

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-160

COMMONWEALTH

vs.

CHENGSUM M. DALEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from an order denying his motion for a new trial, in which he sought to withdraw his plea of guilty to assault and battery by means of a dangerous weapon. He claims that he received ineffective assistance of counsel when his lawyer allegedly told him that the plea carried no immigration consequences. For the reasons that follow, we affirm.

Background. The defendant is a native and citizen of Jamaica. He came to the United States in March 2007, as a returning nonimmigrant temporary nonagricultural worker with authorization to remain in the United States until December 15, 2007. However, the defendant remained in the United States for many years beyond that date.

In June 2014, a grand jury in Barnstable County returned indictments charging the defendant with assault and battery, G. L. c. 265, § 13A; assault and battery by means of a dangerous weapon, G. L. c. 265, § 15A (b); and armed assault with intent to murder, G. L. c. 265, § 18 (b). The offenses stemmed from the stabbing of Sherylee Urquhart on the evening of May 27, 2014. On October 1, 2015, the defendant pleaded guilty to one offense, assault and battery by means of a dangerous weapon. The Commonwealth subsequently entered a nolle prosequi on each of the remaining charges.

At the change of plea hearing, the defendant agreed that the following facts described by the prosecutor were true. Urquhart and the defendant had a daughter. The defendant went to Urquhart's home on the night in question, and the two had an argument regarding the defendant's visitation with their child. The defendant became distraught and retrieved a knife from the kitchen and stabbed Urquhart multiple times. He then called 911 before leaving the scene. The defendant drove to his home where he changed his clothes and discarded the knife along the way. He then returned to Urquhart's house and spoke to the police. The defendant admitted that he stabbed Urquhart and that he knew it was wrong, but claimed that he never meant to hurt her. Before accepting the defendant's plea, the judge conducted a thorough colloquy and determined that the defendant's plea was

knowing and voluntary and that the defendant was satisfied with the advice he had received from trial counsel. The judge then warned the defendant of the immigration consequences he faced as a result of pleading guilty. The judge stated:

"Please listen to the following warning. I must give this warning in every case. If you are not a citizen of the United States, by pleading guilty, you could be deported. If you are not a citizen, by pleading guilty, you could be refused citizenship at a later date if you applied for citizenship. If you are not a citizen, by pleading guilty, you could be refused readmission into this country. In other words, if you left the country and then tried to get back in, the guilty plea could keep you out if you are not a citizen. That's a warning I must give you under state law. I must also tell you, Mr. Daley, that a guilty plea to a crime of this nature which alleges violence by means of a weapon would result in automatic deportation under the federal laws. Do you understand that sir?"

The defendant responded: "Yes sir." The judge subsequently accepted the defendant's guilty plea and imposed a term of incarceration consisting of two and one-half to three years to be served in State prison.

Just prior to completing his sentence, the defendant was notified that removal proceedings had commenced, and upon the completion of his sentence the defendant was released into the custody of United States Immigration and Customs Enforcement. In his immigration court pleadings, and at a subsequent removal hearing, the defendant admitted to the allegations, conceded removability, and designated Jamaica as the country to which he should be removed, but he requested a voluntary departure from

the United States instead of deportation. In part because the defendant had pleaded guilty to an aggravated felony, the immigration judge determined that the defendant was not eligible for voluntary departure and denied the request. The defendant was deported to Jamaica on October 26, 2017.

Less than one year later, on July 20, 2018, the defendant filed a motion for a new trial. As noted, the defendant sought to withdraw his guilty plea on the ground that he received ineffective assistance of counsel. In his affidavit submitted in support of the motion, the defendant claimed that his lawyer told him the plea "would not impact my immigration status." At the time the defendant filed his motion, the judge who had presided over the plea hearing had retired. Consequently, the motion was addressed by a different judge, who denied it without a hearing. We affirm.

Discussion. "A postsentence motion to withdraw a plea is treated as a motion for a new trial" (quotation omitted). Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 637 (2007). In reviewing the disposition of a motion for a new trial, we must "determine whether there has been a significant error of law or other abuse of discretion" (quotation omitted). Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353 (2008).

As we have stated, the defendant's new trial motion is based on a claim of ineffective assistance of counsel. Under

the familiar standard set forth in Commonwealth v. Saferian, 366 Mass. 89 (1974), the inquiry is twofold. The first prong is a determination as to whether the conduct in question falls "measurably below that which might be expected from an ordinary fallible lawyer." Id. at 96. The second prong is a determination of whether the error "deprived the defendant of an otherwise available, substantial ground of defence." Id. The burden is on the defendant to prove that counsel was ineffective. See Commonwealth v. Bannister, 15 Mass. App. Ct. 71, 75 (1983).

Here, as the judge observed, the standard to which counsel is held when advising a client regarding potential immigration consequences is set forth in Padilla v. Kentucky, 559 U.S. 356 (2010), as applied in Commonwealth v. Clarke, 460 Mass. 30 (2011). Specifically, "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear." Clarke, supra at 42, quoting Padilla, supra at 369. In this case, it is clear that counsel was obliged to inform the defendant that his plea to an aggravated felony would make deportation presumptively mandatory. See Commonwealth v. DeJesus, 468 Mass. 174, 180-181

(2014). The defendant claims that he was not so informed and that, had he known of the immigration consequences of his guilty plea, he would not have pleaded guilty, but instead would have chosen to go to trial.¹

As he was permitted to do, the motion judge rejected the defendant's argument as not credible. See Commonwealth v. Buckman, 461 Mass. 24, 43 (2011), cert. denied, 567 U.S. 920 (2012) ("A judge is not required to credit assertions in affidavits submitted in support of a motion for a new trial, but may evaluate such affidavits in light of factors pertinent to credibility, including bias, self-interest, and delay"). In his memorandum of decision and order, the judge explained that he reviewed the transcript of the change of plea hearing and noted that the defendant responded affirmatively to the judge's question whether he understood "that a guilty plea to a crime of this nature which alleges violence by means of a weapon would result in automatic deportation under the federal laws." The judge reasoned that this exchange undermined the defendant's claim that his lawyer had failed to inform him that by pleading

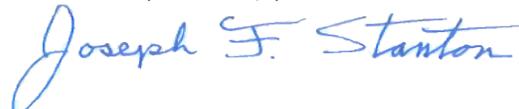
¹ The defendant also claimed that there was a "reasonable probability" that he would have insisted on a trial because (1) he had viable defenses, including self-defense, duress, necessity, and accident; and (2) special circumstances, including the fact he has four children who are United States citizens, existed such that he placed particular emphasis on avoiding immigration consequences.

guilty he would be subject to automatic deportation.² As the judge saw it, if trial counsel had failed to advise the defendant of the obvious and immediate consequences of pleading guilty, the defendant "surely would have communicated his confusion in answering the plea judge's question."

We discern no abuse of discretion on the part of the judge. Because, as the judge determined, trial counsel adequately informed the defendant of the immigration consequences of his plea, the defendant's claim of ineffective assistance of counsel fails. Accordingly, we conclude that the defendant is not entitled to withdraw his plea of guilty.

Order denying motion for
new trial affirmed.

By the Court (Vuono, Rubin &
Sacks, JJ.³),



Clerk

Entered: May 22, 2020.

² The judge also noted that no affidavit from trial counsel had been filed with the motion.

³ The panelists are listed in order of seniority.