COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-663

COMMONWEALTH

vs.

DWAYNE BLACKMAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from an order denying his motion for a new trial, after an Alford plea[1] to charges of manslaughter by motor vehicle while operating under the influence of alcohol, G. L. c. 265, § 13½, and failure to stop for police, G. L. c. 90, § 25.[2] On appeal, he argues that his motion for a new trial on the grounds of newly discovered evidence was erroneously denied and that his Alford plea was not voluntarily and intelligently made. We affirm.

Background. On July 21, 2013, at approximately 4:30 A.M., the State Police received reports of a driver traveling eastbound in the westbound lane of the Massachusetts Turnpike.

[1] See North Carolina v. Alford, 400 U.S. 25, 37-38 (1970).

[2] The defendant does not appeal from his conviction for unlicensed operation of a motor vehicle, G. L. c. 90, § 10.

A trooper observed and attempted to stop the vehicle, but the driver sped past the trooper at approximately eighty miles per hour. As the trooper pursued the driver, he received a dispatch regarding a multiple vehicle crash in the westbound lane of the Turnpike.

When the trooper arrived at the scene, he observed three cars: a minivan overturned and engulfed in flames; a silver Honda with extensive front end damage; and the defendant's silver BMW with the front crushed in. The occupants of the Honda suffered nonfatal injuries and were transported to the hospital. The intensity of the flames prevented first responders from rescuing the sole occupant of the minivan, who died of thermal injuries and blunt impact to the head and torso.

As the defendant was rescued from his car, police observed an odor of alcohol on his breath, glassy and bloodshot eyes, and slurred speech. The defendant told police he did not remember getting onto the Turnpike or the accident itself, he was returning from a party in Boston, and he consumed one beer. Blood and urine samples taken from the defendant at the hospital after his arrest showed that his blood alcohol content was 0.14. The toxicology report also revealed THC and gamma hydroxybutyrate (GHB) in the defendant's system. The defendant's first retained expert acknowledged that there was some GHB present in his urine sample but thought that a

"qualifier out of range" notation made it impossible to say how much was present and that the result was reliable. A second expert, retained after the conviction, reanalyzed the toxicology report and concluded that the amount of GHB present in the sample was consistent with the defendant having taken GHB earlier in the evening while he was at a nightclub. The defendant also claimed that two coworkers with whom he attended the party could corroborate that he may have been drugged without his knowledge. On this basis, the defendant sought to withdraw his Alford plea.

Discussion. "A postconviction motion to withdraw a plea is treated as a motion for a new trial. Accordingly, a judge may grant a defendant's motion to withdraw a guilty plea if it appears that justice may not have been done. Mass. R. Crim. P. 30 (b), [as appearing in 435 Mass. 1501 (2001)]." Commonwealth v. Bowler, 60 Mass. App. Ct. 209, 210 (2003). Such a motion "is addressed to the sound discretion of the judge, and the judge's disposition of the motion will not be reversed for abuse of discretion unless it is manifestly unjust, or unless the plea colloquy was infected with prejudicial constitutional error" (citation omitted). Commonwealth v. Hunt, 73 Mass. App. Ct. 616, 619 (2009). "A defendant seeking a new trial on the basis of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the

justice of the conviction." Commonwealth v. Pike, 431 Mass. 212, 218 (2000).

The defendant has failed to show that the proposed evidence was, in fact, newly discovered. It was the defendant's burden to show that the allegedly new evidence was neither "discoverable at the time of trial despite the due diligence of the defendant or defense counsel" nor actually known to him. Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 699 (2015), quoting Commonwealth v. Sena, 441 Mass. 822, 830 (2004). The defendant and defense counsel had access to the toxicology report noting the presence of GHB before he pleaded guilty. Defense counsel's notes also indicate that he discussed the presence of GHB with the defendant. It is thus clear that, before he pleaded guilty, the defendant knew that the toxicology report showed the presence of GHB.

The defendant nonetheless argues that the postplea expert offered a different view of the drug's significance and that this "new" aspect of the GHB evidence required that he be permitted to withdraw his plea. However, this postplea opinion was not based on science to which the defendant did not have access prior to conviction. For this reason, it significantly differs from the situations in Commonwealth v. Clark, 472 Mass. 120 (2015), and Commonwealth v. Wade, 467 Mass. 496 (2014), upon which the defendant relies. Even if the first expert

inadequately interpreted the toxicology report, nothing prevented the defendant or his counsel from pressing for a different interpretation, either from the first expert or another one, of its significance prior to the plea. Expert testimony is not newly discovered even when new research lends more credibility to testimony that "was or could have been presented at trial," lest convicted defendants be able to obtain a new trial "whenever they could find a credible expert with new research results supporting claims that the defendant made or could have made at trial." Commonwealth v. LeFave, 430 Mass. 169, 181 (1999).

The defendant's reliance on Commonwealth v. DiBenedetto, 458 Mass. 657 (2011), and Commonwealth v. Cowels, 470 Mass. 607 (2015), is misplaced. In DiBenedetto, 458 Mass. at 663, a forensic serologist retained by the defendant extracted an entirely new DNA sample from a piece of evidence, tested it, and came to a different conclusion than the Commonwealth's expert. In Cowels, 470 Mass. at 616, the Supreme Judicial Court noted that the purportedly new DNA evidence was a type that was not admissible until three years after the defendant's conviction. While both cases dealt in reanalyses of some sort, neither stands for the proposition that a defendant can hire an expert after conviction to undermine his own earlier retained expert in order to seek a new trial.

Nor does the supposed evidence from the defendant's former coworkers constitute newly discovered evidence. Even setting aside the fatal problem that the coworkers were unwilling to submit affidavits stating or suggesting that a drug was, or could have been, slipped into the defendant's drink without his knowledge, see Mass. R. Crim. P. 30 (b), this argument fails. Absent affidavits from the witnesses themselves, the judge could disregard the purported evidence. Presented as they were only through an affidavit of a lawyer at appellate counsel's firm, the coworkers' supposed statements were inadmissible hearsay. See Commonwealth v. Jewett, 442 Mass. 356, 365-366 (2004) (motion judge warranted in rejecting affidavits that were "replete with layered hearsay"). See also Commonwealth v. Wright, 469 Mass. 447, 462 (2014) ("To evaluate the newly discovered evidence, we determine whether this additional evidence would be admissible"). Even were we to overlook these defects in the manner of presentation, we note that the defendant himself knew what happened at the club, and of his coworkers' presence there, long before he tendered his plea.

Even were we to accept for the sake of argument that the coworkers' statements were newly discovered, the trial judge did not abuse her discretion in concluding that they would not cast real doubt on the justice of the defendant's convictions. See Commonwealth v. Johnson, 486 Mass. 51, 67 (2020). "The evidence

said to be new not only must be material and credible but also must carry a measure of strength in support of the defendant's position" (citation omitted). Commonwealth v. Bonnett, 482 Mass. 838, 844 (2019). Simply put, even accepted at face value, the evidence would at best have supported a theory of defense that defense counsel thought unwise because it opened the possibility of the jury concluding that the defendant had consumed GHB voluntarily. Given the overwhelming weight of evidence against the defendant, the fact that the accident happened after several hours partying in a club, the defendant's demonstrated lack of judgment and recklessness in driving a significant distance without a license to go to a party, and the absence of evidence that the defendant had not taken GHB voluntarily, the judge did not abuse her discretion in denying the motion.

The defendant further argues that his plea was not intelligently and voluntarily made. See Commonwealth v. Brannon B., 66 Mass. App. Ct. 97, 98 (2006). "A plea is made intelligently if (1) the judge explain[s] to the defendant the elements of the crime; (2) counsel represent[s] that [he or she] has explained to the defendant the elements he admits by his plea; or (3) the defendant admits to facts recited during the colloquy which constitute the unexplained elements" (quotations and citations omitted). Commonwealth v. Wentworth, 482 Mass.

664, 679 (2019). A plea is voluntarily made if it is free "from coercion, duress, or improper inducements." Commonwealth v. Duest, 30 Mass. App. Ct. 623, 631 (1991). Here, the judge explained the charges, the terms of the plea agreement, and the potential immigration consequences to the defendant; the defendant affirmed that his counsel had explained the elements of the crime; and the defendant also admitted that the Commonwealth could prove the facts recited at the plea colloquy. Moreover, the defendant has not argued that he was coerced, induced, or under duress when he pleaded guilty. We thus conclude that the guilty plea was intelligently and voluntarily made.

We are mindful of the defendant's argument that his plea was not intelligent or voluntary because he did not know of the post-hoc interpretation of the toxicology report. See Commonwealth v. Scott, 467 Mass. 336, 345 (2014) (guilty plea may in some instances be "vacated as involuntary because of external circumstances or information that later come to light"). Scott and the other cases cited by the defendant all conceive of external circumstances stemming from governmental misconduct, rather than the defendant second-guessing his trial strategy. See Commonwealth v. Charles, 466 Mass. 63, 64-65 (2013). But even if Scott extended as far as the defendant urges, he has not "demonstrate[d] a reasonable probability that

he would not have pleaded guilty had he known" of the new information. Scott, 467 Mass at 355. As noted above, the defendant's trial counsel had advised him against using GHB as a defense because he could not prove that he did not take it voluntarily. The evidence also showed that the defendant drove, without a license, from Leominster to Boston, to attend a party at a nightclub, drink alcohol, then drove back to Leominster in the wrong direction on the Massachusetts Turnpike, despite efforts of a policeman to stop the defendant's course of travel, and ultimately caused a crash that resulted in serious injury and death. Given the evidence against him and the favorable sentence he received,[3] the defendant has not shown that he would not have pleaded guilty even if he had the second expert's analysis of the toxicology report earlier.

Order denying motion for new trial affirmed.

By the Court (Wolohojian, Blake & Kinder, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: January 12, 2021.

[3] The defendant was aware that a guilty plea would likely result in a sentence of seven to eight years in State prison, despite the Commonwealth's recommendation of a fifteen to eighteen year sentence.

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