

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-696

COMMONWEALTH

vs.

JOSE SANTIAGO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On October 5, 2015, a grand jury returned indictments against the defendant charging him with one count of possession of heroin with intent to distribute as a subsequent offense, G. L. c. 94C, § 32 (b), and one count of possession of cocaine with intent to distribute as a subsequent offense, G. L. c. 94C, § 32 A (b).<sup>1</sup> The defendant pleaded guilty to both charges on November 27, 2017. During the course of the change of plea hearing, the prosecutor gave a recitation of the facts and specifically referred to the defendant's prior drug convictions. The prosecutor stated, "The defendant has been previously convicted most recently of possession with intent to distribute a controlled substance . . . in 2011 out of the Essex Superior

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<sup>1</sup> The defendant also was charged with a related school zone violation, see G. L. c. 94C, § 32J, but a nolle prosequi was entered on that count.

Court." At a later point in the hearing, the defendant acknowledged that the facts recited by the prosecutor were true.

The judge then proceeded to enumerate the various rights that the defendant would be giving up by pleading guilty. In the ensuing colloquy, the defendant indicated by stating "[y]es" or "[y]eah" that he understood, among other things, that he was giving up his right to a trial on the charges against him, his right to have a jury decide his case, and his right to cross-examine the Commonwealth's witnesses. At one point, the judge said, "By pleading guilty, you're giving up your right to file or pursue any other pretrial motions, motions in limine or motions to suppress evidence or dismiss the charges, for example." The judge then asked the defendant if he understood and the defendant replied, "Yes." The judge further asked, "Are you willing to give up that right?" The defendant said, "Yeah." The defendant subsequently acknowledged that he wished to plead guilty; that he did so knowingly and voluntarily; that he had had enough time to speak with his lawyer about the charges against him, his rights and defenses, and the consequences of his pleas; and that he believed that his lawyer had acted in his best interest. At the conclusion of the hearing, the judge found that the defendant was acting "willingly, voluntarily, knowingly, and intelligently" in changing his pleas to guilty, accepted the defendant's pleas of guilty, and imposed a sentence

on which the parties had agreed: three and one-half years on each charge to run concurrently, with credit for time served.

About a year and one-half later, the defendant filed a motion to dismiss the subsequent offense portions of the indictments, claiming that the prosecutor had presented false testimony to the grand jury regarding his prior convictions. The defendant also asserted that he was deprived of the effective assistance of counsel because his lawyer failed to move to dismiss the subsequent offense portions of the indictments. The motion was denied by a judge of the Superior Court, who was not the plea judge, in a well-reasoned memorandum of decision and order. Although the judge did not have the benefit of reviewing a transcript of the change of plea hearing, he concluded, based on the plea judge's usual practice, that by pleading guilty the defendant acknowledged that he would forfeit the opportunity to pursue any pretrial motions. Despite this forfeiture, the judge proceeded to address the merits of the defendant's claim and concluded that the defendant was not entitled to relief. The defendant's motion to reconsider also was denied and this appeal followed.

The issues raised by the defendant require little discussion. As noted above, a review of the transcript of the defendant's change of plea hearing discloses that the prosecutor's summary of the facts included a reference to the

defendant's prior convictions and confirms that the defendant pleaded guilty to the subsequent offense portions of the indictments.<sup>2</sup> It is also clear that the defendant was informed that he was waiving his right to file a motion to dismiss the charges.<sup>3</sup>

Nor is there any merit to the defendant's argument that counsel was ineffective for not moving to dismiss the subsequent offense portions of the indictments on the grounds that the proceedings before the grand jury were unlawful. Even if such a motion would have been successful, which we doubt, the Commonwealth presumably could have remedied any defects in the presentation of the case to the grand jury by reindicting the defendant.<sup>4</sup> Because any problem with the indictments could have been cured, trial counsel's failure to raise the issue did not deprive the defendant of a "substantial ground of defense." Commonwealth v. Saferian, 366 Mass. 89, 96 (1978). More fundamentally, as the Commonwealth notes in its brief, the

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<sup>2</sup> Given these circumstances, the judge was not required to conduct a separate plea colloquy with regard to the subsequent offender portions of the indictments. See Commonwealth v. Pelletier, 449 Mass. 392, 398-399 (2007).

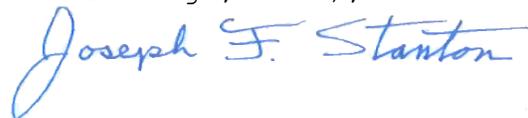
<sup>3</sup> We further note that the defendant signed a "Waiver of Rights" form wherein he acknowledged his understanding that by pleading guilty he was giving up the right to pursue any motions to dismiss.

<sup>4</sup> Given these circumstances, trial counsel's motive for not filing such a motion is inconsequential.

defendant unequivocally stated that he was waiving his right to file further motions to dismiss and stated that he was satisfied that counsel had acted in his best interest.

Order denying motion to  
dismiss subsequent offense  
portions of indictments  
affirmed.

By the Court (Vuono, Lemire &  
McDonough, JJ.<sup>5</sup>),



Clerk

Entered: May 21, 2020.

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<sup>5</sup> The panelists are listed in order of seniority.