hand," did not establish a reasonable probability that the defendant would not have pleaded guilty. Moreover, the affidavit was essentially silent on the question of what she would have done -- other than investigate -- if she had known of Dookhan's misconduct.

The judge also reasoned that the defendant "overestimate[d] the value of evidence of Dookhan's misconduct at trial." The Commonwealth's evidence was strong. The search warrant executed in this case came after a lengthy investigation that included information from a confidential informant and a controlled buy. Documents present at the scene tied the defendant to the apartment, and he ran upon arrival of the police, evidencing a consciousness of guilt. In addition, the primary chemist, Della Saunders, who was not implicated in Dookhan's misconduct, would have presented strong, if not overwhelming, evidence on the nature and weight of the substances in question. See Commonwealth v. Antone, 90 Mass. App. Ct. 810, 816-818 (2017) (work of primary chemist not rendered nullity because of Dookhan's misconduct).

Finally, the benefits of the plea agreement outweighed the value of any evidence of Dookhan's misconduct. As noted by the judge, "[i]n exchange for the Commonwealth nolle prossing the heroin charge, [the defendant] reduced his exposure from a minimum of seven years in [S]tate prison to two-three years." See Antone, 90 Mass. App. Ct. at 818-819. And, the defendant was also facing firearm charges. Therefore, it was proper for the judge to conclude that it would not have been rational for the defendant to reject the plea bargain.

2. Newly discovered evidence and prosecutorial nondisclosure. The defendant argues for the first time on appeal that he is entitled to a new trial based on newly discovered evidence and prosecutorial nondisclosure. Because the claim was not raised below, we decline to consider it. See Gagnon, petitioner, 416 Mass. 775, 780 (1994) ("Generally . . . we shall not address issues raised for the first time on appeal,

if the record accompanying them is lacking . . . in providing a basis for their intelligent resolution").

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

By the Court (Green, C.J., Blake & Kinder, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: January 14, 2020.

[3] The panelists are listed in order of seniority.