

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

19-P-579

COMMONWEALTH

vs.

PEDRO ORTIZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Pedro Ortiz, pleaded guilty in June 1999 to two counts of trafficking in twenty-eight or more grams of cocaine, G. L. c. 94C, § 32E (b) (1), one count of drug conspiracy, G. L. c. 94C, § 40, and one count of conspiracy to unlawfully possess firearms, G. L. c. 274, § 7. He appeals from an order of a Superior Court judge denying his third motion to withdraw his guilty pleas and an order denying his motion to reconsider. Concluding that the defendant has failed to meet his burden to show prejudice from any omission by plea counsel, we affirm.

1. Standard of review. "A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001)." Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). When a

defendant appeals from the denial of a motion for a new trial, we review "only to determine whether there has been a significant error of law or other abuse of discretion."

Commonwealth v. Sylvain, 473 Mass. 832, 835 (2016), quoting Commonwealth v. Lavrinenko, 473 Mass. 42, 47 (2015).

2. Ineffective assistance of plea counsel. To prevail on a claim of ineffective assistance of counsel, "the defendant bears the burden of showing that his attorney's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer,' and that he suffered prejudice because of his attorney's unprofessional errors." Lavrinenko, 473 Mass. at 51, quoting Commonwealth v. Clarke, 460 Mass. 30, 45 (2011). "In the context of a guilty plea, in order to satisfy the 'prejudice' requirement, the defendant has the burden of establishing that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" Clarke, supra at 47, quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985). "The defendant also 'bears the substantial burden' of 'convinc[ing] the court' that a decision to exercise his right to a jury trial 'would have been rational under the circumstances.'" Commonwealth v. Duarte, 477 Mass. 630, 639 (2017), quoting Lavrinenko, supra at 55-56. The defendant must show either "(1) an available, substantial ground of defense that the defendant would have pursued if given

proper advice about the plea's 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.'" Commonwealth v. Lys, 481 Mass. 1, 7 (2018), quoting Clarke, supra at 47-48.

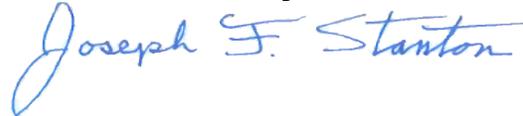
Here, where the defendant was recorded agreeing to sell five ounces of cocaine in exchange for ten handguns and then personally delivered over 120 grams of cocaine to an undercover officer, there was no conceivable defense, and the defendant does not contend otherwise. In light of this overwhelming evidence, the meager evidence of special circumstances fails to make out an adequate showing of prejudice. That, nearly nineteen years after the pleas, all of the defendant's family resides in the United States and he has a steady employment history sheds little light on his situation at the time of the pleas when he was twenty-five years old and was taped explaining that he intended to make money in the United States for a couple of years and then retire to the Dominican Republic and "[s]tay there for good." Indeed, in his November 2016 affidavit, the defendant stated that he was still learning English at the time of the pleas and that, "Massachusetts is now my home,"

suggesting that he did not consider it to be his home earlier. The motion judge acted within his discretion in finding that the defendant had not shown prejudice from any omission in plea counsel's advice. See Commonwealth v. Chleikh, 82 Mass. App. Ct. 718, 728 (2012).<sup>1</sup>

Order dated August 6, 2018,  
denying motion to withdraw  
guilty pleas, affirmed.

Order dated December 3, 2018,  
denying motion to  
reconsider, affirmed.

By the Court (Meade,  
Ditkoff & Englander, JJ.<sup>2</sup>),



Clerk

Entered: May 21, 2020.

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<sup>1</sup> We need not decide whether the defendant waived this issue by raising it unsuccessfully in his prior motions to withdraw his guilty pleas.

<sup>2</sup> The panelists are listed in order of seniority.