COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1415

COMMONWEALTH

vs.

KELLY TONGO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Pursuant to a plea agreement, the defendant pleaded guilty in 2011 to trafficking of over fourteen and under twenty-eight grams of heroin. Prior to the plea, the Commonwealth disclosed evidence of a drug lab certificate signed by Annie Dookhan. After learning of Dookhan's misconduct, the defendant twice moved to withdraw his guilty plea, and his motions were twice denied. The defendant appeals from both orders, arguing that he is entitled to withdraw his plea under Commonwealth v. Scott, 467 Mass. 336 (2014). We affirm.

Background. 1. Facts. On August 5, 2010, a United States Customs and Border Protection officer intercepted a package from India addressed to "Franc Smith," with a Boston address. The officer searched the package and found a purse that contained brown powder wrapped in carbon paper and tape. The Customs

officer conducted a field test of the powder, which indicated that the substance was heroin and weighed approximately 194 grams.

The following day, officers from the Boston Police Department and United States Immigration and Customs Enforcement conducted a "controlled delivery" at the address identified on the package, during which a police officer posed as a FedEx employee. The defendant responded to the doorbell, identified himself as "Franc Smith," and signed for the package. A group of officers then detained the defendant and took him inside, where they gave him Miranda warnings and interviewed him.[1] In the interview the defendant was forthcoming. He stated that he was expecting a package from India that he believed to contain drugs, although he did not know what kind of drugs or how much. Further, the defendant stated that he was receiving the drugs for a friend, whom he identified as Chukwunonso Ifejiofor, in exchange for money. With the defendant's consent, officers searched the contents of the defendant's phone and found several text messages concerning the package, including one from Ifejiofor that contained the tracking number of the FedEx shipment. At the officers' direction, the defendant then sent

[1] Although the defendant permitted the officers to record the interview, he has not made the recording available to us for review.

Ifejiofor a text message stating "thank god." "Thank god" was a code previously agreed between the defendant and Ifejiofor, which meant that the package had been received. That message elicited a reply that read, "Yes men do ur thing." The defendant was thereafter arrested.

On August 9, 2010, the defendant requested another interview with the police, during which he revealed additional incriminating facts. Specifically, the defendant stated that he had sent money to Ifejiofor's contacts in India multiple times, that he had been planning to deliver the intercepted package to someone in the Mission Hill neighborhood of Boston, and that he was engaging in these activities in order to make money.

On August 10, the Massachusetts Department of Public Health's Hinton State Laboratory received the substance in the seized shipment. Dookhan was the primary chemist responsible for the testing. Dookhan, along with a confirmatory chemist, signed a certificate stating that the tested substance was heroin and that it weighed approximately 154 grams.

2. Plea. In October 2010, the defendant was indicted on one count of trafficking 100 to 200 grams of heroin, see G. L. c. 94C, § 32E (c) (3), and one count of conspiracy to violate drug laws, see G. L. c. 94C, § 40. At the time of the defendant's indictment the first charge carried a mandatory minimum sentence of ten years in prison and a maximum of twenty

years; the second carried an equal or lesser sentence.[2] In accordance with a plea agreement, in September 2011 the defendant pleaded guilty in the Superior Court to a lesser charge of trafficking of over fourteen and under twenty-eight grams of heroin, see § 32E (c) (1), and the Commonwealth filed a nolle prosequi on the conspiracy indictment. The defendant was sentenced to three years to three years and a day in prison.[3] Prior to entering his plea, the defendant, who is not a United States citizen, was informed of the potential consequences of a guilty plea on his immigration status in three separate ways -- by plea counsel, by the Waiver of Defendant's Rights form, and by the plea judge.

3. Subsequent procedure. In October 2012, after Dookhan's misdeeds became public, the defendant filed a motion to withdraw the guilty plea, which was denied in November 2013. The defendant timely appealed. In March 2014, the Supreme Judicial Court decided Scott, 467 Mass. 336, which articulated a new

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[2] The Legislature has since amended § 32E (c) (3), which now carries a mandatory minimum sentence of eight, and a maximum of thirty, years in prison. See St. 2012, c. 192, § 26; St. 2014, c. 165, §§ 134-135.

[3] In addition to filing the two motions to withdraw the guilty plea that give rise to this appeal, the defendant filed a third motion to vacate, arguing that he received an illegal sentence because § 32E (c) (1) then carried a five-year mandatory minimum sentence. The motion judge denied the motion without prejudice, but ordered the docket amended to reflect a plea to G. L. c. 94C, § 32 (a), which carried a lesser minimum sentence.

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), citing Scott, supra at 346-358. Shortly thereafter, the defendant filed a renewed motion to withdraw the plea. A special magistrate judge issued a Memorandum of Decision and Proposed Order denying the defendant's renewed motion in May 2014, which the motion judge adopted in an April 2018 order. This case consolidates the defendant's appeals from the 2013 and 2018 orders.[4]

Discussion. The defendant argues that the motion judge abused her discretion by denying his motion to withdraw the plea. We review an order denying a motion to withdraw a plea as we would an order denying a motion for a new trial, for abuse of discretion or significant error of law. Resende, 475 Mass. at 12. Scott, 467 Mass. at 344. "Under Mass. R. Crim. P. 30 (b), a judge may grant a motion for a new trial any time it appears that justice may not have been done" (quotation omitted). Commonwealth v. Lewis, 96 Mass. App. Ct. 354, 357 (2019).

[4] For present purposes we are concerned only with the 2018 order adopting the special magistrate's 2014 proposed memorandum and order. The defendant's first motion, as well as the 2013 order thereon, predated Scott, which supplies the rule of decision here. For simplicity, we refer throughout to the 2018 order denying the defendant's renewed motion, and we discuss the Memorandum of Decision and Proposed Order adopted in the 2018 order.

The Scott opinion addresses a rule 30 (b) motion to withdraw a guilty plea in the specific context of defendants affected by Dookhan's misconduct. Resende, 475 Mass. at 3, citing Scott, 467 Mass. at 346-358. Incorporating the teaching of Ferrara v. United States, 456 F.3d 278, 290-297 (1st Cir. 2006), Scott sets forth a two-prong test: the defendant must show (1) egregious government misconduct that implicates the defendant's due process rights and that predated the entry of the plea; and (2) a "reasonable probability that [the defendant] would not have pleaded guilty had [the defendant] known of [the government] misconduct" (quotation omitted). Resende, supra at 3. Further, Scott held that "where Dookhan signed the certificate of drug analysis as either the primary or secondary chemist in the defendant's case, the defendant is entitled to a conclusive presumption" that egregious government misconduct occurred. Scott, supra at 338. In this case, Dookhan, serving as the primary chemist, signed a drug analysis certificate stating that the intercepted substance was heroin. Thus, the first Scott prong is satisfied.

The second prong requires courts to 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 356-358.

There are as many as thirteen factors identified in Scott that courts should consider, id., although not all will be relevant in each case and some may carry greater weight than others. See Resende, 475 Mass. at 16-17.

Here the special magistrate determined, based on all the circumstances, that the defendant did not satisfy the second Scott prong, and the motion judge adopted the magistrate's conclusion and reasoning. The motion judge did not abuse her discretion in doing so. The gist of the special magistrate's reasoning was that even without the drug lab certification the Commonwealth had a strong case on the charge of trafficking 100 to 200 grams of heroin, which then carried a mandatory minimum sentence of ten years, and the defendant received a favorable deal when the Commonwealth reduced the charges and agreed to a three-year sentence.

As to the strength of the Commonwealth's case even without the Dookhan lab results, the evidence of guilt included the defendant's two admissions during the police interviews that he intended to receive drugs shipped from India. Moreover, the defendant identified himself as "Franc Smith" -- the addressee on the intercepted shipment -- during the controlled delivery; he had a text message in his phone containing the shipment's tracking number; he twice stated that he planned to either receive, or receive and then deliver, drugs to make money; and

he stated that he had previously sent money to contacts of Ifejiofor's in India -- where the shipment at issue originated. Additionally, a reasonable fact finder could have understood the defendant's text message exchange with Ifejiofor to demonstrate the defendant's knowledge that the package contained drugs, and to support a conviction on the conspiracy charge as well. As in Resende, "[a]part from the drug certificates, the evidence against the defendant was strong." Resende, 475 Mass. at 17 (noting that defendant participated as seller in five controlled buys and field tests indicated substance sold was cocaine).

Given the strength of the case against the defendant -- based largely upon his own admissions -- the question is whether the defendant could have reasonably raised any substantial defenses at trial had he known of Dookhan's misconduct beforehand. See Scott, 467 Mass. at 356. We can discern no such substantial ground of defense. On appeal, the defendant argues for the first time that without the Dookhan evidence the Commonwealth would not have been able to prove a necessary element of the trafficking charge -- that the substance in the intercepted shipment was heroin, as opposed to some other substance.[5] The argument fails, however, due to the field test

[5] The defendant waived this argument by not making it below. We review it nonetheless for whether error, if any, created a substantial risk of a miscarriage of justice. Commonwealth v. Johnson, 470 Mass. 300, 307 (2014).

conducted by the United States Customs officer, which returned positive for heroin. Although the defendant claims that the field test would have been insufficient, the case law teaches that positive field tests presented at trial, with proper foundation, may carry persuasive weight. See Resende, 475 Mass. at 17-18. The field test evidence, together with the other strong evidence that the defendant was knowingly engaged in trafficking drugs, would have been sufficient to show the substance at issue was heroin.

Moreover, the defendant received a significant benefit from pleading guilty, in the form of a generous sentence reduction. Based upon analyses showing that the intercepted heroin weighed between 150 and 200 grams, the defendant was indicted on a trafficking charge that then carried a mandatory minimum sentence of ten years. However, under the plea agreement he pleaded to a lesser charge for which he received a three-year prison term, and the Commonwealth also dismissed the conspiracy charge. The benefit of the plea agreement to the defendant is a significant factor in evaluating whether the defendant reasonably would have chosen to go to trial. Here that benefit -- avoiding at least seven years of mandatory prison time -- was substantial. Accord Commonwealth v. Antone, 90 Mass. App. Ct. 810, 819 (2017) (defendant "eliminated potentially ten

additional years in prison" on one charge by pleading guilty, and Commonwealth dismissed second charge).

The defendant argues nevertheless that he would not have pleaded guilty because of the substantial adverse consequences awaiting him in his home country, Nigeria. Specifically, the defendant argues that by pleading guilty he exposed himself to a risk of deportation to his native Nigeria, and he further exposed himself to a risk of conviction and harsh punishment under a Nigerian law that makes it a crime to be convicted of drug-related crimes in other countries, and which carries a five-year prison sentence. Critically, however, the special magistrate found no evidence that either the defendant or his plea counsel knew of this Nigerian law at the time of the plea. The defendant does not challenge that finding on appeal. Scott's "reasonable probability analysis must be based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea" (emphasis added). Scott, 467 Mass. at 357.

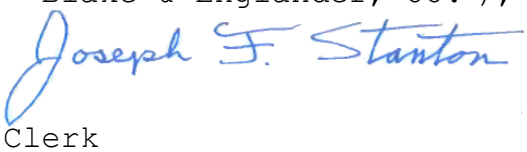
In sum, it is likely true that, as plea counsel testified, had she known of Dookhan's misconduct she might have advised the defendant differently and employed a "different litigation strategy." Such evidence, however, is not sufficient to show a reasonable probability that the defendant would not have pleaded

guilty under the circumstances. The motion judge acted within her discretion in denying the motion.

The order entered November 14, 2013, denying the defendant's motion to vacate guilty plea, is affirmed. The order entered April 20, 2018, accepting and adopting the Special Judicial Magistrate's Memorandum of Decision and Proposed Order and denying the defendant's renewed motion, is affirmed.

So ordered.

By the Court (Wolohojian, Blake & Englander, JJ.[6]),



Clerk

Entered: January 14, 2020.

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